

# COVID CONCERNS: SOME REALISM ABOUT EQUITABLE RELIEF

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## I

### INTRODUCTION

The COVID-19 pandemic has killed millions of people and caused vast disruption to the economy, politics, and social life throughout the world. Against those enormous consequences, the present discussions about the pandemic's legal implications seem trivial, and perhaps heartless. To the extent that they do, one must apologize. But we are all also hoping for a return to something approximating the pre-pandemic normal, and that includes commercial practice, legal practice, legal scholarship, and legal pedagogy. Of course, those never entirely went away, which is an important backdrop to the articles in this special issue of *Law & Contemporary Problems*. Businesses have tried, with varying degrees of success, to continue operation during the pandemic. And where this has not been possible, and parties have been unable to perform their contracts, "for the most part, the affected parties have tried to negotiate a resolution that is painful but practical to insure that 'on the other side' there will be something left."<sup>1</sup> The litigation and court opinions that will be discussed in this Article are what happens in the minority of circumstances, where the parties could not work out matters for themselves. And the standards applied in those cases are important, not only for the parties to those disputes or parties in comparable litigation that is ongoing, but also for disputes that may arise the next time we face comparably unusual or emergency circumstances.

The present work focuses on the application of equitable doctrines to disputes arising out of the pandemic. It does not deal with the express contractual language that has also been the center of much pandemic litigation: *force majeure*

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This Article is also available online at <http://lcp.law.duke.edu/>.

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1. *In re Cinemex USA Real Est. Holdings, Inc.*, 627 B.R. 693, 701 (Bankr. S.D. Fla. 2021).

clauses,<sup>2</sup> specific provisions of business insurance contracts,<sup>3</sup> material adverse change clauses in corporate acquisition agreements,<sup>4</sup> et cetera. As is well known, “where the parties’ contract allocates the risk of a supervening event, the contract—not extra-contractual legal theories such as impossibility [and frustration of purpose and impracticability]—is paramount in determining if performance is excused.”<sup>5</sup> In cases where there are relevant express provisions, the parties have expressly allocated certain risks between them;<sup>6</sup> what remains are cases where the particular risk has not been allocated, and the default rules of contract law must decide who should bear the loss.

As will be discussed, the relevant equitable doctrines, impracticability and frustration of purpose, are vague. It is precisely this uncertainty in meaning and application, and the ways courts are inclined to apply such indeterminate standards in the face of a global economic upheaval, that are interesting. The application of general standards will always be sensitive to background policy considerations. That sensitivity is further pronounced when equitable standards might excuse performance and limit the predictable enforcement of commercial agreements. Parties suffering under the conditions created by the pandemic hoped that they might be saved by the changed circumstances equitable doctrines, a hope that had some basis in the language of the doctrines. However, it is not surprising that, for practical reasons, the doctrines have been read quite narrowly, rarely offering the lifeline sought.

In what follows, Part II summarizes the “black letter” of the equitable doctrines relating to change of circumstances, Part III offers a short digression about realism and indeterminacy, Part IV looks at some prominent pre-pandemic

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2. See, e.g., David A. Shargel, Matthew G. Nielsen & W. Stephen Benesh, *Revisiting Force Majeure and Other Contractual Considerations Amid COVID-19*, NAT’L L. REV. (Nov. 6, 2020), <https://www.natlawreview.com/article/revisiting-force-majeure-and-other-contractual-considerations-amid-covid-19> [<https://perma.cc/DS2C-UKRG>] (discussing *force majeure* clauses in the context of the COVID-19 pandemic); Daniel Sharma, *Coronavirus: The Second Wave and Force Majeure*, DLA PIPER PUBL’NS. (Dec. 9, 2020), <https://www.dlapiper.com/en/slovakrepublic/insights/publications/2020/12/covid-19-the-second-wave-and-force-majeure/> [<https://perma.cc/V23N-P4UC>] (discussing ICC *force majeure* clause). See generally Klaus Peter Berger & Daniel Behn, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study*, 6 MCGILL J. DISP. RESOL. 79 (2020) (discussing the history of *force majeure* and hardship).

3. See generally *Deer Mountain Inn LLC v. Union Ins. Co.*, No. 120-cv-0984, 2021 U.S. Dist. LEXIS 97602, 2021 WL 2076218 (N.D.N.Y. May 24, 2021) (discussing specific provisions of business insurance contracts in the context of the COVID-19 pandemic).

4. Andrew A. Schwartz, *Frustration, the MAC Clause, and COVID-19*, 55 U.C. DAVIS L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3806739> [<https://perma.cc/2CKJ-SSRM>].

5. 1 TIMOTHY MURRAY, *Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting from COVID-19* §1.03[2] (2021); see, e.g., *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F.Supp. 850, 855 (N.D. Ill. 1990) (Posner, C.J.) (explaining that the doctrine of impossibility only controls if the “parties have not drafted a specific assignment of the risk otherwise assigned by the provision”).

6. Thus, a narrowly drawn *force majeure* provision, which names specific excusing events, might be held, by implication (under standard interpretive principles), *not* to excuse performance based on events not listed. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* 457 (4th ed. 2004) (discussing the interpretive principle of “*expressio unius est exclusio alterius*”).

cases, and Part V reviews some of the pandemic-era cases, before concluding.

## II

### THE DOCTRINE

In discussing the relevant doctrine(s), I will initially look at the legal standards covering the sale of goods before turning to the law for service agreements. Article 2 of the Uniform Commercial Code (UCC) is the applicable law for the sale of goods in 49 states (every state except Louisiana) and the District of Columbia, while the United Nations Convention on the International Sale of Goods (CISG) covers most international transactions in goods. For service agreements, I will focus on the *Restatement (Second) of Contracts*.<sup>7</sup> As will be seen, the UCC and CISG each provide a single standard, which arguably encapsulates what the Common Law of Contracts had developed (and the *Restatement* has summarized) as three separate doctrines: impossibility, impracticability, and frustration of purpose.<sup>8</sup>

#### A. UCC and CISG

The primary text in Article 2 of the Uniform Commercial Code touching on our topic is Section 2-615, titled “Excuse by Failure of Presupposed Conditions.” The opening text of the section, combined with subsection (a), states:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance<sup>9</sup>:

Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.<sup>10</sup>

What we see in the UCC standard, the CISG standard, and the *Restatement* standards discussed in the next subpart, is language that is extremely broad and uncertain. Consider especially: “the occurrence of a contingency the non-

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7. One must keep in mind that non-sales of good contract law varies from state to state and at times differs from the *Restatement (Second) of Contracts* (1981).

8. See, e.g., FARNSWORTH, *supra* note 6, at 619–47 (explaining these three contract doctrines).

9. U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM’N 2002); see also U.C.C. § 2-614 (AM. L. INST. & UNIF. L. COMM’N 2002) (“(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted,” and “(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.”).

10. U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM’N 2002). Subsection (b) goes on to discuss the consequences if only a portion of the seller’s capacity is affected (“he must allocate production and deliveries among his customers”); and subsection (c) discusses the requirement of notice to buyers. *Id.*

occurrence of which was a basic assumption on which the contract was made.” The difficulties here are ones both of characterization and judgment. Which assumptions are “basic” assumptions, and how are our assumptions to be described? As to the latter, parties may not assume that market conditions will remain unchanged, but they may assume that the commercial marketplace is not going to be radically upended, or at least assume that the market dislocation will not be caused by something like an attack by terrorists on prominent American buildings, illegal actions by a foreign government (the background facts of cases to be discussed below), or a worldwide pandemic.

The CISG applies to commercial agreements involving the sale of goods<sup>11</sup> between parties from two different countries, where each country is a signatory to the Convention.<sup>12</sup> As of October 2021, ninety-four countries are signatories to the CISG, including the United States and all of its major trading partners with the exception of Britain.<sup>13</sup> CISG article 79(1) states:

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.<sup>14</sup>

One important difference between the CISG provision and the relevant texts from the UCC is that the CISG (by its terms) seems applicable to both buyers and sellers, while the UCC provisions speak only of sellers. This being said, as caselaw has developed, Article 79 appears to have done far less well than its UCC counterpart in creating uniformity on when an equitable excuse for non-performance will be granted based on changed conditions. As two scholars report:

Article 79 has brought little clarity to the issue of when deviations from contractual requirements can occur without liability. It has been the subject of substantial and conflicting commentary, and the cases that have arisen under the provision serve primarily to reveal disagreement on interpretation and a general reluctance by courts to permit exemption.<sup>15</sup>

In part because the CISG caselaw in this area is so under-developed and

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11. The CISG (unlike U.C.C. Article 2) does not apply to consumer transactions. Convention on Contracts for the International Sale of Goods, art. 2(a), Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3 [hereinafter CISG].

12. *Id.* at art. 1(1)(a). By its terms, the CISG would also apply to agreements where only one of the parties is from a country that is a CISG signatory *and* choice-of-law principles would indicate that this country’s laws should apply to the transaction. *Id.* at art. 1(1)(b). However, the United States declared that it would not be bound by this provision. See note (b) by “United States,” in U.N. COMM’N ON INT’L TRADE L., *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, [https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status) [<https://perma.cc/V6HS-437Z>].

13. U.N. COMM’N ON INT’L TRADE L., *supra* note 12.

14. CISG, *supra* note 11, at art. 79(1).

15. CLAYTON P. GILLETTE & STEVEN D. WALT, *THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: PRACTICE AND THEORY* 295 (Cambridge Univ. Press, 2d ed. 2016). The authors add: “Perhaps the best lesson to be garnered from study of Article 79 is that parties would be well advised to fashion an explicit force majeure clause...that defines with more precision the conditions for exemption from performance.” *Id.*

inconsistent, the present work will focus on domestic American law.<sup>16</sup>

## B. Restatement (Second) of Contracts

The most important provisions from the *Restatement (Second) of Contracts* on the sort of changed circumstances created by COVID-19 are Sections 261, 265, and 269:

### § 261 Discharge by Supervening Impracticability

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

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### § 265 Discharge by Supervening Frustration

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

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### § 269 Temporary Impracticability or Frustration

Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.<sup>17</sup>

The change-of-circumstances doctrines originate in well-known cases.<sup>18</sup> Frustration of purpose is generally traced back to the English case, *Krell v. Henry*,<sup>19</sup> which involved a rental of a room to watch the coronation of the new king; the party renting the room wanted to be excused from his obligation when the coronation was cancelled due to the king's illness. Impracticability is connected with the California case of *Mineral Park Land Co. v. Howard*,<sup>20</sup> involving a contract for the extraction of gravel, and whether the party should be excused in connection with gravel below the water line, where the cost of extraction would have been ten to twelve times greater.

In the *Restatement* standards, as in the UCC and CISG standards, we see criteria along the lines of "the occurrence of an event the non-occurrence of

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16. Timothy Murray notes that there is "a dearth of American case law interpreting or applying Article 79. Even where it applies, an American court may view it as if it were UCC § 2-615." MURRAY, *supra* note 5, §1.02[2], at 1-11 (citing *Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG*, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 7, 2004)).

17. RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 265, 269 (AM. L. INST. 1981).

18. The doctrine of impossibility, often grouped with impracticability and frustration of purpose, also has a standard case citation for its origin, *Taylor v. Caldwell* [1863] 122 Eng. Rep. 309 (KB) (finding no obligation under contract to provide Caldwell's music hall for performance after the hall was accidentally destroyed by fire prior to the performance).

19. [1903] 2 KB 740 (Eng.).

20. 156 P. 458 (Cal. 1916).

which was a basic assumption on which the contract was made,”<sup>21</sup> with the same difficulty and uncertainty of application previously discussed. Sometimes, commentators (and some judges) argue that these doctrines should be understood as simply reflecting the terms the parties *would have agreed to*. However, it is not clear that such an approach, even if adopted, would create significantly greater clarity. It seems likely that many relevant “extreme” events (for example, the closing of a major water passage or a global pandemic) would lack a clear point of hypothetical agreement. It is quite easy to imagine, instead, the seller assuming a term with a pro-seller outcome, and the buyer assuming a term with a pro-buyer outcome.

Of course, the equitable change of circumstances doctrines are far from the only areas of contract law (or law, generally) where the standards appear to be vague, uncertain in their application, and potentially subject to conscious or subconscious manipulation to reach a desired result.<sup>22</sup> The next Part focuses on the significance of such uncertainty in the application of legal standards.

### III

#### A DIGRESSION ABOUT REALISM AND INDETERMINACY

It is a standard experience of American legal education: the teacher using the Socratic Method or some variation to show the students, by example, how the applicable legal rules, doctrines, and principles can be used to construct tenable arguments for both sides of most, if not all, of the cases studied. And that there are often good arguments for both sides of disputes is also the basis of our adversarial system. This is not a claim that there are *no* easy cases; there are *many* easy cases. But there are more than enough cases with colorable arguments on both sides to fill our casebooks and keep our court dockets overcrowded.

That the legal materials might be subject to different, even contradictory readings, or subject to manipulation by judges who consciously or subconsciously desire particular outcomes, are recurring themes in American legal scholarship. Some examples from the literature: Karl Llewellyn argued that for every canon of statutory interpretation favoring one reading of a statute, there

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21. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981).

22. There are vague legal and equitable doctrines which the courts have “tamed” through caselaw that superimposed (relatively) detailed and precise criteria over the vague standards. One example may be the criteria applied to determine when someone who rescues a person or property is due compensation under principles of unjust enrichment. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20, 21 (AM. L. INST. 2011) (describing that restitution is due to those who perform, supply, or obtain “professional services required for the protection of another’s life or health” and also those who take “effective action to protect another’s property from threatened harm”). There are also examples in many states of general doctrines like “good faith” being given narrowing constructions and limited application through court decisions. *See generally* Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995) (describing the resurrection of conceptualist interpretations of contract law in the 1980s and early 1990s); David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999) (examining an “anti-antiformalism” phase of commercial law taking place in the 1990s). The extent to which the changed circumstances doctrines have been comparably “tamed” will be discussed below.

was a matching canon that could be used to argue for a contrary outcome.<sup>23</sup> Mark Tushnet once claimed that he could make a colorable argument for why the United States Constitution requires socialism, though, as he reported, he also knew that no judge—at least, no appellate court—would ever accept it.<sup>24</sup> Duncan Kennedy asserted that a good judge, sufficiently motivated and with adequate time, could take a case that had seemed easy, requiring a win for one party, and make it seem easy (or at least tenable), requiring the other party to prevail.<sup>25</sup> Closer to the present topic, Roberto Mangabeira Unger argued that American contract law contained matched principles and counter-principles, making particular cases indeterminate, in the sense that a valid doctrinal argument could be used to argue for either the plaintiff or the defendant in most contract disputes.<sup>26</sup> And, more toward the mainstream of legal and Contract scholarship, Robert Hillman has referred to “contract law’s general uncertainty in difficult cases.”<sup>27</sup>

Of course, all of those arguments have their weak points, and have been subject to important responses.<sup>28</sup> The point here is not to claim that these, or any other arguments *prove* legal indeterminacy, however one might understand that phrase, but rather that the idea of legal materials being subject to different—competing, and often contrary—readings is a common idea, from legal practice, legal education, and legal scholarship.<sup>29</sup>

Those of us who teach contract law are only too aware of the temptation many students have to see potential equitable arguments everywhere. This seems an

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23. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

24. Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 696–705 (1980).

25. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL ED. 518, 544 (1986); *see also* DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 157–79 (1997) (exploring how judges respond when they have an ideological preference for a particular rule choice).

26. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 143–178 (2015).

27. Robert A. Hillman, *Health Crises and the Limited Role of Contract Law*, 85 LAW & CONTEMP. PROBS. No. 2, 2022, at 29.

28. *See generally* John Finnis, *On “The Critical Legal Studies Movement,”* 30 AM. J. JURIS. 21 (1985) (responding to Unger); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992) (responding to Llewellyn); Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989) (responding to a number of arguments for legal indeterminacy); Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481 (1995) (responding to a number of arguments for legal indeterminacy).

29. For a recent interesting work on the broad similarities of common law reasoning and critical theory (the latter, broadly understood), *see generally* Charles L. Barzun, *The Common Law and Critical Theory*, 92 U. COLO. L. REV. 1221 (2021) (outlining similarities between common law reasoning and critical theory). This convergence may help to explain the susceptibility of private law areas like contract law to critique by critical theory. Or it may simply reflect the fact that all (legal) texts—including contracts and restatements—have an ineradicable level of ambiguity. On the last possibility, *see* Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX L. 9, 11 (1982) (“[T]he draftsman can control and select what will be left ambiguous, but he cannot banish or control the aggregate amount of ambiguity.”).

especial danger with reliance (promissory estoppel),<sup>30</sup> unjust enrichment,<sup>31</sup> and unconscionability.<sup>32</sup> Equitable doctrines, with their vague standards and references to fairness, reasonableness, and justice, are naturally prone to expansive readings. But one can find students overreading even outside equitable doctrines, for example, the defense of misrepresentation. Law students can construct, or think they have constructed, a colorable argument under the doctrines, while not being good enough (wise enough) to see that their arguments would not be accepted by a court. In applying misrepresentation doctrine, was the representation false, material, and relied upon?<sup>33</sup> In reliance, was a promise made, was it relied upon, was the reliance reasonable, and can injustice only be avoided by enforcement of the promise?<sup>34</sup> The difference between what the students offer and what the teachers, or, later, judges, deem correct, may be only a matter of what is sometimes called “judgment”—or, perhaps, that old cliché, “thinking like a lawyer.” John Bell described it as the sense well-trained, well-socialized lawyers have of what is and is not “acceptable” or “beyond the pale” by way of argument or conclusion.<sup>35</sup>

The point—one understood by veteran practitioners, even if imperfectly grasped by beginning lawyers—is that it is one thing to see that a colorable argument can be made for the application of an equitable doctrine. It is another matter to know that a court is unlikely to accept an argument, and to understand the practical and policy reasons why that is the case. The courts are not likely to conclude that the U.S. Constitution requires socialism, or that a very large percentage of commercial contracts are subject to avoidance or excuse based on equitable doctrines.

#### IV

##### THE CASES – PRE-PANDEMIC

This Part will consider some paradigmatic older pre-pandemic cases on whether and when changes of circumstances excuse non-performance. The next Part will then turn to cases arising during and because of the pandemic.

One informative pre-pandemic case involved a dispute between International

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30. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981) (enforcing a promise if one “should reasonably expect to induce action or forbearance” and nonenforcement would lead to injustice).

31. See, e.g., FARNSWORTH, *supra* note 6, at 185–98 (outlining restitution as a ground for recovery”).

32. See U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM’N 2002) (outlining the court’s ability to refuse to enforce an unconscionable contract or clause); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981) (describing potential nonenforcement of an unconscionable term or contract).

33. See RESTATEMENT (SECOND) OF CONTRACTS §§ 162–164 (AM. L. INST. 1981) (describing the misrepresentation doctrine).

34. See *id.* § 90 (enforcing a promise if one “should reasonably expect to induce action or forbearance” and nonenforcement would lead to injustice).

35. John Bell, *The Acceptability of Legal Arguments*, in THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 45, 50 (Neil MacCormick & Peter Birks eds., 1986) (“[O]ne has to work within the framework of premises and criteria of what constitute acceptable legal arguments”).

Harvester and one of its former dealers, Karl Wendt Farm Equipment.<sup>36</sup> Because of what a court describes as a “dramatic downturn in the market for farm equipment,”<sup>37</sup> International Harvester suffered massive financial losses: described at different points in the appellate court opinion as over two million dollars a day,<sup>38</sup> and as over two billion dollars over two years.<sup>39</sup> Because of the downturn, International Harvester sold its farm equipment division to J. I. Case Co. and Tenneco Inc. As part of the sale, Case/Tenneco gained access to International Harvester’s franchise network, but in locations where Case/Tenneco already had a dealer, sometimes the International Harvester dealer did not receive a franchise. Karl Wendt was one such not-accepted franchise, and it sued International Harvester for breach of the dealership agreement.<sup>40</sup> International Harvester argued that any contractual obligations it had towards Karl Wendt were excused based on impracticability or frustration of purpose, but the Sixth Circuit held that both defenses had to be rejected as a matter of law.<sup>41</sup>

On impracticability, one reaction to the case is that if losing two million dollars a day is *not* impracticability, what is? The court pointed out that this loss must be considered in proportion to the vast size of International Harvester, and smaller companies suffering proportional losses were also denied the defense of impracticability.<sup>42</sup> However, this just repeats the mystery of a doctrine that seems on its terms to be met in situations with extreme facts, but where relief is nonetheless denied.

Regarding frustration of purpose, International Harvester argued that the primary purpose of the franchise agreement with Karl Wendt had been “mutual profitability,” and that the sharp downturn in the market for agricultural products frustrated that purpose.<sup>43</sup> The court responded: “If [International Harvester’s] argument were to be accepted, the ‘primary purpose’ analysis under the Restatement would essentially be meaningless as ‘mutual profitability’ would be implied as the primary purpose of every contract.”<sup>44</sup> That is, we cannot have an understanding of the doctrine of frustration of purpose that would potentially make a very large portion of agreements subject to its equitable relief. Doctrines of equitable excuse are meant to be exceptional, for otherwise the oft-celebrated predictability and certainty of contracts would be undermined.

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36. Karl Wendt Farm Equip. Co. v. Int’l Harvester Co., 931 F.2d 1112 (6th Cir. 1991).

37. *Id.* at 1114.

38. *Id.* at 1117.

39. *Id.* at 1123 (Ryan, C.J., dissenting). Both figures were allegations by International Harvester, accepted as true for the purpose of the court decision. *Id.* at 1114 n. 1 (majority opinion).

40. *Id.* at 1114 (majority opinion).

41. *International Harvester* was a diversity action, and the federal courts purported to be applying Michigan law. *Id.* at 1115. In the course of its opinion, the court cited a mixture of Michigan cases and sections from the Restatement (Second) of Contracts. *Id.* at 1114–22.

42. *Id.* at 1118.

43. *Id.* at 1120.

44. *Id.*

The *Karl Wendt* case exemplifies the general point: courts are extremely reluctant to allow equitable relief based on change of circumstances doctrines beyond a small number of narrow, clearly specified categories of cases, in which the doctrines are applied as a matter of course.<sup>45</sup> This refusal persists even when the fact situations seem to fall within the terms of the doctrine, and the reluctance may be especially great where the equitable claim is grounded on facts that are present in a large number of cases.

In a more recent case, *Hemlock Semiconductor Operations, LLC v. Solarworld Industries Sachsen GmbH*,<sup>46</sup> the buyer responded to a breach of contract action by claiming an excuse grounded on the assertion that illegal actions by the Chinese government had caused a massive change in the market for the goods being purchased. Rejecting an argument based on impracticability, the court argued:

Applying the impracticability defense here could also open up a flood of similar arguments based on allegedly illegal actions of third parties. In the context of global market fluctuations, which can be affected by the actions of many businesses from different countries, defendants in breach-of-contract cases could easily claim that a violation of the law by a third-party actor contributed to a market shift. Allowing parties to litigate the causes of market shifts would swallow the general rule that a contract's unprofitability does not warrant application of the impracticability defense.<sup>47</sup>

Again, one can see the court worrying about what precedent would be created, what floodgates might be opened, and how much allowing an equitable excuse in one case might unsettle contractual certainty across a wide range of cases.

In thinking about disputes arising from the pandemic, it may be helpful to look at cases arising out of other events with far-reaching consequences—even if not quite as far-reaching as the present crisis—which led to a rash of equitable relief claims. For example, the Suez Canal was closed from October 1956 until March 1957. The Suez Crisis was caused by military actions by Great Britain, France, and Israel in response to Egypt's nationalization of the Canal. This required many ships to find long and expensive alternative routes. Buyers, sellers, and shipping companies adversely affected by the closure sought relief from their contractual obligations under the doctrines of impossibility, impracticability, and frustration of purpose, but these claims were generally rejected by the courts in the U.S., the UK, and elsewhere.<sup>48</sup>

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45. These are mostly in relation to the impossibility doctrine, where the impossibility is connected to the death of a person or the destruction of an identified subject of the contract, or where the impossibility or impracticability is directly connected to compliance with a government regulation. The government regulation exception is now an express part of the U.C.C. standards. U.C.C. §§ 2-614, 2-615 (AM. L. INST. & UNIF. L. COMM'N 2002).

46. 867 F.3d 692 (6th Cir. 2017).

47. *Id.* at 704.

48. See generally *Transatlantic Financing Corp. v. U.S.*, 363 F.2d 312 (D.C. Cir. 1966); *Glidden Co. v. Hellenic Lines, Ltd.*, 275 F.2d 253 (2d Cir. 1960); *Am. Trading & Prod. Corp. v. Shell Int'l Marine, Ltd.*, 453 F.2d 939 (2d Cir. 1972). For a comparable outcome in the British courts, see generally *Tsakiroglou & Co. v. Noble Thorl, G.m.b.H.*, [1962] A.C. 93; *Ocean Tramp Tankers Corp. v. V/O Soufracht (The Eugenia)*, [1964] 2 Q.B. 226 (C.A. 1963). For a general overview, see RICHARD E. SPEIDEL, *CONTRACTS IN CRISIS* 160–66, 177–79 (2007) (describing the line of Suez Canal cases).

John Henry Schlegel, reflecting on the frustration of purpose cases arising out of the Suez Crisis, offered a few conclusions:

- (1) “[N]o matter how the theory [of the doctrine of frustration] is stated the court is essentially finding the just and reasonable solution . . . .”<sup>49</sup>
- (2) “[F]rustration is a case of breach in such extraordinary circumstances as not to seem wrongful.”<sup>50</sup>
- (3) “[But] these ideas do not suggest how to determine what circumstances are extraordinary enough or which assumptions are to be recognized.”<sup>51</sup>

In more recent times, courts have also been similarly unreceptive to (potentially wide-ranging) claims that contractual obligations should be excused because of terrorism threats connected to the Gulf Wars<sup>52</sup> or the worldwide financial crisis of 2008.<sup>53</sup>

## V

### THE CASES - PANDEMIC

One difference between the current situation and the historical examples given in the previous Part is the even more wide-spread effects of the pandemic. While the 1956 Mideast War affected shipping for a significant number of companies, the shutdowns, travel restrictions, and import/export restrictions created by COVID-19 were global and pervasive. So, the courts’ concern with generally undermining contractual certainty based on excusing one instance of non-performance will inevitably be elevated. Therefore, it should not be surprising that in the pandemic, the standard response of courts has been that the “non-occurrence of the pandemic was *not* [in the *Restatement’s* terms] a ‘basic assumption’ on which the contract was made.”<sup>54</sup>

In one pandemic case, *A/R Retail LLC v. Hugo Boss Retail, Inc.*,<sup>55</sup> the New York Supreme Court rejected frustration of purpose and impossibility arguments raised by a retail tenant. It commented: “A harsh result, to be sure, but so in its own way would be mass rescission of commercial leases, assigning all risk of the pandemic to property owners who face their own unrelenting expenses and

49. John Henry Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suze, and Frustrating Things – The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419, 446 (1969).

50. *Id.*

51. *Id.*

52. *See, e.g.*, 7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc., 909 P.2d 408, 418 (Ariz. Ct. App. 1995) (concluding that the perceived threat of terrorism does not relieve a contractual obligation).

53. *See, e.g.*, *Bean v. BAC Home Loans Servicing, L.P.*, No. 11-CV-553-PHX-GMS, 2012 WL 171435, at \*5 (D. Ariz. Jan. 20, 2012) (rejecting impracticability and frustration defenses); *Tri-Town Const. Co., Inc. v. Com. Park Assocs. 12, LLC*, 139 A.3d 467, 476 (R.I. 2016) (rejecting frustration of purpose defense); *cf. Route 6 Outparcels, Inc. v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436, 538 (N.Y. App. Div. 2011) (rejecting defense based on a broad *force majeure* clause).

54. *See* Part II, *supra*; MURRAY, *supra* note 5, §1.03[2], at 1–39 (discussing 1140 Broadway LLC v. Bold Food, LLC, No. 652674, 2020 WL 7137817 (N.Y. Sup. Ct. Dec 3, 2020)) (emphasis added).

55. 149 N.Y.S.3d 808 (N.Y. Sup. Ct. 2021).

economic burdens.”<sup>56</sup>

There is at least one case where a court granted relief based on equitable doctrines. In *UMNV 205–207 Newbury, LLC v. Caffé Nero Americas Inc.*,<sup>57</sup> a Caffé Nero location made a frustration argument that its obligation to pay rent was excused due to government restrictions not allowing on-premises consumption of food. In upholding the argument, the court emphasized that the lease contained a condition that the premises be used only to operate a “Caffé Nero themed café,” and not for any other purpose.<sup>58</sup> For the court, this created a *specific* purpose for the lease, which the government restrictions had frustrated.<sup>59</sup> This ruling appears to be exceptional<sup>60</sup>; one commentator wrote about the case: “This is an important case because, to our knowledge, this is the first case since the beginning of the COVID-19 pandemic where a court concluded that the Frustration of Purpose defense excused rent payments.”<sup>61</sup>

## VI

### REFLECTIONS: EQUITY AND SERVING MARKETS

Equitable doctrines, in contract law and elsewhere in the law, have multiple functions. They are escape valves to allow courts to do justice in extreme cases. They are also sometimes characterized as gap fillers to cover circumstances not expressly covered in the agreement. In relation to the latter function, as noted, the parties can adjust individual contracts, through express terms, to be more or less willing to excuse performance due to changed conditions than the default equitable doctrines would.<sup>62</sup> As standards that incorporate vague terms—which, for the most part, have *not* been made more precise in their application by court decisions<sup>63</sup>—the equitable doctrines also potentially add to the uncertainty in the enforcement of contracts. Here, it is important to note the courts’ (often unarticulated) commitment to the functioning of the commercial system. Consider Stewart Macaulay’s conclusion about courts’ refusal to recognize frustration of purpose claims arising out of World War II regulations:

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56. *Id.* at 814.

57. No. 2084CV01493-BLS2, 2021 WL 956069 (Mass. Super. Ct. Feb. 8, 2021).

58. *Id.* at \*4–6.

59. The court also emphasized that none of the other contractual provisions could be read as assigning the risk of that government restriction to the tenant.

60. At least one other court, on similar facts (restrictive lease language), *refused* equitable relief. *SVAP III Riverdale Commons LLC v. Coon Rapids Gyms, LLC*, No. 02-CV-20-3652, 2020 Minn. Dist. Lexis 361, at \*13–14 (D. Minn. Dec. 3, 2020).

61. Ronald Shoss & Cody Smith, *COVID-19 and Frustration of Purpose: US Court Excuses Rent Payment*, MAYER BROWN: PERSPECTIVES AND EVENTS (Mar. 3, 2021), <https://www.mayerbrown.com/en/perspectives-events/publications/2021/03/covid-19-and-frustration-of-purpose-us-court-excuses-rent-payment> [https://perma.cc/P7E2-GEHE].

62. *See, e.g.*, VICTOR GOLDBERG, *FRAMING CONTRACT LAW* 333 (2006) (“The importance of the impossibility doctrine is circumscribed by the ability of the parties to contract around the law.”); *cf. In re CEC Ent., Inc.*, 625 B.R. 344, 357–63 (Bankr. S.D. Tex. 2020) (showing that in COVID-19-related litigation *force majeure* clauses supplanted frustration doctrine).

63. *See supra* note 22.

*Lloyd v. Murphy*] and *Mitchell v. Ceazan Tires, Ltd.*] were wartime cases, and government regulations disrupted many settled business practices. An easily satisfied frustration doctrine would have overturned many contracts. It might have contributed to even further disruption of the civilian economy beyond that caused by shortages and regulations.<sup>64</sup>

Modern commercial economies inevitably value the predictability of enforcement over doing full justice between the parties. Without such predictability, such basic aspects of commercial trade as the use of accounts receivable as collateral would be significantly undermined. The courts, in their development and interpretation of doctrine over time, have generally worked to protect the market system. Commentators predictably differ on whether that is a good thing or a bad thing.<sup>65</sup>

Where equitable doctrines like frustration of purpose and impracticability might seem, by their terms, to apply to a broad range of cases, it is not surprising that the courts will find ways to read them narrowly, such that relief is in fact granted in only a small fraction of the cases litigated. In fact, the more the facts might seem to warrant a *broad* application of such doctrines—surely, the absence of a worldwide pandemic was a basic assumption of *all*, or nearly all commercial transactions—the greater the likelihood that the courts will choose interpretations of the doctrines *to avoid* their application.

## VII

### CONCLUSION

The legal realists reminded us that there are factors in judicial decision-making beyond the legal texts. Judges applying contract law during a pandemic are likely aware that too broad a reading of equitable doctrines might create significant additional uncertainty in commercial markets; it is no surprise that in the present pandemic they have responded to such fears by interpreting such doctrines more narrowly than the doctrines' terms might indicate. And part of what law professors and law firm mentors need to inculcate in law students and young lawyers is the judgment to understand such pressures, and how they influence predictions of what courts will do.

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64. Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 837 (1961) (discussing *Lloyd v. Murphy*, 153 P.2d 47 (Cal. 1944) and *Mitchell v. Ceazan Tires, Ltd.*, 153 P.2d 53 (Cal. 1944)).

65. Compare MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780 - 1860*, at xiii–xvi (1977) (viewing critically the way contract law rules were altered to protect commercial interests), with NATHAN B. OMAN, *THE DIGNITY OF COMMERCE* 184 (2016) (arguing that protecting markets is and should be the central motivation of contract law).