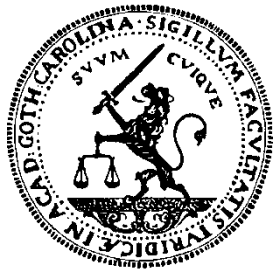

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Force majeure and hardship in Europe: a comparative analysis of French law and English law, and the EU autonomous concept

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Abbreviations

APA	Advance Purchase Agreement
AG	Advocate General
CISG	The United Nations Convention on Contracts for the International Sale of Goods
C civ (fr)	French Civil Code
C civ (be)	Belgian Civil Code
CJEU	Court of Justice of the European Union
Covid-19	Coronavirus Disease 2019
DCFR	Draft Common Frame of Reference
ECLI	European Case Law Identifier
ECR	European Court Reports
EU/Union	European Union
ICC	International Chamber of Commerce
PECL	Principles of European Contract Law
SARS	Severe Acute Respiratory Syndrome
UK	The United Kingdom
UNIDROIT	International Institute for the Unification of Private Law
UN	The United Nations
US	The United States of America
WWI	World War One

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Abstract

The goal for this research is to understand the problems and issues with force majeure principle in a cross-border trade setting taking into the impact on how the English legal system, French judicial framework and the European Union (EU) functions on said defence. The topic is relevant due to the volatile situations, from the first world war (WWI) to the war in Iran and from Severe Acute Respiratory Disease (SARS) to the Coronavirus Disease 2019 (Covid-19)-pandemic. Even though such events have unfolded and caused disruptions in global trade, and continues to do so, no significant development towards a harmonised force majeure principle and definition exist in the EU. The recent events that have required governmental interference that have caused disruptions in trade, such as the Covid-19 lockdowns, Russian Sanctions and Irani related bans. This research will compare how courts in different legal systems have addressed problems caused by the events of governmental restrictions and whether such issues would better addressed through a harmonised system of force majeure or prevail through the principles of contractual freedom.

Key words: Contractual freedom, force majeure, hardship, harmonisation, impossibility.

1. Introduction

1.1. Background

Freedom of contract is a principle that has been developed since the early contract law of obligations and liabilities, based on the *pacta sunt servanda* principle, namely that arrangements ought to be honoured and kept and nothing should come in between that sacred pact.[1] The freedom of contracting, which is recognized in the French,[2] English,[3] and EU,[4] legal frameworks refers that each party may choose the governing law and legal venue and terms, including the defined force majeure defence.

In the French legal system, force majeure, codified in the civil code provides a statutory defence,[5] as this research will show, that defence is evidently left for courts to interpret considering the strictness of the application of said principle of French law and practice.[6] The comparative element comes to play between the French and English case laws, whereas deriving from completely different legal traditions, strike many similarities in practice, adding to the difficulties in invoking hardships, impossibility and non-performance as this research will show.[7] While the EU law framework on contractual discussions has been very limited, and taken an interpretative standpoint on the principle of force majeure, the concept is generally recognized but in practice left for Member States to enforce and define,[8] why EU comes into play in private legal matters can be

[1] Georgios Martsekis, *Good Faith in International Commercial Arbitration* (Routledge 2025), 25.
[2] C civ (fr), art 1102.
[3] Gerald Henry Louis Fridman, 'Freedom of Contract' (1967) 2 Ottawa Law Review 1, 1-2.
[4] Regulation (EC) 593/2008 of the European Parliament and off the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.
[5] C civ (fr), art 1218.
[6] *Georgios Martsekis* (n1), 67-68.
[7] Hannes Rösler, 'Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law' (2008) 15 ERPL 483, 497-501.
[8] Case 4-68 *Firma Schwarzwaldmilch GmbH v Einfuhr- und Vorratsstelle für Fette* [1968] ECR 377.

considered in the regulatory frameworks impacting contractual obligations between parties, e.g. sanctions.

The comparative factors including the analysis of soft law instruments will be considered in the harmonisation argument of EU contract law, that is not to mention the failed attempts to introduce a framework of an "European Contract Law" by EU legislative organs. In summary the harmonisation argument is a threefold quarrel between a freedom that is already limited in the EU, codified in the French civil code, including a greater freedom provided by the commonwealth of England.

1.2. Aim

The objective of this research is to comprehend how impossibility, hardships and non-performance functions under force majeure principles between two different legal family, where one provides a codified definition and one leaves the parties to define thus, to answer the question whether force majeure harmonisation is necessary for the requirement of legal certainty under such interpretative principle. The comparative analysis of the French and English legal system is vital in grasping the problems and issues deriving from the nature of force majeure regardless of the differences of civil and common law systems as well as identifying positive outcomes of either system, thus in helping to assess whether the idea of force majeure harmonisation is purely fiction or pragmatic.

1.3. Methodology

In order to achieve the goals of this paper, the research will be conducted mainly through case law analysis based on private law matters but also considering some aspects to public law cases which have had an influence on private law aspects of the case studies. It is noteworthy that some of the case laws (mainly French) are not publicly available, therefore they are accessed through secondary electronical resources. The research utilizes not only legislation, EU related secondary sources, books and journals but also emphasises other electronic resources to support the arguments based on multiple angles of presented issue.

The collected information will be analysed comparatively to the specific legal area in creating an understanding of key issues and development areas. Where French case decisions are quoted in this thesis, the translation is the author's own, prepared with the aid of automated translation. The main research question to answer throughout this paper is as follows:

"Does the divergence between the French codified doctrine of force majeure (Article 1218) and hardship (Article 1195), the English combination of frustration and party-drafted force majeure clauses, and the EU autonomous concept of force majeure provide for sufficient legal uncertainty in cross-border contracts to justify EU-level harmonisation?"

1.4. Significance

This research will provide clarity of the in-depth analytical principle of force majeure considering the limited research of force majeure harmonisation and understanding how the principle is interpreted by courts, and legal professionals. The recent extraordinary events of pandemics and armed conflicts are foundation on how such principle has been applied and interpreted including the arising challenges within.

1.5. Chapter Outline

The research will comprise in total of six chapters;

I) An introductory chapter will provide the background of the research, aims & methodologies, and the significance to the current events.
II) Different force majeure traditions in civil and common legal systems, presents the Roman, French and English legal systems.
III) Force majeure and practice under European Union law, analysis the principle and case laws within the EU legal framework considering regulations, and secondary sources from the EU institutions.

IV) Contractual obligation and liability under extraordinary circumstances, considers sanctions, energy contracts, Covid-19, armed conflicts and general interpretation chapter.

V) Force majeure and hardship under soft law instruments: the harmonisation argument; provides other instruments as evidence towards a possible harmonisation of the principle, and whether the harmonisation should exist or not.

VI) Conclusion of the research and limitations of future research

2. Different force majeure traditions in civil and common legal systems

2.1. Development of contractual obligations under Roman law

In order to understand the issues of force majeure harmonisation we will briefly examine the development of contractual obligations and force majeure which has its roots in Roman law,[9] and dating back to the fourteenth century in the common law systems, referring to as an 'act of God', in other words an 'unforeseen supervening event'.[10] Roman law, English law and French law, has each contributed to the current understanding and application of what force majeure entails, thus referring to the impossibility to perform, or something supernatural outside of the control of either contracting party. French legal system has been influenced mainly by Roman law while English law has had little to no influence, thus developing into two specificities in foundational law of civil law and common law, both developed as 'recognizable legal systems' during the Middle Ages.[11]

The Roman contract law has its foundation on the notion that law is interchangeable and constantly evolving, and one of the earliest of such contracts of an offer and acceptance related to an oral agreement which was not solely based on intent but also a formality consisting of an exchange of questions and answers in order to create a binding formal obligation between the parties.[12] The contractual obligations based upon good faith and liability upon negligence, bad faith and failure to exercise reasonable care. The liability could be excused under the '*vis maior'* principle or 'superior force' outside the party's control such as

[9] Myanna Dellinger, 'Rethinking Force Majeure in Public International Law' (2017) 37 PLR 455, 458.
[10] Thomas D Musgrave, *Force Majeure and the Law: Acts of God in Comparative and Historical Perspective* (Routledge 2025), 1.
[11] ibid, 2-6.
[12] William Alexander Hunter and Alexander Falconer Murison, *Introduction to Roman Law* (rev. edn Alexander Falconer Murison, Sweet & Maxwell 1929), 92-94.

due to 'theft with violence'. Roman law also acknowledged that hardships or impossibility caused by own omission or own accord was not an excusable defence to avoid contractual damages. The contractual obligations already from the Roman principle, is arguably based on strict liability, where one cannot escape their responsibilities unless an act of God event alters the foundation of the agreement.[13] Next we will illustrate, how the French and English law follow similar foundation of honouring agreements to its strictest sense.

2.2. French legal system and *code civil*

In France, The Civil Code or '*Code civil des Francais'* was not enacted until the early 19th Century following the French Revolution and induced pressure by Napoleon. The law of obligations follows the exact traits of the Roman law part,[14] and similarly to the Common law countries, force majeure prevailed undefined by statutory acts, however, was stated under its effect in Article 1148 of the Code: 'No damages shall be payable when the debtor has been prevented from performance or from doing that to which he has obliged as a result of Force Majeure'.[15] For a force majeure defence to be effective under French law, it had to meet the requirements of unforeseeability, irresistibility and externality. The Court of Cassation analysed that unforeseeability argument is founded upon at the time of the conclusion of the contract, this is important as it times the unpredictability for the contract formation and not during the performance of its obligations.[16] Evidently, French courts have viewed force majeure in its strictest sense, where it can only be a defence under direct impossibility not merely a hardship to perform.[17] This is exemplified by the reform of The Civil Code on hardship and force majeure in 2016, allowing a party to excuse performance where a contract has become more onerous to perform due to unforeseen

[13] Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press 1962), 169-171.
[14] *Musgrave* (n10), 38.
[15] C civ (fr), art 1148.
[16] Court of Cassation, Plenary Assembly [2006] No 2-11.168, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007051847/> accessed 2 April 2026.
[17] Court of Cassation, Civil Division Commercial Chamber [2014] No 13-20.306, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000029480960/> accessed 30 April 2026.

circumstances,[18] and force majeure defence on an unforeseeable event beyond a party's control that could not have been avoided in preventing performance, and temporary event results in a suspension whereas permanent results in termination.[19] Even in this instance where force majeure is codified, the outcome in the reliance of the principle seems to be highly unpredictable, as seen in a case of natural disaster where volcanic eruption constituted a force majeure event,[20] yet a 2003 heat wave did not constitute a viable defence for non-supply of tomato seeds.[21] These two examples indicate that force majeure is not applied on an even basis despite its applicability, thus the question remains whether a harmonised defence provide any different outcomes in EU or not. The English legal system approaches this problem, applying such conditions without defining and applying a codified defence, which is evidently left for the parties to determine, thus leaving the courts to interpret the contract term instead of the law itself.

2.3. English law and the act of God

Contrary to civil law countries, the English legal system does not readily recognize a harmonized definition and application of force majeure, as it is intended to be left for parties to stipulate an appropriate defence under a contractual agreement.[22] However the legal system does provide a frustration doctrine, which on the surface appeared to be similar to force majeure as of early development, after all since both are defences built on the inability to perform. In one of the earliest cases it can be seen how strictly frustration of an obligation was viewed by the Court, the example in *Paradine v* Jane, the King's Bench refused to accept a frustrating event, thus maintaining absolute liability on the due rent even in cases where the lessee could not enjoy the land due to enemy

[18] C civ (fr), art 1195.
[19] C civ (fr), art 1218.
[20] Court of Cassation, First Civil Chambers [2012] No 10-25.913, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000025471662/> accessed 3 April 2026.
[21] Court of Appeal AIX en Provence [2015] No 12/19468 (reported in: Valeriia Bohdanova, ' "Force Majeure" as a basis for Exemption from Contractual Liability in European Union Legislation' (2024) 66 Scientific Journal of Polonia University 5, 134).
[22] *British Electrical and Association Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR 280 (QB).

invasion. This was due to the lack of clause description in the contract where liability could be excused.[23] Later on, in the landmark case of *Taylor v Caldwell*, the Court abolished the application of a strict absolute contract liability, where the Court questioned whether an obligation shall be held where the party liable cannot enjoy the contract, it was concluded that due to the burnt down musical hall, the contract could not be performed under specific terms.[24] It is imperative to note that, while the frustration is not a defence in itself, it gives a party possibility to be excused from obligations under a contract, where the object of the contract has radically changed, as seen in *Krell v Henry* where the object of the rent was not to the enjoyment of the room itself but the coronation event of The King, which never took place due to a cancellation of the event, thus fulfilling the requirements of frustration.[25] It meant that the contract had become radically different and the purpose of the contract could not be fulfilled, such as in *Davis Contractors Ltd v Fareham*, where Lord Radcliffe concluded that 'hardships, inconveniences or even material losses' do not amount to a frustrated contract. The fact that the original contract which was supposed to be completed in eight months and extended to twenty-two months due to foreseeable issues of access to labour and materials, the risk of delays in making a tender was on the contractor's liability, could not simply amount to a frustrating event.[26] As of 1943 the frustration doctrine has been set in Law, establishing the foundation for such a "defence".[27]

As demonstrated, although strictly interpreted frustration arguments seems quite straight forward, unlike force majeure where English law binds the parties only by a specific contractual clause, meaning that it only exists as far as the parties intend it to, such as in case of weather, strikes or other interfering events.[28] In the English legal system of the 'act of God' definition is arguably founded in *Wolfe*

[23] *Paradine v Jane* (1646) Al 26, 82 ER 897.
[24] *Taylor v Caldwell* (1863) 3 B&S 826;122 ER 309, 314-315.
[25] *Krell v Henry* [1903] 2 KB 740 (CA).
[26] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (HL), 729-731 (Lord Radcliffe).
[27] Law Reform (Frustrated Contracts) Act 1943.
[28] *Matsoukis v Priestman & Co* [1915] 1 KB 681, [683] – [684] (Bailhache J).

v Shelley, where the King's Court concluded that in cases where performance became impossible it would be 'unreasonable' for the party to be held accountable for such an omission due to impossibility.[29] Evidently, the force majeure in English law is based on the freedom to contract, meaning that no statutory act or legislation exists to provide a clear foundation for parties to rely on. In *Lebeaupin*, Justice Mccardie stated that force majeure clause 'should be construed in each case with a close attention to the words which precede to follow it, and with all due regard to the nature and general terms of the contract'. And the actual event is based upon those words following, where an event happens, and the distinction between a breach of contract or accident or by an act of God.[30]

The English impossibility doctrine leans towards an absolute impossibility which renders a contract unable to be fulfilled in its terms due to unforeseen, unpredictable circumstances beyond a party's control, not based on a 'hindrance' of such.[31] Force majeure is arguably strictly limited to its wording, where one has to specifically state the objective of the clause, e.g. in *Metropolitan*, Lord Parmoor reasoned that unspecific, uninventive wording cannot be grounds for the use of a force majeure defence, thus avoiding unlimited application of force majeure applying to all situations.[32] Furthermore, recent application of force majeure can be illustrated by *Tandrin Aviation*, where Justice Hamblen did not accept economic hardship under the contract clause merely due to the fact that the contract had become more difficult or expensive to perform.[33] On the other hand, in a Supreme Court case regarding currency payment obligations under imposed Russian sanctions, the Court contradicted this kind of rationale of performance, stating that one contractual clause derived obligation does not render the defence of force majeure in terms of taking reasonable endeavours to

[29] *Wolfe v Shelley* (1579) 1 Co Rep 93b;76 ER 206, 219-220.
[30] *Lebeaupin v Richard Crispin & Co* [1920] 2 KB 714, 719-720 (Mccardie J).
[31] *Tennants (Lancashire) Limited v CS Wilson & Co Limited* [1917] AC 495 (HL), 521-523 (Lord Shaw).
[32] *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119 (HL), 138 (Lord Parmoor).
[33] *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC and another* [2010] EWHC 40 (Com Ct), [50]-[52] (Hamblen J).

perform.[34] In other words events due to governmental interference impacting contractual performance did not automatically mean that obligation could not be met, despite being made excessively difficult to perform, it also meant that if the sanctions rule not directly prohibit performance, it could not be excused on the illegality defence (frustration). Conclusively force majeure as a principle in England goes as far as the parties intend it to, where statutory acts do not prevail, the burden of proof in litigation is higher, that is of the circumstances, contract clauses and the intent of the parties. Although the legal system is based upon freedom to contract, the only defence is that of termination under frustration, which means that the contract becomes unenforceable under an unexpected event that renders the contract impossible to perform without any fault to either party.

2.4. Summary

Considering the development of contract law and force majeure in Roman, French and English law it seems to be deriving from the strictest sense that contracts are honoured and kept. The law and practice also provide a leeway to that defence where one cannot possibly be expected to perform under circumstances that it is not accumulated to the party invoking it whether that be through contract clauses or statutory acts or not. While French law gives statutory defence of which parties can rely upon unlike English law, it is arguably to be interpreted narrowly and to its effects rather than a principle per se. Although English law has had little to no influence by Roman law, the force majeure defence resemble much of the same logic used by the French, meaning that one cannot be held liable for an event or action directly influencing their contractual performance, but such omission must not be attributive to the event itself. Evidently, civil and common law countries have differentiating systems what it comes to contractual freedom, our next chapter will consider how EU law views this freedom under contractual performance of obligations and liabilities.

[34] *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, [43]-[46] (Lord Hamblen and Lord Burrows SCJJ).

3. Force majeure and practice under European Union law

Contractual freedom has been a cornerstone of EU law for a long time and recognized as a general principle of Community law, which cannot be limited without the absence of 'Community rules imposing specific restrictions in that regard'.[35] While this freedom is not absolute it is a foundational aspect on contract freedom and the right to freely practice trade or profession within the allowed national and Union laws.[36] Moreover, the Commission has communicated the importance of contractual freedom in the Union, allowing each party in choosing their own terms, whereas some national contracting rules are mandatory and some are not,[37] where Rome I codifies this freedom whereas each party may choose the applicable law to their contract.[38] The EU Charter Article 16 also provides the freedom to conduct business arguably falls in the same category of the above mentioned.[39] As this chapter will show, the EU's relationship between force majeure and contractual freedom is asymmetric, where force majeure concept is an autonomous concept in certain areas such as agriculture, asylum and migration applied uniformly across Member States and detached from private rules and principles. Yet in private contract disputes heavily relied on the principles of contractual freedom by private parties and national rules. Our fourth chapter will provide the absence of such principle in private law matters followed by the question harmonisation of in the fifth chapter.

The definition of force majeure in EU law, while not codified can be found in one of the early cases regarding impossibility or failure to import. In *Schwarzwaldmilch* while not harmonised under EU law, the Court defined the

[35] Case C-240/97 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-6571, para 99.
[36] Case 4-73 *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para 14.
[37] Commission, 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (Communication) COM (2001) 398 final, paras 27 & 47.
[38] *Rome I* (n4), recital 11 & art 3.
[39] Charter of the Fundamental Rights of the European Union [2012] OJ C326/391, art 16.

concept of force majeure to be an 'unavoidable' and 'unusual' event rendering the contractual performance impossible even when exercising 'all due care'. Similarly to English and French rationale there is a requirement of a causal link between non-performance and impossibility.[40] In *Kampffmeyer*, the Court reinforced the idea that for a successful application of force majeure, the non-performance had to be beyond a party's control and more importantly strengthening the idea that force majeure could be invoked even in the absence of absolute impossibility.[41] In *Commission v Italy*, the Court stated that force majeure is an event attributable to the circumstances, beyond invoking parties' control, which are 'abnormal, unforeseeable and could not have been avoided exercising all due care'.[42] Despite the case laws, the Union has produced Regulations noting force majeure yet limited to certain areas such as agriculture,[43] migration and asylum matters.[44] The specific Commission Communication although related to agriculture defines force majeure as an 'abnormal circumstances' beyond the invoking party's control having exercised all reasonable care against those circumstances.[45] The Communication also provides an insight and clue on the general application and definition of force majeure in the Union;

'The concept of force majeure in Union law shares similar principles, conditions and requirements with the corresponding concept in national laws of Member States, but it has an independent character in Union law.'[46]

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[40] Case 4-68 *Firma Schwarzwaldmilch* (n8), 385-386.
[41] Case 158-73 *E Kampffmeyer v Einfuhr – und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 101, paras 8-9.
[42] Case C-297/08 *European Commission v Italian Republic* [2010] ECR I-1749, para 47.
[43] Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013 [2021] OJ L435/187.
[44] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing the situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L1359/1.
[45] Commission, 'on force majeure and exceptional circumstances in Regulation (EU) 2021/2116 of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy' (Communication) COM (2024) 225 final, paras 2.1 & 2.2.
[46] ibid, para 2.1.

This specific paragraph refers to a case regarding the relevance and uniformity of force majeure within the means of the functioning of the internal market, concluding that force majeure has a part in each Members States considering its constant character.[47] So far it seems that force majeure yet an acceptable principle but a limited legal theory, leans towards a soft law that is only enforceable through the specific governing law at hand, closely resembling the English courts approach on contractual liability. From the case law, commission notice and statements we can deduce that force majeure is an acceptable principle in the Union, coupled with strict limitations to ties in national laws and practices including but not limited to obligations deriving from the contract itself.

As previously mentioned, the French and English courts have taken a strict approach when assessing impossibility and non-performance of contractual obligations. It is imperative to note that courts in the EU approach to force majeure issues differently where different legislation and national law impact the analysis of such a defence contrary to relying solely on the wording and main concept of force majeure.[48] While this research focal point is on private law matters, it is necessary to understand how such defences have been evaluated from a public law perspective, since the that is the only framework currently where said principle is enforced under applicable Union law. In *Commission v Belgium*, the Court assessed whether force majeure can be used as a defence against their own omission for not applying a Directive, and since the omission was regarded as 'purely of domestic nature' the Court did not accept their arguments of an event beyond the party's control.[49] Advocate General Jacobs sums up the application of force majeure in the EU being a 'general principle of Community law' which does not have uniform application, not limited to having a distinct role in Community law in instances where events are 'unusual, unforeseeable, beyond the parties control', and not deriving from situations of

[47] Case C-314/06 *SPMR v DNRED* [2007] ECR I-12273, para 22.
[48] Case C-263/97 *The Queen v Intervention Board for Agricultural Produce, ex parte First City Trading Ltd and Others* [1998] ECR I-5537, paras 38 & 41.
[49] Case C-236/99 *Commission of the European Communities v Kingdom of Belgium* [2000] ECR I-5657, paras 21-23.

their own omission not to perform, summarized as a 'flexible doctrine by nature'.[50] What is interesting is that the failure to meet certain requirements for example in the postal Directive due to force majeure is not met with scrutiny.[51] Should force majeure be viewed only as an external event under Union law is a debatable question which will be further analysed throughout this research.

The instance of force majeure is only applicable in a sense how far the parties choose to contract their own obligations, e.g. parties have the ability to choose the United Nations Convention on Contracts for the International Sale of Goods (CISG),[52] the ICC Force Majeure and Hardship Clauses 2020[53] (ICC FM), UNIDROIT,[54] or Principles of European Contract Law[55] (PECL) to govern which could make EU principle of force majeure less relevant in terms of application and as a matter of relied concept. Similar regulatory triggers may produce contradictory outcomes across different jurisdictions, such as in an arbitration case between Gasum, a Finnish gas company and Gazprom, a Russian national gas company, regarding a longstanding agreement to buy a minimum set amount of gas.[56] The Finnish company, although contractually committed to buy said gas, claimed their hardship defence on three criterions of market share losses, soaring gas prices, and military actions in Ukraine.[57] The inability to meet such quotas due to the hardships were indeed not accepted by Gazprom to fall

[50] Case C-236/99 *Commission of the European Communities v Kingdom of Belgium* [2000] ECR I-5657, Opinion of AG Jacobs, paras 16-17.
[51] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1997] OJ L15/14, art 5.
[52] The United Nations Convention on Contracts for the International Sales of Goods (adopted 11 April, entered into force 1 January 1988) 1489 UNTS 3 (CISG).
[53] ICC Force Majeure and Hardship Clauses (International Chamber of Commerce, March 2020), <https://iccwbo.org/news-publications/icc-rules-guidelines/icc-force-majeure-and-hardship-clauses/> accessed 13 May 2026.
[54] UNIDROIT, *Principles of International Commercial Contracts* (4th edn, UNIDROIT, 2016).
[55] Ole Lando & Hugh Beale (eds), *Principles of European Contract Law: Parts I and II* (Kluwer Law International 2000).
[56] *Gasum Oy v Gazprom Export LLC* [2022] (Commercial Arbitration in Stockholm Sweden), para 86 <https://jusmundi.com/en/document/decision/en-gasum-oy-v-gazprom-export-party-representatives> accessed 8 April 2026.
[57] ibid, para 120.

under article 79 CISG,[58] although resulting in renegotiations in 2020,[59] where such hardships claims were waived by Gasum.[60] Evidently, the deliveries of gas seized in May 2022, but remaining payments were never received accordingly to the contract changes of the Russian federation (Decree No. 172.), since Gasum never accepted the required amendment of the contract according to the governmental Decree.[61] The question pinpointed by the tribunal on whether such a government decree can influence the contractual obligations between parties in amounting to force majeure. According to the principle of force majeure under the Swedish law- governed contract (and CISG), the government interference was considered a legitimate force majeure event due to suspension ban by the authorities.[62] The arbitration case illustrates that hardship triggers renegotiations with judicial adaption, including that such hardships cannot be treated as an impossibility of contractual performance of own failure to meet market demand and changes.[63]

In comparison, one can expect that English application of force majeure is left for interpretation but in this instance it seems to be that a principle that is on the one hand recognized, is on the other not, which fuels a grey area of interpretation with Union interference of how far such principle should be governed and applied in disputes. If the force majeure principle allows for governmental interference as an unforeseeable event, then it would equally be reasonable to presume in providing an adequate harmonised defence which parties can rely upon. We will look into more detailed how force majeure plays around during recent global extraordinary events.

[58] *Gasum Oy* (n56), paras 425-426.
[59] *Gasum Oy* (n56), para 465.
[60] *Gasum Oy* (n56), paras 540-542.
[61] *Gasum Oy* (n56), paras 206-207.
[62] *Gasum Oy* (n56), para 925.
[63] *Gasum Oy* (n56), para 620.

4. Contractual obligation and liability under extraordinary circumstances

As it is evident by now, EU force majeure concept is strictly limited to a soft law principle which does not have direct enforceability from an EU law perspective where contractual freedom prevails, despite recognizing the impossibility to perform, the lack of codifications results in inapplicability of said principle outside of the specific contractual terms and/or national rules. While it is certain that EU law would prevail in cases of conflicting laws as the precedent in *Costa Enel* indicates,[64] yet as we will see in the sub-chapters, the question of EU level primacy may influence indirectly contractual obligations between private parties and conflict with the enjoyment of contractual freedom between the parties. We will be looking at impossibility and non-performance under sanctions, the issues in the energy sector, unforeseeability during the Covid-19 pandemic and armed conflicts.

4.1. Sanctions and non-performance

The most recent example would be the sanction rules against Russia, whereas the Council in 2014 adopted Regulations 269/2014,[65] and 833/2014,[66] due to the armed conflict in Ukraine. Regulation 269/2014 relating to issues regarding overall contractual obligations, freezing of assets, applies to all legal and natural person listed, whereas no funds shall be made available to these parties.[67] What is interesting is that the Regulation provides each Member States the powers to authorize the release of frozen funds if there has been a pre-existing contract or an agreement with any of the persons listed, provided that funds remain inaccessible. This means that each Member States can decide in their discretion

[64] Case 6-64 *Flaminio Costa v ENEL* [1964] ECR 585.
[65] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L78/6.
[66] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1.
[67] *Regulation 269/2014* (n65), art 2.

whether such contractual obligations should be honoured or not.[68] The Regulation also provides a non-compensation paragraph which means that if a person has suffered directly or indirectly from the detriment of the implemented Regulation no claims can be made,[69] and more importantly the paragraph does not make a distinction of agreements made before or after the implemented decision. As mentioned in the previous chapter, contractual freedom is never absolute and should not abolish said sanction regulations effectiveness. Whether an event can be covered under a hardship or impossibility, can be inferred in *Parras Medina*, where the Court determined force majeure as 'not limited to absolute impossibility' but to an abnormal, unforeseeable circumstance that national courts must analyse in relation to the facts provided under Community legislation.[70] Evidently there is a thin-line between actual contractual obligations deriving from law and that deriving from the contract terms itself, but the lack of harmonisation on force majeure and thereof, arguably increases contract uncertainty and liability risks especially with private entities in third countries.[71] For example, in England, the courts have strictly interpreted contractual performance defences during extraordinary circumstances, such as those of governmental interference,[72] and even despite of sanctions affecting contractual performance it has not prevented courts in entering money judgments for the sanctioned party.[73] In *Litasco* the Court further reasoned that a lack of foreign currency to perform a payment 'even if resulting from sanctions on Russian oil, do not amount to a force majeure event'.[74] The governmental aspect on

[68] *Regulation 269/2014* (n65), arts 6-7.
[69] *Regulation 269/2014* (n65), art 11.
[70] Case C-208/01 *Isabel Parras Medina and Adelina Parras Medina v Consejeria de Agricultura y Medio Ambiente de la Junta de Comunidades de Castilla-La Mancha* [2002] ECR I-8955, paras 22-23.
[71] Ilya Kokorin and Jeroen van der Weide, 'Force Majeure and Unforeseen Change of Circumstances. The Case of Embargoes and Currency Fluctuations (Russian, German and French Approaches)' (2015) 3 Russian Law Journal 46, 77-78.
[72] *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Com Ct), [105]-[108] (Teare J).
[73] *Mints and others v PJSC National Bank Trust and another company* [2023] EWCA Civ 1132, [210] (Sir Julian Flaux C).
[74] *Litasco SA v Der Mond Oil and Gas Africa SA and another* [2023] EWHC 2866 (Com Ct), [38v] – [39] (Foxton J).

contractual interference seems to have different outcomes to as to the reach of sanctions and what may considered a valid excuse thereof. As shortly mentioned in the Introduction, the fundamental case law of *Mur Shipping* further represents how courts in England evaluate contractual performance under most recent sanction regulations. The Supreme Court case was founded upon whether a party had to accept reasonable endeavours under a force majeure clause in order to overcome non-contractual performance.[75] The force majeure sub clause stated the following: 'A Force Majeure Event is an event or state of affairs which meets all of the following criteria; it cannot be overcome by reasonable endeavours from the Party affected'.[76] The Court, analysed that the clause does not require a party to accept non-contractual performance, but is a wording to describe what steps ought to be taken to ensure contractual performance, and if a party had not given up that right expressed or implied, then the contract interpretation is strictly related to its performance thereof.[77] This case is imperative in understanding how strictly contractual obligations are viewed under the *pacta sunt servanda* principle, even despite that it would have been reasonable to accept a currency different than of the contract.[78] As we already know, hardship doctrine is not recognized under the English legal system, thus one could argue that not being able to pay in the explicit currency could fall under such principle. Clearly, unavoidable gap between this fundamental case and the frustration decision in *Davis v Fareham*,[79] exists in terms of performance that has become more onerous to perform, hence the contract terms ought to be the saviour in these instances of "hardship".[80]

Comparably in France, the Paris Court of Appeal did not accept that due to EU and UN sanctions on the Islamic Republic of Iran e.g. leading to freezing of assets held a valid argument for impossibility under force majeure in 2020. The Court

[75] *RTI Ltd v MUR Shipping BV* (n34), [1]-[2] (Lord Hamblen and Lord Burrows SCJJ).
[76] *RTI Ltd v MUR Shipping BV* (n34), [4] (Lord Hamblen and Lord Burrows SCJJ).
[77] *RTI Ltd v MUR Shipping BV* (n34), [46]-[48] (Lord Hamblen and Lord Burrows SCJJ).
[78] *RTI Ltd v MUR Shipping BV* (n34), [65] (Lord Hamblen and Lord Burrows SCJJ).
[79] *Davis v Fareham* (n26).
[80] Edwin Peel, *Treitel on The Law of Contract* (16th edn, Sweet & Maxwell 2025), 1200-1201.

did not agree that the force majeure event did not derive from an external situation since the fact that the Bank was contributing to the Irani nuclear and ballistic program. The Iran Bank Sepah had accrued interest to a creditor Oaktree Finance Limited, and the question arose whether the Civil Code applied statute of limitation to that interest could have been prohibited without prior authorization from the national competent authority.[81] The case was referred to CJEU for a preliminary ruling where the Court determined that such limitation requires prior approval by the authorities, thus prohibiting a priority of a creditor over others.[82] More recently, the Paris Court of Appeals confirmed in a similar case that no enforcement measures can be authorised against frozen Libyan assets without prior authorization[83] under Regulation (EU) 2016/44, which allows for each Member State to release the frozen assets upon their discretion.[84] While these cases do not illustrate force majeure in more depth, it illustrates that sanction Regulations in these instances have not only impact on contractual obligations and liabilities, but also leaves Member States deciding whether performance can be rendered under the Union Regulations. In a similar case considering the terms of the contract, the English Court of Appeal determined that the force majeure clause of avoiding making interest payments to comply with mandatory provisions of law, in this case US based secondary sanctions, was permitted, even when the parties in question where not operating on US soil or considered US based entities, since the EU Block Regulation required EU entities to comply with foreign based sanctions requirements, thus allowing the non-performance based on these criterions coupled with the force majeure clause.[85] Interestingly in *Banco San Juan v Petroleos*, Justice Cockerill analysed that the wording of a contract clause under the defence of sanctions was not a

[81] Cour of Cassation Plenary Assembly [2020] No 18-18.542 & 18-21.814, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000042128145> accessed 30 April 2026.
[82] Case C-340/20 *Bank Sepah v Overseas Financial Limited and Oaktree Finance Limited* [2021] ECLI:EU:C:2021:903, paras 56-59.
[83] Cour of Cassation Civil Division, Second Civil Chamber [2026] No 23-15.936, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000053452231> accessed 2 May 2026.
[84] Council Regulation (EU) 2016/44 concerning restrictive measures in view of the situation in Libya and repealing Regulation (EU) No 204/2011 [2016] OJ L12/1, art 11(2).
[85] *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ, [29]-[47] (Sir Geoffrey Vos LC).

defence but a negative covenant excuse not pay. The US sanction rules were not widely imposed but targeted to specific entities and business activities restricted thereof, which was not the case here. The importance in this case even so was the contractual drafting of the defence within, as no suspension was mentioned, no suspension could be expected.[86] One important aspects on sanction impaired performance can be explained in *Mamancochet*, where Justice Teare stated that a party is not liable to pay a claim which is rendered illegal or prohibited under the laws which would expose the other party to sanctions, which did not mean that the claim was terminated but rather suspended as defined in the contract terms.[87] This is important as it means that the contractual obligations do not disappear just due to sanctions but merely suspends the performance until further notice, thus a force majeure defined event not a frustrating event per se.

We can deduct from practice that sanction rules, if not prohibiting specific performance can make contractual obligations more onerous, thus force majeure terms may only be the key for once excuse of said performance under English and French law, not to mention the illegality defence in both jurisdictions. Next, we will look into how the energy sector's impact on sanction regulations in the EU and how it has impacted contractual certainty.

4.2. European Union energy sector and force majeure

What it comes to the question of energy supply, EU imports a 'large portion' of natural gas from third countries and any disruptions to gas supply would 'severely damage' the economy in the Union.[88] The Regulation 2017/1938, aims to provide a security of gas supply in the Union in order for the functioning of the internal market and such supply shall have a shared responsibility of natural

[86] *Banco San Juan Internacional Inc v Petroleos De Venezuela SA* [2020] EWHC 2937 (Com Ct), [46]-[60] (Cockerill J).
[87] *Mamancochet Mining Ltd v Aegis Managing Agency Ltd and others* [2018] EWHC 2643 (Com Ct), [48]-[50] (Teare J).
[88] Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 944/2010 [2017] OJ L280/1, recitals 1-2.

gas entities, Member States and the Commission.[89] The Regulation arguably provides a very limited force majeure justifications, while it does not mention the principle per se, it does state that any emergency in relation to disruption of gas supply and the actions thereof shall be justified and not restrict gas supply in the Union.[90] Comparing the sanction Regulations above (while allowing for derogations) seems to be a contradictory on how energy companies should aim towards sustainable gas contracts with parties of a sanction country and to abolish said contracts, one point is certain that is left for interpretation and for analysing whether such measures should have a Union wide force majeure clause that would provide clarity for private entities under such circumstances.

This is especially apparent where EU relies heavily on imported energy especially from Russia, e.g. before 2022 Russia was the biggest exporter of natural gas to the Member States. While the 2022 sanctions have not been directly banning EU importation of energy, the Russian Federation has limited their export, increasing the energy crisis in the Union. It is important, since the sanctions have had a direct impact on business and specifically contract obligations between Union and sanctioned countries.[91] While the amended Regulation of 2022 does allow for derogation of energy importations such as natural gas and oil, it was once again left in the hands of the Member States discretion.[92] One example where the Germany's Ministry urging the national energy company 'SEFE' to terminate its long term energy importation contract with Russia, stating a possibility to terminate the contract through a force majeure clause in relations to the sanction Regulations in EU, this move would not only cost around ten billion Euros but debatably also lead to contractual uncertainties

[89] ibid, arts 1-3.
[90] *Regulation 2017/1938* (n88), art 11(3-6).
[91] Diana Chen and Xiaohong Yu and Eduardo Pardo-Piñashca, 'Dynamic effects of EU economic sanctions on the EU-Russian energy market: Evidence on crude oil and natural gas' [2026] 210 Energy Policy 1, 1-7.
[92] Council Regulation (EU) 2022/1269 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2022] OJ L193/1, paras 9-10.

of future trade.[93] This discretion and practice arguably would threaten the said contractual freedom and legal certainty in the Union within private entities. On the other hand, a German energy company; 'Uniper', was allowed to terminate its agreement with Gazprom after non-performance on their Russian counterpart, the arbitration award in accordance with Swiss law are legally binding and final.[94] While the arbitration documents are not publicly available, it is still interesting that despite differing laws in contractual arrangements the threat to terminate are based on some sort of non-performance allowed under the terms deriving from the same instrument under the Sanctions and the indirect results thereof. Similarly, the Slovakian and Hungarian energy undertakings are under pressure by the EU and the US to drop Russian oil, but so far these countries have managed to utilize the derogations allowed by the sanction Regulations.[95] Nevertheless, the future for long term contracts will come to an end as the EU's 'REPower EU'-project aims to abolish all energy imports regarding oil and natural gas deriving directly or indirectly from Russia by 2027,[96] and as of January 2026, this matter has become increasingly clear for energy companies in the Union, since new formation of contractual arrangements with Russia will be prohibited.[97] The previous derogation regarding importation of natural gas on long term contracts will be considerably more onerous and evidently end as of

[93] Petra Sorge, 'Germany Tells SEFE to End Long-Term LNG Deal with Russia' *Bloomberg* (11 November 2025) <https://www.bloomberg.com/news/articles/2025-11-11/germany-pushes-sefe-to-end-long-term-gas-import-deal-with-russia> accessed 13 April 2026.

[94] Georg Oppermann and Oliver Roeder, 'Uniper terminates Russian gas supply contracts' *Uniper* (Düsseldorf 12 June 2024) <https://www.uniper.energy/news/download/8b1153a0-a5ba-4372-8244-3ddd21b52b8b/20240612-uniper-pr-uniper-kuumlndigt-gasvertraumlge-mit-gazprom-en.pdf> accessed 13 April 2026.

[95] Sandor Zsiros, 'Hungary and Slovakia under pressure as US and EU target Russia with energy sanctions' *Euro News* (11 September 2025) <https://www.euronews.com/my-europe/2025/09/11/hungary-slovakia-under-pressure-as-us-and-eu-target-russia-with-energy-sanctions> accessed 14 April 2026.

[96] European Commission, 'REPowerEU – phase out of Russian energy imports' (The roadmap is the EU's strategy to remove Russian oil, gas and nuclear energy imports from EU markets in a gradual and coordinated way) <https://energy.ec.europa.eu/strategy/repowereu-phase-out-russian-energy-imports_en> accessed 14 April 2026.

[97] Regulation (EU) 2026/261 of the European Parliament and the of the Council of 26 January 2026 on phasing out Russian natural gas imports and preparing the phase-out of Russian oil imports, improving monitoring of potential energy dependencies and amending Regulation (EU) 2017/1938 [2026] OJ L 2026/261.

30 September 2027.[98] What this means is that regardless of what force majeure exception provided by the national law and/or contract terms, the long term contracts will be unlawful and unenforceable as of the date. While it is understandable that Member States have given their supremacy powers to the EU, there lies a certain conflicting idea between the freedom to contract and the uncertainty behind governmental interference in contract liabilities and obligations, that would arguably be better dealt with in a Union level providing an enforceable definition of force majeure in any given contract law situation rather than applying Regulations altering these types of contracts.

The problems with governmental interference may not always be as straightforward as exemplified by the arbitration case between an Italian and Ukrainian gas company governed by Swedish law. Naftogaz, an Ukrainian entity invoked impossibility of performance due to a duress to signing an agreement with Gazprom (a Russian entity) concluding that any re-exporting of gas would not be allowed.[99] The tribunal held that due to the pressure by the agreement with Gazprom, Naftogaz was not liable to deliver gas until the end of 2006 but for the agreements signed in 2008 and 2009 were no such duress was invoked, the obligation of performance was not suspended.[100] The tribunal also analysed the arguments regarding the supposed illegality by the Ukrainian law to export gas unless there was a 'enough gas for the domestic market',[101] establishing that since the exportation ban was not absolute and related to the supply it was not impossible to perform the contract in some parts.[102] Even if the performance could technically be met, the tribunal found that Naftogaz had taken reasonable steps considering the circumstances to secure the exportation of gas.[103] This case illustrates the difficulties what it comes to contractual interpretation and how the

[98] ibid, arts 3-4.
[99] *Italia Ukraina Gas SPA v National Joint-Stock Company "Naftogaz of Ukraine"* (SCC Case No V007/2008), paras 255-259 & 282 <https://jusmundi.com/en/document/decision/en-italia-ukraina-gas-s-p-a-v-national-joint-stock-company-naftogaz-of-ukraine-separate-arbitral-award-tuesday-19th-october-2010> accessed 14 April 2026.
[100] ibid, paras 296-297.
[101] *Naftogaz* (n99), paras 312-315.
[102] *Naftogaz* (n99), paras 323-328.
[103] *Naftogaz* (n99), paras 461-465.

performance is evaluated based on the merits of the contract, law and provided evidence. Not invoking a duress and not informing the party of difficulties is an important part of the defence, meaning that impossibility is not automatically applied if not informed such as in this case of the duress. Interesting enough the force majeure clause-defence was never brought up in the proceedings, arguably since the force majeure clause did not mention the current event described as: '…such as fire, flood, earthquake, other acts of God, war and hostilities, blockade and gas main accidents, which is beyond the Parties' control…'.[104] While looking at the circumstances, the performance could not be rendered due to the control of an outside force it was justifiable to not expect performance according to the tribunal, however according to the contract, the force majeure defence would have rendered it unenforceable since no notification had been made accordingly to the specified event,[105] as one could deduce that the inability to delivery was some sort of hinder or block to perform under threat of punishment. Regardless, the inability to deliver is left for interpretation and arguably alters legal certainty what it comes to the questions of contractual obligations and whether a harmonised force majeure would be able to address the situation any differently. In order to answer the remaining question on whether contractual interpretation is based on its merits, contractual drafting by the parties, law or a combination of both under the discretion of a legal tribunal, we will look at how courts have assessed unforeseeability under Covid-19.

4.3. Unforeseeability argument under Covid-19

Even if hypothetically speaking a force majeure clause would apply, the unforeseeability argument depends on when exactly the contract has been concluded compared to the actual event classified as force majeure (considering the French principle).[106] For example, in *First City Trading*, the Court pinpointed that acts by public authority banning importation and exportation in the Community constituting a force majeure considering case law and the applicable

[104] *Naftogaz* (n99), para 7(art 7).
[105] *Naftogaz* (n99), para 7(arts 7.3-7.4).
[106] *Court of Cassation, No 2-11.168* (n16).

regulation is of irrelevance as to the actual event itself,[107] by this rationale it arguably means that the decision affecting contractual performance in the Union are still considered force majeure, even it would be not seen as unforeseeable as to the foreseeable decision made prior to the actual ban. Similarly to sanctions (although temporary), the ban was due to the limitation on the spread of 'bovine spongiform encephalopathy'-disease. While it is understandable that such spread could cause serious damage in the Union it is left to decide where contractual freedom entails and where it does not depend on the authorities in these situations.[108]

The unforeseeable event in recent years can be considered under the global pandemics of Covid-19 impacting contractual obligations and liabilities under international trade.[109] The specific analysis of Covid-19 is imperative as to how the governmental restrictions and prohibitions were treated differently in terms of the contractual defences in several Member States, e.g. in February 2020, the French Prime Ministry of Economy stated that Covid-19 will be considered a force majeure event and any penalties with government contract are abolished.[110] However such statement did not include payment obligations of a rental premises since the Covid-19 restrictions was of 'temporary' nature and did not fulfil the means of loss of property criteria, due to the sole reasoning that the tenant could not operate their business in those premises under the French Civil Code. The Court of Appeal's reasoning on the matter confirms the difficulties of force majeure interpretation even when it is codified under law, evidently leaving the courts to decide whether to discharge contractual obligations based on governmental action or not.[111] Similarly in another rental dispute, the French Court of Appeal did not allow the defence of force majeure, even when an

[107] *Case C-263/97* (n48), paras 36-39.
[108] *Case C-263/97* (n48), paras 12 & 73.
[109] Tom Hick, 'The Coronacrisis and its impact on Creditors: Frustration of Purpose' (2022) 30 ERPL 389, 390.
[110] Klaus Peter Berger and Daniel Behn, 'Force Majeure and Hardship in the Age of Corona – A Historical and Comparative Study' (2019-2020) 6 McGill Journal of Dispute Resolution 79, 80.
[111] Court of Cassation, Civil Division Third Civil Chamber [2022] No 21-20.190, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000046013764?isSuggest=true> accessed 22 April 2026.

unforeseeable event of Covid-19 rendered the contract more onerous to perform, and despite stating that the tenant renting the premises could not have conducted their business from the premises due to governmental interference.[112] These two cases affirm the strict interpretation of the conditions behind extraordinary events and whether they are considered temporary, impossible or create merely more difficult circumstances to perform said obligations. Correspondingly, in *Salam Air*, Justice Foxton did not accept that the aircraft lease and intended use for a specific route was enough for the contract to be terminated under frustration due to the Covid-19 flight restriction for that route. The agreement was not specific for that route alone, meaning that the lessee could utilize the aircraft as he pleased, thus resulting in non-applicable defence under the pandemic.[113] One could argue that the object of the rental contracts was based upon running the business via the lease, not merely the enjoyment of a property, as it was established in the English coronation case,[114] eventfully a temporary element of a governmental restriction is not enough to spark the defence in under these rulings. What is striking is that you could not accurately predict how long a pandemic would last, surely the government restriction is temporary (depending on the length), but the time a pandemic or conflict lasts should not be based upon a speculatory decision making, as the whole point of force majeure defence is the unforeseeability and unpredictability of the concept itself. Evidently, there is a thin line between what can be considered temporary and permanent, left to decide by the relevant tribunal. In *Fibula* the English application of force majeure clause was not activated before a time limit of ten days was passed, meaning that even in the event of impossibility, it had to prevail for at least ten days before a defence could be claimed.[115] This provides an example, where parties may choose the definition of what may considered temporary or permanent before a defence can

[112] Court of Cassation, Civil Division Third Civil Chamber [2023] No 21-10.119 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000046013764?isSuggest=true> accessed 28 April 2026.
[113] *Salam Air Saoc v Latam Airlines Group Sa* [2020] EWHC 2414 (Com Ct), [49]-[56] (Foxton J)
[114] *Krell v Henry* (n25).
[115] *Fibula Air Travel SRL v Just-US Air SRL* [2020] EWHC 3048 (Com Ct), [5] & [12] (Jacobs J).

be justified. But as of now, the duration of an event and whether it is unforeseeable is left for the Members States/Union's decision. One example where such time limit may be considered is the current situation of the Hantavirus Cardiopulmonary Syndrome (HCPS) in the world.[116] Nevertheless, a Council Regulation focusing on Covid-19 aftermath may offer some clues on how similar situations may be handled in the future in response to economic crisis, supporting small and medium sizes businesses.[117] The Regulation states that the situation caused by the pandemic is 'beyond the control of Member States which calls for a coherent and unified approach at Union level'. Generally, the Regulation accepts that the pandemic resulted in economic problems in the Union and that in order for us Member State to recover for the downfall resulted thereof, it required unified and coordinated response by the Union and between the Member States.[118] The Regulation is not only evidence that the pandemic was an extraordinary event beyond Member States control but also proof that the Union could produce a rule (although limited) towards a unified effort of crisis management, thus similar approach could be applied regarding force majeure concept across the Union.

4.4. Armed conflicts and contractual interpretation

Regarding unforeseeable events, one hot topic that have been impacting trade is major armed conflicts ranging from WWI to the Russian-Ukraine conflict within the past century. So far one could assume that war is a predicament of impossibility but that has not always been the standpoint, especially in England where war may be considered a hindrance but not an impossibility as illustrated in *Paradine v Jane*.[119] But as we have concluded so far, the English law of force majeure goes as far as the parties have drafted the definition, and in absence of

[116] World Health Organization 'Hantavirus cluster linked to cruise ship travel, Multi-country' (Disease Outbreak News 4 May 2026) <https://www.who.int/emergencies/disease-outbreak-news/item/2026-DON599> accessed 5 May 2026.
[117] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433/23.
[118] ibid, recitals 1-5.
[119] *Paradine v Jane* (n23).

such the only defence under war is then frustration, acting like a two-way street, providing a safe passage for party that cannot possibly perform under an armed conflict defence. In *Zinc Corporation*, the Court held that the correct wording of the defence clause meant that only parts of the contract where to be suspended, not in its entirety. The defined force majeure event would have normally applied if war would have not broken out between Great Britain and Germany, thus resulting in frustrating event as the contract was rendered illegal continuing trade with the enemy.[120] Similarly in *Fibrosa*, the contract had ceased to exist by frustration, where the question arise of obligations and performance already rendered by either party, and the liability thereof: as Lord Porter overturned the decision in *Chandler v Webster* on 'the loss lies where it falls'-statement, claiming that despite the situation, frustration is of no fault of either side, the case here was not a discussion of performance failure or a matter of fault but a discussion of supervening illegality and the failure of consideration in its entirety, meaning that the prepayment sum could be recovered since performance could not be rendered by the seller.[121] Arguably, the case lead to the development of statutory definition of a frustrating event under English Law.[122]

The main difference with the French legal system is that it provides the impossibility as a statutory defence which is eventually left at the courts discretion, thus the contract and statutory definition coexisting by allowing the specified defence. However, this defence under armed conflicts has not been straight forward before the 2016 Reform of the principle: during WWI, a contract which was not rendered impossible did not meet the requirement under force majeure principle and even if it did, the suspension would only be considered temporary to the rationale that war causes hardships, although during the armed conflict, the French introduced an emergency law named '*Loi Failliot*' which allowed parties to terminate the contracts due to the state of war resembling that

[120] *Zinc Corporation, Ltd v Aron Hirsch und Sohn* [1916] 1 KB 541.
[121] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32 (HL), 76-84 (Lord Porter).
[122] Law Reform (Frustrated Contracts) Act 1943.

of the English application of the frustration doctrine.[123] The French has maintained a strict standpoint on contractual obligations by not allowing defences in mere hardships due the results of war even if the increase of prices would cause losses to the party, thus concluding that economic hardships regardless of the situation are met with scrutiny.[124] Correspondingly in recent decision, the Paris Court of Appeal did not accept gas market fluctuations of 600% due to the results of Russian-Ukraine armed conflict, the reasoning by the Court founded on parties willingly acceptance of the risks of unforeseen and unpredictable circumstances deriving in concluding such agreements.[125] Surprisingly later that year, the Paris Commercial Court accepted that rising costs due to Covid-19 and Russian-Ukraine armed conflict was unforeseeable during the conclusion of the contract in the eyes of the Court. One could deduce that the difference here is that the party tried to renegotiate the terms of the contract with the other party before outrightly trying to terminate it, falling into Article 1195 of the French Civil Code (hardship clause).[126]

Considering the current armed conflict in Iran and the issues related to the closing of the strait of Hormuz, the closure of Suez Canal in 1956 due to military operations, resulted in an unexpected increase in shipping costs and delays, but did not amount to such a 'fundamental change of the contract' including the inability to apply the force majeure clause due to limited wording only related to the shipping of the product, which in this instance was not hindered.[127] Another important aspect of armed conflict is the issue of war declaration which was discussed in *Kawasaki Kisen v Bantham Steamship*, where the Court determined

[123] Radosveta Vassileva and Catherine Pédamon, 'Contractual Performance in COVID-19 Times: Does Anglo-French Legal History Repeat Itself?' (2021) 29 ERPL 3, 7-10.
[124] Court of Cassation, Civil Chamber [1921], <https://www.legifrance.gouv.fr/juri/id/JURITEXT000006953019/> accessed 29 April 2026.
[125] Paris Court of Appeal [2022] No 22/00326, <https://www.courdecassation.fr/decision/6388590301d0fb05d44b0e98> accessed 29 April 2026.
[126] Paris Commercial Court [2022] No 2022033136 (reported in: International Bar Association, 'Unforeseen circumstances and contract rebalancing' (*International Bar Association* 29 August 2025) <https://www.ibanet.org/clint-august-2025-feature-3#_ftnref13> accessed 29 April 2026.
[127] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 (HL), 93-94.

that despite war not being officially declared, war could still be defined as an armed conflict amounting to a non-performance defence.[128] For the sake of an argument, let's assume that one would conclude a contract before the hostilities in Iran which depends on oil importation, now it is safe to assume that the importation of oil is not guaranteed and/or the market price is volatile impacting the contractual performance. What can be considered a normal business risk and what can be considered a force majeure event? In *Denny Mott v James B Fraser*, the House of Lords analysed whether the contract had frustrated due to war regulations or rendered parts of the contract suspended.[129] As Lord Wright states that the contract was for the supply of timber for an undefined amount of time, and while the war could end at any time, the argument arose whether such a contract ought to be terminated or suspended for the time being considering contractual terms of termination of either party due to the impossibility to deliver timber.[130] Lord Wright referring to Lush J's statement that a state of war 'must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, so as to defeat and destroy the object of the commercial adventure', concluding that letting the contract continue indefinitely by the terms of the contract in regards of the suspension, would have been 'unreasonable and inequitable' thus frustration applies to the contract in its entirety regardless of the clause, since the concept is directly connected to the supervening event and not the interpretation of the event itself.[131] The case provides a slice of evidence how armed conflicts could be evaluated considering the difference between force majeure terms and frustration under (illegality and impossibility), a frustration principle should be considered a term of impossibility as a harmonised principle in the Union, considering the events and decisions on particular events of armed conflicts affecting these situations. The question remains on how should courts evaluate the current armed conflict in the middle east which has sparked increase

[128] *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544 (CA).
[129] *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 (HL), 270 (Viscount Simon LC).
[130] ibid, 274-277 (Lord Wright).
[131] *Denny v Fraser* (n129), 278-281 (Lord Wright).

in in oil and jet fuel prices including the disruptions in shipping, should it be considered a temporary hindrance amid possible peace talks, or should it be considered a permanent war related impossibility defence?[132] The next chapter will provide some clues on how force majeure should and should not be interpreted and drafted.

4.5. Considerations of contractual interpretation

The main issue at hand is that each case is evaluated on its merits based on applicable law of the contract, the venue and in some sort of compliance of Union law depending on the effects of that contractual performance. For example, a war in a major oil exporting country will likely cause volatilities in the market for the price of oil and even interrupt trade but how far is that foreseeable to the actual contractual arrangements made after such "discovery"? For example, in Commission Communication regarding agricultural policy, a force majeure defence does not cover market fluctuations.[133] Does it mean global events having indirect impacting on market trends should be considered outside of this scope? The idea is not as simple as the result of the previous mentioned English and French case laws provide, that is economic hardships are usually not considered a viable defence of force majeure, but what if those hardships are strictly related to government actions or omissions? In *Commission v Italy* the Court determined that in cases where the private company had faced difficulties in implementing a new waste management system due to protests and organised crime, the Commission was of that opinion that even in the light of convincing evidence the events were not unforeseen circumstances.[134] What is striking is that the force majeure defence do not apply to internal situations amounting to justification for non-performance, therefore it is rather irrelevant whether the force majeure

[132] Kamal Khashoggi and Lojayne Shaheen and Mercedes Romero and Claire Morel de Westgaver, 'Contracts at Risk: Navigating Force Majeure, Hardship and Disruption Clauses in the Wake of the 2026 Iran Conflict' *Ontier* (9 April 2026) <https://www.ontier.law/en/contracts-at-risk-navigating-force-majeure-hardship-and-disruption-clauses-in-the-wake-of-the-2026-iran-conflict/> accessed 28 April 2026.
[133] *COM (2024) 225 final* (n45), para 2.2.
[134] *Case C-297/08* (n42), paras 15-17.

definition exists, as the principle does not cover domestic issues and omission based on events that have or have not been dealt with prior to the proceedings, the Court also pinpointed that the Commission enjoys full discretion on bringing an action under Article 258 TFEU,[135] and the Court's cannot review that power.[136] The statement made by the Court could have impact contractual arrangements between the Member States and the private entity if somehow these situations can be connected to the private entities failure to perform, but whether that will be the case in reality depends entirely on the arrangements between Member State and the private company, yet such statements begs to question on the principles actual force majeure enforceability in private law matters in general.

It is evident that contractual interpretation when it comes to legal conflicts between Union institution and private parties is left at the Court's discretion on the favour of the EU principle. For example, in 2021 EU decided to sue AstraZeneca for failure to deliver a set of vaccines,[137] and according to the Advance Purchase Agreement (APA), AstraZeneca was 'committed to use its Best Reasonable Efforts' to deliver a set of vaccines. 'Best Reasonable Efforts' considered the company size, resources and the actual ability to produce vaccines in a large-scale emergency to 'end a global pandemic'.[138] The Belgian governed contract is certainly left for interpretation in terms of whether AstraZeneca had failed to deliver vaccines under the 'Best Reasonable Efforts', as the definition did not mention deliveries and also included the fact that the Commission and relevant Member States supporting AstraZeneca in their efforts.[139] As of 2022,

[135] Consolidated Version of The Treaty on the Functioning of the European Union [2012] OJ C 326/47, art 258.
[136] *Case C-297/08* (n42), paras 83-86.
[137] Reuters and Francesco Guarascio and Giselda Vagnoni, 'EU sues AstraZeneca over breach of Covid-19 vaccine supply contract' *Reuters* (26 April 2021) <https://www.reuters.com/world/europe/eu-sues-astrazeneca-over-delayed-deliveries-covid-19-vaccine-2021-04-26/> accessed 9 April 2026.
[138] Advance Purchase Agreement ("APA") for the Production, Purchase and Supply of a Covid-19 Vaccine in the European Union, 26 August 2020 (Ref.Ares(2020)4440071), 2 & cls 1.9. & 5.1. <https://www.aboutpharma.com/wp-content/uploads/2021/01/APA_-_AstraZeneca.pdf.pdf> accessed 9 April 2026.
[139] ibid.

the Belgian law distinguishes on two obligations deriving from 'best efforts obligation' on the debtor to take all reasonable due care (proof lies on the creditor) and 'strict obligation' on the debtor to achieve a certain result (presumed default on debtor unless force majeure proven).[140] 'Best Reasonable Efforts' is easily a wide enough term to be easily interpreted in one way or the other, meaning that evidence needs to be evaluated against such claims, nevertheless it proves how interpret sensitive contracts can be in dispute, where a clause may be looked from two perspectives. Sadly, we will not see the court's evaluation on the dispute, as the matter was settled, thus we won't be able to factually pinpoint the arguments of the parties to the said agreement.[141]

Interestingly enough the contract contained an extensive force majeure clause imbedded, which stated a wide range of 'events beyond the reasonable control of the party' including the wording 'epidemic',[142] which we will focus on next considering some English case law. In a Supreme Court dealing with an insurance policy regarding 'any…occurrence of a Notifiable Disease within a radius of 25 miles of the Premises',[143] the Court emphasized that the policy was directed towards the wording of occurrence, meaning one single event evaluated on an individual level, and that such wording could possibly not mean an outbreak in its strictest sense. The policy referring to an 'occurrence of illness sustained by a particular person at a particular time and place', and that such clause is correctly applied to interruptions caused by 'any cases of illness resulting from Covid-19' within a 25-mile radius.[144] Alternatively in *Football Association*, the contract defined force majeure as an event of '…government action, lockout, Act of God…' but was absent of event specific related to

[140] C civ (be), art 5.72(2).
[141] European Commission 'Coronavirus: The EU and AstraZeneca agree on Covid-19 vaccine supply and on ending litigation' *European Commission Press Corner* (IP/21/4561, 3 September 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4561> accessed 10 April 2026.
[142] ibid, cl 18.7.
[143] *The Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2021] UKSC 1, [61].
[144] ibid [62]-[74].

epidemic or pandemic,[145] thus the defence had failed. What is interesting, even in the absence of a defence, Mr Justice Fraser acknowledged that the Covid-19 could amount to a government action but should nevertheless be proceed to trial for analysis.[146] Lastly in *European Professional Club Rugby*, the contract had two sides of a force majeure, a general obligation and liability clause under force majeure (the general definition what constitutes a force majeure) and the covering events: e.g. '…epidemic, war, civil disorder…',[147] thus allowing the defence to cover the Covid-19 pandemic under the clause.[148] The aforementioned cases not only illustrates the importance of contractual drafting and interpretation, but also the full exercise of a freedom entailed to both parties in an agreement, equally. Regardless of the difference in the English common law to civil law countries, the judgments highlight the importance of contractual drafting and begs to question why the parties in the APA-agreement would have left such a term "epidemic" as an event constituting force majeure, debatably it could be interpreted as a novel disease or extending to a new strain of the existing pandemic. It nevertheless illustrates the need for some harmonisation of the principle which would arguably lower the risk for decision through litigation measures. While the AstraZeneca-settlement does not directly refer to a force majeure event it illustrates the importance of contractual wording, interpretation and the results of such non-performance statements made by a private entity going against the power conferred in the supremacy of EU law which is again left for the courts to reason and interpret. The correlation between supremacy and contractual freedom argument can be deduced during Brexit where European Medicine Authority tried to terminate their agreement under the defence that the lease agreement had become illegal due to the 2018 introduced Regulation and would be acting without capacity.[149] Thus, the case is fundamental in

[145] *Football Association Premier League Ltd v PPLive Sports International Ltd* [2022] EWHC 38 (Com Ct), [52] (Fraser J).
[146] ibid, [138]-[140] (Fraser J).
[147] *European Professional Club Rugby v RDA Television LLP* [2022] EWHC 50 (Com Ct), [11] (Judge Pelling QC).
[148] ibid, [31] (Judge Pelling QC).
[149] *Canary Wharf (BP4) T1 Ltd and other companies v European Medicines Agency* [2019] EWHC 335 (Ch), [96]-[100] (Smith J).

understanding the English courts strict approach to illegality defence under own accord, meaning that even in events where parts of the contract performance had become impossible, the frustration renders the whole contract terminated, which was not the situation as to the issue to the ability to pay for rent.[150] The most fundamental part about this judgment is the fact that self-induced impossibility to perform cannot be regarded as frustrating event under common law principles, where European Medicine Authority was considered a 'constitutional part of the EU'.[151] This is not only important distinction considering legal certainty but illustrates the difficulty between contractual freedom and the governmental decision that impacts said ability to rely on contract obligations and liability clauses. Ironically enough similar arguments and rationale was used by the Commission in the question of the inability to introduce a Directive by a Member State,[152] illustrating the legal uncertainty what it comes to the principle of force majeure in the Union as a whole. Notwithstanding the above, correctly formulated force majeure clause would have made the termination plausible. As a notion regarding non-performance defences and causation where the contractual interpretation of the force majeure event is due to not only any event, but an event impacting the specific performance for the defence clause to be activated.[153] The causation and contractual clause requirement was further strengthened in *PD Teesport* where Judge Klein interpreted the force majeure term as having two conditions of non-performance (claimant) on an event affected or capable of being affected due to Covid-19 (or Brexit) and event in the 'same category' preventing the defendant from transporting the unit. Judge Klein, reasoned that these two conditions were cumulative in a sense on how the clause was constructed,[154] meaning that the defendants reliance on inability to deliver was only acceptable to the detriment of the claimant's reliance on force

[150] *Canary Wharf* (n149), [173]-[176] (Smith J).
[151] *Canary Wharf* (n149), [201]-[207] (Smith J).
[152] *Commission v Belgium* (n49).
[153] *Classic Maritime Inc v Limbungan Makmur SDN BHD and another company* [2019] EWCA Civ 1102, [45] (Males LJ).
[154] *PD Teesport Ltd v P&O North Sea Ferries Ltd* [2023] EWHC 857 (Com Ct), [48]-[54] (Klein J).

majeure.[155] Noticeably, the English practice of force majeure illustrate the grave importance of contractual drafting in its strictest meaning and wording, and mistakes such as the above is costly to the defence itself, while the French Civil Code provides the definition,[156] parties are free to amend their clause similarly, which could provide a similar approach to a harmonised approach yet allowing contractual freedom between parties, rather than relying fully on terms and conditions of a contract.

[155] ibid, [66] (Klein J).
[156] C civ (fr), art 1218.

5. Force majeure and hardship under soft law instruments: the harmonisation argument

After addressing the force majeure function within and outside of the internal market, it is safe to say that in some level a harmonisation argument exists due to the inconsistent judicial decision considering impossibility, hardships and overall principle of force majeure. Discussion regarding harmonised contract law implementations have been realistically on the table since the early 1990's but has never rationalised into actual actions.[157] In 2001, the Commission expressed its opinion on whether the Union should intervene in private law matters by bringing together the Union agencies as well as stakeholders, businesses, legal practitioners, academics and consumer groups together.[158] The aim for the Communication was to have a detailed analysis of whether the internal market could benefit from harmonising in some but not all areas of contract law, such as non-performance and liabilities in the Union, since the Commission acknowledged that many Member States already share similar or same principle of contract law despite stemming from different 'legal traditions'.[159] On the paper it sounds straightforward to implement one uniform code that applies to all contract law matters, however one of the issues is when implementing Community law that it shall make no reference to the 'Member States law' since the uniform application of Community law has to have its own interpretation and meaning to be effective.[160] In areas where contract law does not differ in terms of the outcome it would be increasingly difficult to create enforceable uniform code without any conflicting rules, thus any abstract legal terms should only cover concepts and/or principles as such.[161] Nevertheless the harmonisation of contract law appears to be more than burdensome coupled with difficulties

[157] *Commission on European Contract Law* (n37), paras 1-2.
[158] *Commission on European Contract Law* (n37), 2.
[159] *Commission on European Contract Law* (n37), paras 10-15.
[160] Case C-357/98 *The Queen v Secretary of State for the Home Department ex parte Nana Yaa Konadu Yiadom* ECR I-9265, para 26.
[161] *Commission on European Contract Law* (n37), paras 34-38.

arising from conflicting laws, ironically something the harmonisation should instead abolish. The Communication establishes four possible solutions to the problem:

i) No Harmonisation (full freedom to contract);
ii) Promote national legal development towards a common ground;
iii) Improve the existing Union legislation in relation to contract law;
iv) create a new legal order in the contract law that would apply to all contract law matters in the Union, either through a Regulation, Directive, Recommendations or a combination of some.[162]

Followed by the 2001 Communication, the 2003 action plan confirmed that while some discussion around harmonisation exists, no identified need to change the current sector-specific approach was established, and the need for elaboration on the possibilities of a harmonised contract regime in the EU. Despite the intent to rationalize the ideas from 2001, the action plan did not result in any changes, more than it was an acknowledgment of the current problems and issues in EU contract law.[163] Despite the Commission's intent towards a harmonised contract framework in the EU, the collaboration efforts did not result in any relevant changes regarding harmonisation; despite the Draft Common Frame of Reference (DCFR),[164] which provides principles, definitions and model rules of civil, tort and contract law. Furthermore, the 2010 Green Paper acknowledges that differences in national contract laws can have negative impact on legal certainty, cross-border trade and the overall function of the internal market. The DCFR and PECL are all instruments with the aim towards a better functioning internal market and to tackle the economic crisis in the Union through a uniform system

[162] *Commission on European Contract Law* (n37), paras 49-69.
[163] Commission, 'Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan' (Communication) COM (2003) 68 final, 1-2 & paras 98-99.
[164] Christian von Bar and Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (sellier. European law publishers 2008).

of contract law.[165] Why the attempt has not been successful can arguably bee deduced to the EU's 'lack of exclusive competence' in the matter, despite addressing some sector specific areas of contract law in the EU yet lacks general applicability of contract law in private law aspects.[166] Thus, the current setting of contractual freedom allows parties to choose their venue and law, e.g. based on CISG, UNIDROIT, PECL, DCFR or ICC FM as governing aspects to their contract (hereinafter: "instruments"), and while the instruments all offer a foundation of non-performance definitions, some differ more than others as illustrated by the following table:

Requirement & Definition	CISG	PECL	UNIDROIT 2016	DCFR	ICC FM 2020
Notification	Required within a reasonable time art. 79(4)	Art. 8:108(3)	Art. 7.1.7(3)	III.-3:104(5)	ICC FM 2020, art 4
Beyond control	Art. 79(1)	Art. 8:108(1)	Art. 7.1.7(1)	III.-3:104(1)	ICC FM 2020, art 3(a)
Unforeseeability	Art. 79(1)	Art. 8:108(1)	Art. 7.1.7(1)	III.-3:104(1)	ICC FM 2020, art 3(b)
Unavoidability (could not overcome)	Art. 79(1)	Art. 8:108(1)	Art. 7.1.7(1)	III.-3:104(1)	ICC FM 2020, art 3(c)

[165] Commission, 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses', (Communication) COM (2010) 348 final, paras 1-3.
[166] Claudia F. Peña Rodriguez, 'Harmonization of EU Contract Law adopted on the basis of Article 114 TFEU' (Master Thesis, Lund University 2020), 14.

Consequence	Limited to no damages art. 79(5)	Limited to no damages and claim of performance art. 8:101(2)	Limitations if temporary art. 7.1.7(2) Right to terminate, withholding performance or request interest on money due art. 7.1.7(4)	Limited between temporary and permanent performance in terms of termination III.-3:104(3-4)	ICC FM 2020, arts 6-8 Suspension of obligations & possible termination
Adaption	Not specified	Referral to court if no agreement reached art. 6:111(3)	Renegotiations in court (arts 6.2.3(1-4).	Court decisions under specific considerations III.-1:110	Mitigation (arts 3(c), 5 & 7)
Hardship and its consequences	Not specified	Subject to conditions art. 6:111(2)	Subject to conditions arts. 6.2.1-6.2.3.	III.-1:110	Separate

The instruments recognize the definition of impacted performance that has been resulted from events beyond the party's control, that could not have been reasonably expected, and that such non-performance require notice and without explicit notice results in liability of damages. One of the noticeable differences is the hardship clause, while CISG mentions the 'due to an impediment' under article 79(1) it is left for debate whether that could be summarized as a hardships or performance that has become more onerous unlike the others. Although not legally binding, yet worth noting is the CISG Council's advisory opinions on the

issues on the interpretation of Article 79 and hardship,[167] firstly, the judicial decisions have not been consistent in applying the defence on whether hardship could be classified as an impediment under a specific threshold including whether the Convention requires renegotiations.[168] While Article 79 does not specifically state hardship, it has been accepted 'more or less' by judicial decisions,[169] yet one important distinction has to be mentioned is where the performance has become more onerous, CISG still requires performance unless the hardship is considered to be an impediment outside of the party's control.[170] One matter is of certainty, that despite such advisory, the elements to determine hardship evidently leaves the concept in a much state of interpretation.[171] The question of renegotiation is clear according to the advisory opinion, where CISG does not impose such obligations under the good faith principle.[172] Contrary to England,[173] the Civil Code of France requires parties to negotiate in good faith.[174] However, the distinction between the good faith principle and hardship doctrine (including adaption) in relation to contractual terms may not be as clear as it seems, since the question is first of all whether the performance have become more onerous to perform and secondly whether the endured hardship is enough to change said circumstances of the contract, thus leaving to the interpretative aspects of not only the contractual terms but also the situation at hand.[175] The imperative aspect of these instruments (UNIDROIT, PECL and DCFR) provide the renegotiations clause allowing parties to adhere to changes in circumstances affecting such performance of a contract, the issues arise how to assert such a negotiations, when conflicts arise between parties do not willingly want to enter negotiations, that is where PECL art 6.111(3) only sanctions parties for doing so,

[167] Edgardo Muñoz, 'CISG Advisory Council Opinion No. 20: Hardship under the CISG' <https://cisgac.com/opinions/cisgac-opinion-no-20/> accessed 18 May 2026.
[168] ibid, paras 0.1.-0.10.
[169] *Edgardo Muñoz CISG Opinion No 20* (n167), paras 2.1.-2.2.
[170] *Edgardo Muñoz CISG Opinion No 20* (n167), paras 4.1.-4.4.
[171] *Edgardo Muñoz CISG Opinion No 20* (n167), paras 4-7.
[172] *Edgardo Muñoz CISG Opinion No 20* (n167), para 11.4.
[173] *Walford v Miles* [1992] 2 AC 128 (HL), 138-140 (Lord Ackner).
[174] C civ (fr), art 1104.
[175] Christoph Brunner, *Force majeure and hardship under general contract principles exemption for non-performance in international arbitration* (Kluwer Law International 2009), 391-395.

thus in reality more likely to be enforceable in practice.[176] Adaption is evidently a good foundation to find a solution for the hardship where the terms and resulted dispute cannot solve, similarly to arbitration but with less time, parties could reach to an agreement, however issues may arise if such renegotiations are force upon parties where the desire of conclusion of such an agreement is on the table or when to apply such adaption after the said performance has been concluded by one party. While other instruments provide for adaption, it is debatable whether CISG can provide such application under Article 7(2) or not.[177]

Furthermore, CISG is a binding Convention between contracting states and expressed terms by the parties is required for opting out of the applicability,[178] while PECL, UNIDROIT, DCFR and ICC FM are so to say "pick and choose" instruments where freedom of contract prevails, allowing parties to construe the meaning of a contract based upon their own needs, thus enforceability goes as far as the parties intend it to. Arguably, the main difference between CISG and the other instruments is the consequences of such non-performance, where CISG provides a limited excuse to no damages while the contract remains intact, whereas PECL, UNIDROIT, DCFR and ICC FM allows for renominations of the contract or termination of contract. Overall, these instruments provide proof of non-performance recognition and possibility of a limited harmonisation of force majeure defence in an EU law framework provided that each Member State recognizes, adheres and enforces such principles.

Going forward from the instruments, the Commission does notice that in order for the unform application to be successful it would need years of research, and collaboration between different legal areas of the Member States to find common ground in establishing the rules.[179] Despite such an acknowledgement and years of efforts, the one of the last ditch efforts to create 'a Common European Sales

[176] Ingeborg Schwenzer and Edgardo Muñoz, 'Duty to renegotiate and contract adaption in case of hardship' (2019) 24 ULR 149, 160-163.
[177] ibid, 166-170.
[178] CISG, arts 1-2 & art 6.
[179] *Commission on European Contract Law* (n37).

Law' in 2014 failed to establish a harmonised contract law framework in the Union.[180] While the internal market has been created as a machine to provide a well-functioning trade area, directed towards consumer protection, whereas the EU has been able to take a strict stand what shall be respected and protected in the internal market, such as the unfair contract terms Directive, yet not been able to take a strong stand on commercial contracts, i.e. breaches and remedies of business-to-business derived obligations. To enforce the goal for 'justice', the EU has taken a traditional approach to regulate to increase the functioning of the internal market e.g. through competition Regulations, and while these measures do note enforce private law directly, they have the possibility to impact aspects to it.[181] One example in a case between a gas supplier and consumer protection agency in Germany, the Court determined that gas contracts concluded with consumers price increases shall be transparent and well communicated, including the actual right to terminate such contracts if needed.[182] This case is a classic examples on how EU legislation can positively influence contracts in general and in private law matters, but this influence is strictly limited and a representation of parts of powers conferred in the Member States private law systems. While EU institutions have the powers only what is conferred to them in the Treaties, it arguably fuels towards legal uncertainty and undermines transparency.[183]

The other aspect is Union's conflict of its own aim and goal and the balancing thereof: the Fundamental rights and the right to business, e.g. in *Omega*, the Court decided that right to protection of human dignity overrules the right to business,[184] whereas in *Viking Line* the right to establishment, the right for a

[180] Pierre de Gioia Carabellese and Camilla Della Giustina, *Contract Law and International Trade Regulation Contemporary Issues and Challenges* (Routledge 2026), 7-8.
[181] Hugh Collins, 'Building European Contract Law on Charter Rights' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (vol 2, Intersentia 2017), 8-10.
[182] Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180, para 65.
[183] Rafal Manko and European Parliament, EU competence in private law: The Treaty framework for a European private law and challenges for coherence (2015 ERPS, PE 545.711), 14-16 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/545711/EPRS_IDA(2015)545711_REV1_EN.pdf> accessed 14 May 2026.
[184] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

company to re-flag their ships overruled the social right of employees.[185] Yet in *Schmidberger* the freedom of expression and freedom of assembly overruled the right of free movement of goods, and although the hindrance was temporary the judgment illustrates the Court's standpoint which is on their discretion what is justified, proportionate and legitimate.[186] These three cases are only the tip of the iceberg of conflicting laws in the Union, but is capable of illustrating that not only has the application of fundamental rights been left in the hands of the courts, but also what goal and aim the Union has taken, evidently it is quite uncertain how a harmonised force majeure principle could play a better role in the conflicting rules established thereof. For now, the only codifying rules relating to harmonised practice on contract law is the Rome I Regulation that offers the obligation of contractual freedom, such as the right to choose venue and law, which are fundamental to the functioning of contract law in avoiding conflicts. Regarding the Rome I Regulation it provides some clues as to the possibility of not posing a strict obligation of force majeure itself but providing the minimum requirement in all Union contract law matters, without having to harmonise every aspect to it.[187] For example, in Belgium, where government interference is classified as force majeure, no damages can be paid out, but 'parties are free to regulate their own clause'.[188] In France, the force majeure may be regulated by the parties and the legal definition and principle may be amended.[189] In the EU it appears that governmental interference overlaps the core structure of the contract those deriving from introduced Regulations, and in England the contractual freedom overlaps governmental interference unless the contract fulfils the criteria of frustration (e.g. due to illegality). Going back to the definition of force majeure meaning an event that have not been caused by either party, which could not be prevented, in theory should be easy to define and enforce in the EU where it is

[185] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and Viking Line Eesti* [2007] ECR I-10779.
[186] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659.
[187] *Rome I* (n4).
[188] C civ (be), art 1148.
[189] C civ (fr), art 1218.

mostly an acceptable principle. Clearly, contracts follow the elementary principles of *pacta sunt servanda*, and so far, the only legitimate interference of this principle is a supervening event of either governmental decision or an actuality not related to a decision per se. Nevertheless, practice indicates the problematic nature of force majeure even in codified systems under civil countries, and non-codified system in England where contractual freedom prevails. But one part is certain, that force majeure leaves for interpretative context of the definition for the courts to analyse and reason under the relevant facts, regulations and arguments, thus the harmonised contract law of force majeure principle could provide a legal footing towards contractual expectations in terms of non-performance including amounting to higher legal certainty than the current system.[190] Currently, contract law matters are only enforceable according to the chosen law and venue, where the EU cannot interfere unless the exercising of contractual freedom conflicts with Union law. In either case it would cause for indirect interference in private law matters via Directives or Regulations, thus relying on each Member State to correctly apply Union law accordingly.[191]

[190] *Claudia on 'Harmonization of EU Contract Law adopted on the basis of Article 114 TFEU'* (n166), 41-42.
[191] Michael Stürner, 'How Autonomous Should Private Law Be? Elements of a Private Law Constitution' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (vol 2, Intersentia 2017), 46-47.

6. Conclusion

By reaching the end of our research on force majeure principle we have compared three very different legal frameworks in times of extraordinary circumstances during sanction, pandemic and armed conflict regimes. At the start of this research, one could have assumed that statutory defence of non-performance or performance under more difficult conditions would have significantly provided an enhanced protection of contractual liability in courts, yet that has not been the outcome. Evidently, both in France and England the *pacta sunt servanda* principle follows as a legal definitive concept that is imbedded not only in judicial decisions but also how contractual obligations are viewed in general by the parties' invoking defences of non-performance.

While France has had considerable amendments in force majeure definition and application due to the 2016 reform, it has not resulted in any major changes of post rulings, especially deriving from the Covid-19 or Russian-Ukraine armed conflict. Contrary to English common law, force majeure that is strictly related to contractual interpretation leaves courts to interpret the situation without the reference to a statutory definition of said concept. The main common subject is the frustration doctrine which is provided in both legal families and adhered to strict impossibility of performance, resembling a black and white type approach. EU law come into play where Union institutions have their powers to interfere with private law matters such as contractual obligations, these primacy powers provided under the ruling of *Costa Enel*, grants EU to enforce Regulations, that interferes with contractual freedom in the Member States, this interference shall be read not only through national rules considering contract terms and laws but also in combination of introduced Union rules, thus the EU does not grant instructions on how such situations shall be dealt with in terms of force majeure.

Considering the approach in France, England and overall principle of force majeure including the recent approach of global crisis, the considerations of contract law unification or harmonisation exist, though very limited. Considering

the past three decades, we have seen several unexpected events around the globe, even so no contract law harmonisation has taken place in the EU, and as a result of that the force majeure has found its way into court cases, arbitration matters through governmental decision making. While force majeure is an understandable concept regardless of the legal system, the concept is nevertheless left for interpretation at the specific tribunal. In the spear of EU contractual freedom, it is limited through conflicting rights with fundamental rights, and other secondary instruments such as sanction Regulations, whereas in England the contractual freedom prevail largely based on the merits of the contract. While no legal system is expecting parties to perform under the threat of illegal practice, English legal system provides the differentiation between force majeure and frustration, whereas EU and France imply it in the same principle of force majeure.

6.1. Limitations and future research

What the outlook for the force majeure principle in the future in the Union regarding the findings of this research is substantially based upon the goals and aims of the Union are fulfilled in its entirety before a contractual harmonisation can even be considered. Is it for the courts to assess at their discretion of relevant laws, Union laws and existing practice or could the Union provide guidance, a minimum harmonisation towards a better functioning internal market? Looking at all the aspects of this research, the Union will continue to produce rules that will undoubtedly interfere contractual freedom, in some areas more than others, therefore the best solution would be to combine a minimum harmonised definition and application of force majeure along with the introduced Regulations, granting parties at least applicable legal certainty on what can and should be considered unforeseeable, and acts beyond the parties' control, e.g. some of the sanction Regulations has left this in a vague standpoint for both Member States as well as private entities in how far should the aims and goals of EU be met. Evidently the main principle of a well-functioning internal market is minimising conflicts, thus it goes without saying that increasing the risk of

conflicting laws and practices will both impact trade and legal certainty. Even after experiencing Covid-19 and armed conflicts in Ukraine and Iran, there has not been any significant development of force majeure principle in the Union, nor has it sparked significant changes of unilateral approach to remedies and breaches of obligations. As a final though, the beauty about contract law is that it can be precises, but also very vague resulting in differentiating outcomes regardless of origin of the legal system, thus an important aspect of a defensive principles that most legal system understand and recognize could equally be produced by the Union. While one whom enters a contract should assume the risk of contracting, a balance of obligations and liabilities ought to be met by a higher power, such as in the case of the unequivocal aim for consumer protection in the Union.

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