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Covid-19 and the Italian Legal System

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ABSTRACT

COVID-19 hit Italy with particular violence. Then spreading around Europe and worldwide, the virus raised unprecedented issues requiring the implementation of urgent measures to prevent its propagation. This Article focuses on selected topics of the Italian civil law particularly affected by the rise of COVID-19 and tries to provide brief comparative remarks. Namely, after summarizing the most important events that occurred in Italy—originating from the discovery of the first Italian case of COVID-19 in Codogno—it outlines relevant social and legal scenarios. This Article also concentrates on commercial lease contracts, and subsequently addresses the legal implications of vaccination, with reference to the consent of incapacitated persons.

Keywords: Covid-19, legal formants, Italy, lease contract, informed consent

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I. INTRODUCTION

After its appearance in the province of Wuhan, China, COVID-19 hit Italy with violence before spreading around Europe and worldwide. This phenomenon led countries to adopt governmental measures aimed at preventing its dissemination. Absent a proper medical remedy, the lockdown and the containment measures seemed to be the only tools available to hold back such plague. When vaccines finally became available—towards the end of 2020 and the beginning of 2021—the vast majority of countries gave in to the idea of mass vaccination. Ultimately, these countries, and Italy among the first ones, introduced forms of "green pass": this pass granted access to a wide range of services to selected categories of people, namely, people vaccinated against or having recovered from COVID-19, or people whose negativity to COVID-19 had been verified through swabs.[1]

Such an extraordinary scenario has significantly affected the ordinary life of the Italian population, as well as the Italian legal system. The Italian Constitution itself turned out to be a valuable tool during the pandemic.[2] At that time, several changes were introduced, such as the broad recourse to emergency legal provisions, the wide diffusion of smart working in both public and private sectors, the closure of non-essential activities,[3] the restrictions on personal freedom, freedom of movement[4] and other fundamental rights, etc.

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1. Both the chronological list of normative provisions dealing with such topic and the relevant text are available at: https://perma.cc/4KTZ-3M89.

2. COSTITUZIONE [COST.] [CONSTITUTION] (It.), *translated in* SENATO DELLA REPUBBLICA, CONSTITUTION OF THE ITALIAN REPUBLIC 20-21 (hereinafter "CONST. IT."), https://perma.cc/3WG7-9W2D.

3. *See* CONST. IT. art. 41:

> Private economic enterprise is free. It may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity. The law determines appropriate planning and controls so that public and private economic activities may be directed and coordinated towards social ends.

4. *See* CONST. IT. art. 16:

> Every citizen has the right to travel and reside freely in any part of the national territory, except for limitations provided by general laws for reasons of health or security. No restrictions may be imposed for political

The present Article will focus on selected topics of the Italian civil law particularly affected by the rise of COVID-19, as well as try to provide brief comparative remarks: the comparison with what happened in different countries appears particularly significant in order to provide a better understanding of the legal implications and consequences of the situation.

Section I will chronologically evoke the most important events that occurred in Italy—originating from the discovery of the first Italian case of COVID-19 in Codogno—while outlining the relevant social and legal scenarios as well. Section II will focus on commercial lease contracts, and Section III will address the legal implications of vaccination, with particular reference to the consent of incapacitated persons.

II. THE SOCIAL AND LEGAL CONTEXT

Italy was the first democracy to implement restrictive measures (with the lockdown)[5] to fight the spread of the COVID-19 virus. In January 2020, the first two cases in the country involved two Chinese tourists who were quickly isolated and treated. A day later, the government declared a six-month long state of emergency, which was prolonged from time to time before eventually being extended until March 31, 2022.[6] The Italian patient zero was reported on February 21, 2020 in Codogno, a small town in the province of Lodi,

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reasons. Every citizen is free to leave the territory of the Republic and return to it except for obligations defined by law.

5. *See* for example Giovanni Farese, *The Economics of COVID-19 in Italy and Lessons for Africa*, *in* COVID-19 IN THE GLOBAL SOUTH (Pádraig Carmody, Gerard McCann, Clodagh Colleran, Ciara O'Halloran eds., Bristol University Press 2020) (arguing that there is a general belief about a coronavirus trade-off between economics and health and questioning whether livelihood or lives shall prevail). According to the author, lockdown has different meanings and implications depending on the context, and is therefore not necessarily the only solution available, nor the best. Equally, lifting the lockdown restrictions does not immediately nor necessarily spur economic recovery, as social distancing measures and uncertainty over the future in general continue to limit spending and investment.

6. Decreto-legge Mar. 24, 2022, n.24, G.U. Mar. 24, 2022, n.70. The Ministry of Health broke down the implications of this regulation on its website: https://perma.cc/K3TU-SY4D.

Lombardy. The first red zones, where quarantine was enforced and freedom of movement was heavily restricted, were established a few days later and only involved circumscribed areas. The general lockdown (Phase 1) started on March 9, 2020, and ended on May 4, 2020[7] when a progressive lift of the restrictions took place (Phase 2).[8]

After the end of summer and the lift on most regulations—for example, the use of masks outdoors—new closures and strict restrictions were adopted during Fall 2020. Italy was then divided in different zones according to the occurrence of the new cases, hospitalization rates, and other statistical factors.[9] In particular, four main zones were created: (i) red zones, with the most restrictions. It included the closure of all non-essential economic activities, meaning restaurants could only offer delivery and/or takeaway services, and many shops were subject to e-commerce only. It also encompassed restrictions on personal contact and personal freedom, hence the

7. For many countries, Italy included, lockdown involved significant non-pharmaceutical interventions in public and private life: quarantine, physical distancing requirements, bans on large gatherings, stay-at-home orders, closures of schools, businesses, and public transport, masking requirements, among other measures. *See* Holly Jarman, *State Responses to COVID-19 Pandemic: Governance, Surveillance, Coercion, and Social Policy*, *in* CORONAVIRUS POLITICS 51 (Scott L. Grier, Elizabeth J. King, Elize Massard de Fonseca, André Peralta eds., University of Michigan Press 2021) (arguing that, when effectively implemented, these public health measures controlled the spread of the virus and therefore reduced its death toll, though they come with significant economic costs and political implications).

8. *See generally* Decreto-legge Feb. 23, 2020, n.6, G.U. Feb. 23, 2020, n.45 (establishing the first red zones in Italy, including 10 municipalities in the province of Lodi and the municipality of Vo' Euganeo in Veneto); Decreto Presidente del Consiglio dei Ministri Mar. 1, 2020, n.346, G.U. Mar. 1, 2020, n.52 (laying down urgent measures regarding the containment and management of the epidemiological emergency from COVID-19); Decreto-legge Mar. 2, 2020, n.9, G.U. Mar. 2, 2020, n.53 (instituting a generalized lockdown). The full text of these legal provisions is available at: https://perma.cc/X4AS-A2DA.

9. *See* Decreto-legge May 16, 2020, n.33, G.U. May 16, 2020, n.125, art. 1 § 16-septies, converted into Legge n. 74/2020 (providing legal definitions for each of the zones created), https://perma.cc/8HHF-VJ7F. The determining criteria and the list of allowed and prohibited activities have been repeatedly amended.

See for example, Decreto-legge July 23, 2021, n.105, G.U. July 23, 2023, n.224, converted into Legge Sept. 16, 2021, n.126, G.U. Sept. 18, 2021, n.224 and amending Decreto-legge Apr. 22, 2021, n.52, G.U. Apr. 22, 2021, n.96, https://perma.cc/NEJ7-TE2Y.

impossibility to meet friends or relatives at home, or to leave one's residence but for specific reasons; (ii) orange zones, where certain restrictions were mitigated—though cafés and restaurants were still closed—and limitations to personal freedom and movement persisted; (iii) yellow zones, where the economic activities and general services remained opened with limitations—regarding the amount of clients allowed—and where freedom of movement was increased; (iv) white zones, with no particular limitations except for the use of masks indoors. By the late Spring of 2021, with the opening of the vaccination campaign to most of the population, almost the entirety of Italy fell into the yellow zone category and, at the beginning of summer, into the white zone category.

Subsequently, the Italian government introduced the so-called "green pass," a certificate proving either the individual's completion of the vaccination process, his recovery from COVID-19, or the negative result of a swab.[10] The validity period of the green pass fluctuated: initially, it was valid for up to 9 months after the last dose of vaccination, up to 6 months after the successful recovery, and up to 48 hours after the swab. Later, it was progressively reduced to 6 months after the last dose of vaccination and/or the recovery.[11]

The large majority of the Italian population completed the double-step vaccination process during the Fall of 2021 in order to prevent the dissemination of new variants of the virus, in particular, the "omicron-variant." Nevertheless, the Italian government decided to strengthen the scope of the green pass.[12]

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10. *See* Decreto del presidente del consiglio dei ministri June 17, 2021, n.52, G.U. June 17, 2021, n.143, implementing the Art. 9(10) of the Decreto-legge Apr. 22, 2021, n. 52, then converted into Legge June 17, 2021 n.87, G.U. June 17, 2021, n.146, available at: https://perma.cc/GUN2-62HC.

11. *See* art. 9 of the aforementioned D.L. n. 52/2021, then converted into L. n. 87/20021 and the Decreto-legge Dec. 24, 2021, n.221, G.U. Dec. 24, 2021, n.305, art. 3 (introducing the six-month validity period). For further information, *see supra* note 1.

12. Regular basic activities such as eating at the restaurant, going to the gym, theatre, cinema, or even to work, require one to hold the green pass: for normative references, *see supra* note 1.

In the period between December 2021 and January 2022—where the flu season reached its peak and the cases of Covid dramatically increased due to the appearance of new variants—the normative scenario evolved, and stricter limitations were adopted through the introduction of the so-called "super" or "strengthened" green pass. Such kind of green pass was only granted to people who had either fulfilled the entire vaccination process or recovered from COVID-19. This was introduced in order to induce as many people as possible to subject themselves to the "booster," an additional dose of vaccine,[13] and to limit the validity of swabs. The access to the majority of services and activities was therefore only open to holders of the "super" green pass. Furthermore, after a strong debate about imposing vaccination as a general mandatory requirement to access workplaces, public employees—and eventually private workers older than 50 years old—were mandatorily required to hold the super green pass to access their work areas. In particular, the obligation to be vaccinated had initially been charged upon specific categories of workers only, regardless of their age—namely, healthcare professionals and employees, educational professionals including academics, servicemen/servicewomen, etc. Eventually, it was required from every worker older than 50 years old.[14]

During the summer of 2022, the requirement of both the super green pass and the basic green pass progressively decreased. While drafting this Article (Fall 2022), even the requirement of indoor masks has been lifted. The 2022-2023 academic year started without limitations imposing social distancing, distance learning methods, or the use of indoor masks: all academic activities are currently carried out in person.

13. As mentioned in the text, the green pass initially lasted nine months starting from the completion of the vaccination process. Its validity period then decreased to six months, making it necessary to receive a further dose of vaccine to prevent its expiration.

14. *See* Decreto-legge Jan. 7, 2022, n.1, G.U. Jan. 07, 2022, n.4 (imposing the above-mentioned obligation from February 15, 2022).

III. COMMERCIAL LEASE CONTRACTS

With reference to the legal effects of supervening events, the Italian system distinguishes between the impossibility of performance on one side—dealt with by articles 1463–1466 of the Italian Civil Code—and the case of a performance becoming excessively burdensome—*eccessiva onerosità sopravvenuta*, as stated in the Code itself—dealt with by articles 1467–1468 of the Civil Code.[15] Although the latter does not completely overlap with the general concept of hardship, the aim of both doctrines is to provide the affected party with a remedy, should the performance become excessively burdensome after the contract has been entered into.[16]

The letter of Article 1467 of the Civil Code argues that 1) at least one of the performances must not have been completely executed; 2) the performance shall be excessively burdensome when compared to the normal range of risk;[17] 3) the onerousness shall be due to extraordinary and unpredictable events. If such requirements are met, the affected party is entitled to ask the judge to terminate the contract. To avoid the termination of the contract, the counterparty may offer—but is not obliged—to modify the terms of the contract in order to restore the equity of the bargain. However, the judge does

15. CODICE CIVILE [C. CIV.] [CIVIL CODE] (1942) (It.) [hereinafter "IT. CIV. CODE"] art. 1467 applies to contracts in general. However, the Italian Civil Code also provides for specific applications of the rule in the case of insurance contracts (*see* IT. CIV. CODE art. 1897–1898) and building contracts (*see* IT. CIV. CODE art. 1667).

16. For interesting remarks, *see* Olivier Moréteau, *Remedies for Breach of Contract: A Theoretical and Practical Approach to Specific Performance in International Commercial Law*, 2017 INT'L BUS. L.J. 639 (2017) (arguing that the transnational contract practice needs to be emancipated from the conceptual and structural framework of domestic laws by developing its nationless notions while also maintaining dialogue with national jurists, their concepts and structures).

17. The Italian courts grant the remedy even in cases where the party complains that, while the value of the performance remains unvaried, on the contrary, the value of the counter-performance has been excessively devalued. *See* VINCENZO ROPPO, IL CONTRATTO, *in* TRATTATO DI DIRITTO PRIVATO 1021–22 (Giovanni Iudica & Paolo Zatti eds., Giuffrè 2001) (referring to such phenomenon as "indirect onerousness").

not have the power to alter the terms of the contract, nor is the affected party entitled to require the renegotiation of the terms.[18]

On the other side, should the impossibility to perform arise due to a *force majeure* event, the affected party is released from liability if he is not in default. The contract is thus terminated, and both parties are discharged from their obligations. Had one party already performed his obligation, the performance must be returned. When only partial performance is possible, it is up to the counterparty to decide whether he is interested in receiving it or not. In case of acceptance of the partial performance, the counterparty's performance is proportionally reduced.[19] In the event of temporary impossibility, the affected party is not liable for the delay in performing. However, if the impossibility persists, the contract is terminated if—according to the nature of the performance or to the legal ground of the obligation—the affected party cannot still be held as obliged to perform, or the counterparty is no longer interested in receiving the performance.[20]

Nevertheless, if parties provide for such events through *ad hoc force majeure* and/or hardship clauses, the will of the parties prevails, and judicial scrutiny is limited by such clauses. Absent any of these elements, the above-mentioned legal framework rules.

With reference to COVID-19, interesting holdings were introduced by Italian first instance courts dealing with commercial leases. Lease contracts are particularly notable when dealing with supervening circumstances because, in general, these events do not directly affect the performance of the debtor—such as the pecuniary

18. The approach adopted by the Italian legal system about hardship has influenced both the Latin American models and the international trade: *see* in particular Sergio García Long, *The influence of the Italian model of hardship in Latin America and international trade (with some notes from social sciences)*, 28 UNIF. L. REV. 57-77 (2023).

19. IT. CIV. CODE art. 1464.

20. IT. CIV. CODE art. 1256 deals with the question of temporary impossibility under its chapter devoted to obligations. Nevertheless, it is commonly deemed applicable to contracts too: *see* RODOLFO SACCO & GIORGIO DE NOVA, IL CONTRATTO 1669 (4th ed., UTET 2016).

obligation to pay the rent—which remains possible.[21] Consequently, such cases are usually dealt with as hardship cases where the performance has become excessively burdensome, and the equilibrium of the bargain has been dramatically altered. However, the lockdown measures imposing the closure of premises to the public—whether a shop, a beauty salon, or a club—might also be understood as an event directly affecting the core of the commercial lease, since they impede the normal destination and availability of the rented spaces.[22]

The first relevant provision in order to deal with such an issue is Article 3, para 6-bis of the Law Decree n. 6, as of February 23, 2020—or the "Stay at home" decree—then converted into Law n. 13/2020. In particular, the norm provides that compliance with the lockdown measures shall be always taken into account: the idea is to exempt the debtor from contractual liability and/or penalties pursuant to Articles 1218 and 1223 of the Civil Code in the event of

21. For a concrete application of the general principle of *genus nunquam perit*, *see* Cass., Apr. 30, 2012, n. 6594, Giust. civ. 2013, 9, I, 1873; Cass., Mar. 16, 1987, n. 2691, Foro it. 1989, I, c. 1209; Bruno Inzitari, *Il ritardo nell'adempimento del debito di valuta estera*, *in* VI BANCA BORSA E TITOLI DI CREDITO 583 (Giuffrè 1988); GIOACCHINO SCADUTO, I DEBITI PECUNIARI E IL DEPREZZAMENTO MONETARIO 24 (F. Vallardi 1924); MICHELE GIORGIANNI, L'INADEMPIMENTO. CORSO DI DIRITTO CIVILE 299 (Giuffrè 1975); CESARE MASSIMO BIANCA, DELL'INADEMPIMENTO DELLE OBBLIGAZIONI ART 1218-1229 80 (Zanichelli 1979); BRUNO INZITARI, DELLE OBBLIGAZIONI PECUNIARIE ART 1277-1284 13 (Francesco Galgano ed., Zanichelli 2011).

22. About the impact of Covid-19 on relational contracts, *see* Guido Alpa, *Note in margine agli effetti della pandemia sui contratti di durata*, *in* LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 57 (CEDAM 2020); Alberto Maria Benedetti, *Il rapporto obbligatorio al tempo dell'isolamento*, *in* 2 CONTRATTI 213 (2020); Cristiano Cicero, I RAPPORTI GIURIDICI AL TEMPO DEL COVID-19 (Edizioni Scientifiche Italiane 2020); Alessandro D'Adda, *Locazione commerciale ed affitto di ramo d'azienda al tempo del Covid-19: quali risposte dal sistema del diritto contrattuale?*, *in* LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 102 (CEDAM 2020); D'Amico, *L'epidemia Covid-19 e la "legislazione di guerra"*, *in* CONTRATTI 253 (2020); Emanuele Lucchini Guastalla, EMERGENZA COVID-19 E QUESTIONI DI DIRITTO CIVILE (Giappichelli 2020); Emanuela Navarretta, *Covid-19 e disfunzioni sopravvenute dei contratti. Brevi riflessioni su una crisi di sistema*, *in* LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 87 (CEDAM 2020); Fabrizio Piraino, *La normativa emergenziale in materia di obbligazioni e contratti*, *in* CONTRATTI 485 (2020).

non-performance by such party.[23] Indeed, Article 3, para 6-bis, neither refers to impossibility of performance nor to hardship, but generally refers to compliance with the lockdown measures as an element to always be taken into consideration by the judge. Subsequently, this provision has been enriched with the new para 6-ter, ruling that any contractual disputes relevant for the purposes of para 6-bis shall be preliminarily submitted to mandatory mediation.[24]

Although the provision clearly shows the legislative inclination towards lockdown measures as an example of supervening events exempting the obligor from liability, it does not introduce any additional remedy or specific ground for the exemption. In brief, absent such provision, the judges would have in any case considered the factors above in assessing the liability, or not, of the non-performing party.

The common issue of the case law dealing with commercial lease contracts involves the harshness of the duty to pay the agreed rent whilst lockdown measures are in effect. In a first case example, the Tribunal of Venice ruled in favor of the lessees of a clothing store. Located inside a mall closed due to the pandemic and the lockdown measures, the lessees had not paid rent from February to April—amounting to 50,000€ of unpaid bills—and claimed that the lessor was not entitled to enforce the collateral granted by the bank. The Tribunal issued a temporary order on behalf of the debtor, preventing the creditor from enforcing the collateral. The issue of knowing whether the breach of contract was excusable or not was referred to a full hearing and has not been decided on yet. However, the granting of the temporary relief on behalf of the lessee in light

23. *See generally* Claudio Scognamiglio, *L'emergenza Covid-19: quale ruolo per il civilista?*, GIUSTIZIACIVILE.COM (April 15, 2020), available at: https://perma.cc/7YT6-GPEZ; Ugo Carnevali, *Emergenza Covid-19: un anno dopo*, *in* CONTRATTI 145 (2021).

24. Decreto Legislativo Mar. 4, 2010, n.28, G.U. Mar. 05, 2010 n.53 (also known as Legislative Decree 28/2010), art. 5 (setting forth the cases of mandatory mediation), https://perma.cc/3FDP-9QR6.

of the emergency is significant.[25] The Tribunal of Bologna addressed the same issue.[26] In this case, the lessee was the owner of a beauty salon subject to the lockdown, who had provided bank collateral as a guarantee of the regular payment of the rent. The outcome of the temporary judgment was the same as that of Venice. Furthermore, the Tribunal of Genova ruled on the case of the owner of a discotheque who had provided the lessor with a promissory note as a guarantee of the rent but could not pay such rent due to the lockdown.[27] Even in this case, the Tribunal ruled on behalf of the debtor, thus preventing the lessor from enforcing the promissory notes.[28]

In the three cases above, COVID-19 and the consequent lockdown measures were deemed to be events able to legally affect the ordinary course of the contractual relationship. However, the emergency legislation has provided for further piecemeal remedies, lacking a consistent and systematic framework aimed at intervening on the contractual consequences of both the pandemic and the relevant

25. Trib. Venice, decree of May 22, 2020. The legal provision referred to by the Tribunal in order to find for the debtor is art. 3, para 6-bis of the Decreto-legge n. 6, as of February 23, 2020.

26. Trib. Bologna, decree of May 12, 2020.

27. Trib. Genova, decree of June 1, 2020.

28. The three rulings found their legal basis both in the general contractual provisions of the Italian Civil Code and in the special legislative provisions enacted during the COVID-19 emergency. The case law about such issue has been quite significant: *see* for example, Trib. Milan, June 25, 2021 commented by Alessandro Purpura, *in* LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 1 (2021); Trib. Palermo, May 26, 2020; Trib. Rome, May 29, 2020; Trib. Pordenone, July 8, 2020; Trib. Milano, July 24, 2020; Trib. Roma, July 25, 2020, Trib. Roma, July 31, 2020; Trib. Roma, Aug. 27, 2020; Trib. Treviso, Dec. 21, 2020; Trib. Milan, May 18, 2021; Trib. Rome, May 21, 2021; Trib. Palermo, June 9, 2021. Among these holdings, the existence of a duty to renegotiate in good faith was affirmed, as well as the judicial power to intervene to restore the equilibrium of the contract: in particular, Gabriele Carapezza Figlia, *Rimedi contrattuali e disfunzioni delle locazioni commerciali. Problemi e limiti dell'attivismo giudiziale nell'emergenza Covid-19*, *in* CONTRATTI 712 (2020) (commenting on Trib. Rome, Aug. 27, 2020); Gianluca Sicchiero, *La prima applicazione dell'intervento giudiziale fondato sull'equità ex art. 1374 c.c*, *in* GIURISPRUDENZA ITALIANA 590 (2021) (commenting on Trib. Treviso, Dec. 21, 2020).

containment measures. The commercial leases have been particularly relevant regarding such phenomenon.[29]

In particular, property repossessions have been suspended until December 2020.[30] Exceptionally, for commercial leases of private gyms, swimming pools and sports facilities only, a monthly reduction of 50% of the rent was provided between March and July 2020.[31] Furthermore, article 95 of the Law Decree 18/2020 argued in favor of the suspension of the monthly rent for sports facilities owned by the State and/or other public entities when the tenant is a national sports federation or a sports company or association, both professional and non-professional. Different tax deductions were also introduced: for example, commercial tenants suffering from a loss of income of at least 50% of the previous tax period could benefit from a tax reduction of up to 60% of the monthly rent from March 2020 to June 2020.[32]

It is also worth mentioning that the Italian Anti-Corruption Authority (*Autorità Nazionale Anticorruzione*, or "ANAC") has recognized the COVID-19 as affecting contractual performance and meeting the requirements of extraordinariness and non-foreseeability of supervening events set forth by Articles 1463 and 1467 of the Italian Civil Code. Within the Guidelines n. 9, approved by the deliberation 20.3.2018 n. 31833—providing for the contracts of private-public partnership—the ANAC has affirmed the principle according to which "among the events not ascribable to the economic operator

29. *See* Massimo Franzoni, *Il COVID-19 e l'esecuzione del contratto*, *in* RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1 (2021) (arguing that the pandemic offers an opportunity to rethink contract law by focusing less on the parties' will, in light of the market's general interest).

30. Decreto-legge Mar. 17, 2020, n.18, G.U. Mar. 17, 2020, n.70, art. 103 para 6, converted into Legge Apr. 24, 2020, n.27, G.U. Apr. 29, 2020, n.110, and its subsequent amendments.

31. Decreto-legge May 19, 2020, n.34, G.U. May 19, 2020, n.128, art. 216, para. 3, converted into Legge July 17, 2020, n.77, G.U. July 18, 2020, n.180.

32. Decreto-legge Mar. 17, 2020, n.18, G.U. Mar. 17, 2020, n.70, art. 65 and D.L. n. 34/2020, art. 28 as modified by Decreto-legge Aug. 14, 2020, n. 104, G.U. Aug. 14, 2020, n.203, art. 77 para. 1 letter a).

33. Autorità nazionale anticorruzione, *Delibera numero 318 del 28 marzo 2018* (2009), available at: https://perma.cc/WH5N-MYEK.

entitling to the revision of the PEF34 there are those events of force majeure able to render, totally or partially, the contractual performance objectively impossible or excessively burdensome." Among the events amounting to force majeure, the ANAC has expressly included "epidemics and contagions."

In addition, with the deliberations 25.11.2020 n. 102235 and 1.7.2020 n. 54036, the ANAC has officially declared that the emergency situation triggered by the COVID-19 pandemic shall be qualified as a legal requirement entitling parties to the request of contractual amendments—in that case, a variation during the execution of the tender contract—due to unforeseen and unforeseeable circumstances, pursuant to article 106 § 1 letter c) of the Procurement Code.[37]

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34. PEF stands for *Piano Economico e Finanziario*, meaning, "Economic and Financial Plan."

35. Autorità nazionale anticorruzione, *Delibera numero 1022 del 25 novembre 2020* (2020), available at: https://perma.cc/3DE6-3UAH.

36. Autorità nazionale anticorruzione, *Delibera numero 540 del 1 iuglio 2020* (2020), available at: https://perma.cc/TDN6-4TYL.

37. In particular, under a particular decree, Decreto legislativo Apr. 12, 2006, n.163, G.U. May 02, 2006, n.100 (superseded by the new Procurement Code: Decreto legislativo Apr. 18, 2016, n.50, G.U. Apr. 19, 2016, n.91), the presence within the public tender contracts of a clause of price adjustment for the periodic supply of goods and services was mandatory, as provided for by art. 115 of the above-mentioned Decree. Consequently, absent such clause, the contract would have been partially null and void pursuant to IT. CIV CODE art. 1419, and the relevant gap would have been filled through the mechanism of art. 1339 c.c. In addition, art. 133 §§ 4, 5 and 6 of D.Lgs. 163/2006 set forth a contractual mechanism to specifically consider the oscillations regarding the price of the materials. On the contrary, art. 106 of the new Italian D.Lgs. 50/2016 ("Procurement Code") overturned the approach above. Accordingly, it is now up to the Contracting Authority (i.e. *stazione appaltante*) to insert within the public tender agreement "in clear, precise and unequivocal terms" which amendments can be made during the performance of the contract. This includes the mechanism of price adjustment as well, which is subject to the limits and requirements set forth by art. 106 itself. This new approach adopted by the Italian lawmaker does not comply with the general principles created by the Italian caselaw under the domain of the previous code (i.e. D.Lgs. 163/2006) that highlighted the strong public interest (i) to avoid the risk for the Contracting Authority to receive a low-quality performance due to its excessive onerousness, on one side, and (ii) to avoid the risk for the Contractor to suffer damages as a consequence of the alteration of the economic and financial landscape wherein the contract had been originally stipulated, on the other. This used to be the rationale to uphold the approval of the request of price adjustment. The caselaw specifically dealing with such issue was copious: ex multis, Cons. Stato, IV division, Aug. 6, 2014, n. 4207; Cons. Stato, V division, Jan. 24, 2013,

Furthermore, Article 216 §2 of the Law Decree 34/2020 provides for the revision of the rental fees within the grant contracts of sports facilities. Articles 103 §2 L.D. 18/2020 and 10 §4 L.D. 76/2020 have prolonged the initial and final terms for the execution of public works provided for by Article 15 DPR 380/2001. Article 1septies §1 L.D. 73/2021 has introduced an automatic system of price adjustment for the building sector, and Article 28bis L.D. 34/2020 has set forth a mandatory revision of the economic and financial plan—PEF—within the field of public grants of refreshment services through vending machines.

Despite a piecemeal process that does not cover all the possible kinds of contractual relationships, the rationale of these legislative provisions seems to be the expression of the same general principle.

Subsequently, with specific reference to commercial lease, Article 6-bis of the Law 69/2021 has introduced the mechanism of their "renegotiation": as a matter of fact, the text of the provision simply stated such aim in the event of a lease contract where the lessee was an entrepreneur suffering a "significant" decrease of his business activity due to COVID-19. However, the norm did not have any binding effects, as it merely enunciated the duty for the parties to cooperate in order to redetermine the rent, without providing a sanction or a remedy.[38] With the subsequent Law n. 106 as of July 23, 2021, the text of the norm has been completely rewritten, on one side introducing a specific duty to renegotiate, and on the other furtherly narrowing its range of application. In particular, contracting parties shall cooperate in good faith to redetermine the rent for a maximum period of five months in 2021. However, the provision

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n. 465; Cons. Stato, V div., Aug. 3, 2012, n. 4444; Cass. civ., Oct. 30, 2014, n. 2307; Cass. civ., Mar. 15, 2011, n. 6016; Cass. civ., Jan. 12, 2011, n. 511; Cass. civ., July 12, 2010, n. 16285.

38. On the unenforceability of the duty at stake, *see* Paolo Scalettaris, *A proposito del "percorso condiviso" per la ricontrattazione delle locazioni commerciali introdotto dalla Legge n. 106/2021*, *in* IMMOBILI E PROPRIETÀ 719 (Wolters Kluwer 2021); Vincenzo Cuffaro, *Rinegoziare, ricontrattare: rideterminare il canone? Una soluzione inadeguata*, *in* CORRIERE GIURIDICO 954 (Wolters Kluwer 2021).

can only be applied to commercial lessees 1) with an activity that has been subject to mandatory closure for at least 200 days—even non-consecutive—from March 8, 2020, and 2) facing at least a 50% reduction of their average business volume in the period ranging from March 2020 to June 2021 compared to that of the same period during the previous year.[39] The two requirements must concur in order to trigger the provision. However, the lessee shall not have previously benefited from other governmental measures of financial support related to the pandemic or from previous agreements with the lessor—for example, temporary reduction of the fee or deferment of the payment.[40]

Accordingly, the impact of the new provision has been very limited due to its narrow range of application. In addition, the norm neither clarifies the "shared path" to be complied with by contractual parties in order to renegotiate the rental fee nor dictates any criteria for the redetermination of the rent.

Another issue deals with possible remedies in the event of a breach of the duty to renegotiate in good faith: in particular, it was debated whether the Italian judge had the authority to redetermine the rent absent an agreement between the parties. It has been highlighted that the parties are under a legislative obligation, that is, the duty to renegotiate in good faith, not the duty to agree on a new rental fee. Consequently, the judge lacks the above-mentioned power.[41] In light of all the remarks above, such legislative intervention has not been particularly successful.

Since the legislator has not expressly addressed the issue of unexpected change of circumstances, the task to deal with the consequences of such occurrence has therefore been left to the courts.[42] It

39. More precisely, the reduction must be due to "sanitary restrictions," to "the economic crisis" and/or to "the decrease of the flows of tourism."

40. Art. 4bis-4ter of the law at stake, amending Decreto-Legge May 25, 2021, n.73, G.U. May 25, 2021, n.123, available at: https://perma.cc/479S-ATAN.

41. With reference to such provision, *see generally* Scalettaris, *supra* note 38, at 724.

42. A comparative example is offered through the lens of the Spanish legal system in cases where the supervening change of circumstance takes place in the

has been highlighted that a significant number of holdings dealing with the issue of supervening events occurred in the last ten years, but no unanimous approach emerged from the relevant case law.[43] The COVID-19 has thus emphasized the need for legislative intervention, with measures aimed at reforming the provisions dealing with the supervening events affecting the ordinary performance of a contract. With regard to such issue, the Italian Supreme Court—known as *Corte di Cassazione*—has published a "Report" on anti-Covid emergency regulations in contract and insolvency matters[44] on July 8, 2020.

The Report focuses precisely on the duty of renegotiation, highlighting the inadequacy of remedies set forth by Article 1467 of the Italian Civil Code to handle the problem of supervening effects. Nevertheless, according to the opinion of the Court, the duty to cooperate helps solve the apparent conflict between the obligation to renegotiate, on one side, and the freedom of the parties, on the other, because the renegotiation aims at giving rise to the will of the parties, and not at limiting their autonomy.[45] Consequently, the duty to renegotiate stems from the duty of good faith, pursuant to Articles 1175 and 1375 of the Italian Civil Code.[46] It thus implies the obligation to undertake all the behaviors that—in light of the

absence of an express legislative provision: *see* Jorge C. Jerez, *The Unexpected Change of Circumstances Under American and Spanish Contract Law*, 25 EUR. REV. PRIV. L. 909, at 912 (2017), arguing that courts have decided on such cases either by adopting foreign solutions or by alleging the doctrine of *clausula rebus sic stantibus*, which is not expressly included in the Spanish Civil Code.

43. Giuseppe Sbisà, *La prima norma in tema di rinegoziazione nel contesto del dibattito sulle sopravvenienze*, *in* CONTRATTO E IMPRESA 15 (CEDAM 2022), with particular attention to n. 7 and the relevant text.

44. Corte di Cassazione, *Novità normative sostanziali del diritto emergenziale anti-Covid 19 in ambito contrattuale e concorsuale* (Rome, July 8, 2020), available at: https://perma.cc/MMS2-UJWC.

45. *Id.* at 23.

46. For interesting remarks about the role of contractual good faith in judicial holdings, *see* Jumoke Joy Dara & Olivier Moréteau, *The Interaction of Good Faith with Contract Performance, Dissolution, and Damages in the Louisiana Supreme Court*, 10 J. CIV. L. STUD. 261 (2017).

circumstances of the case—allow the parties to agree upon the new terms and conditions due to the modified situation.[47]

In the opinion of the Court, while renegotiation[48] seems to be the proper remedy, on the contrary, contract termination or damage compensation are unlikely to give rise to a good outcome because they would lead to a disruption of the contract that renegotiation tries to avoid. The Supreme Court refers to a possible remedy—should one party refuse to renegotiate—identified in the specific performance of the obligation to enter into a contract, as set forth by Article 2932 of the Italian Civil Code.[49] However, this remedy implies that the parties have already reached an agreement on the content of the final contract so that the judge can issue a "constitutive ruling" substituting the effects of the final contract. Nonetheless, in the case at stake, if parties do not renegotiate the terms of the contract, the required agreement remains lacking. To avoid such an impediment, the Court considers that the judge would then be entitled to amend the terms of the contract, taking into account the content of the parties' negotiation before its interruption.[50] Furthermore, according to the Report, referring to Article 1464 of the Civil Code—dealing with the partial impossibility of performance—to partially or fully release the lessee from the obligation to pay the rent means fixing the alteration of the contractual equilibrium, thus allocating the

47. Corte di Cassazione, *supra* note 44, at 24.

48. About the duty to renegotiate, *see generally* FRANCESCO GAMBINO, PROBLEMI DEL RINEGOZIARE (Giuffrè 2004); Aurelio Gentili, *La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto*, *in* CONTRATTO E IMPRESA 667-724 (CEDAM 2003); Aurelio Gentili, *De Jure Belli: l'equilibrio del contratto nelle impugnazioni*, RIVISTA DI DIRITTO CIVILE 27 (2004); Gianluca Sicchiero, *La rinegoziazione*, *in* CONTRATTO E IMPRESA 774 (CEDAM 2002); Francesco Macario, *Rischio contrattuale e rapporti di durata nel nuovo diritto dei contratti: dalla presupposizione all'obbligo di rinegoziazione*, RIVISTA DI DIRITTO CIVILE 63 (2002); FRANCESCO MACARIO, ADEGUAMENTO E RINEGOZIAZIONE NEI CONTRATTI A LUNGO TERMINE (Jovene 1996); Pietro Rescigno, *L'adeguamento del contratto nel diritto italiano. Considerazioni conclusive*, *in* CONTRATTI INTERNAZIONALI E MUTAMENTO DELLE CIRCOSTANZE: CLAUSOLE MONETARIE, HARDSHIP, FORZA MAGGIORE 95 (Ugo Draetta, Mark E. Kleckner, Dino Rinoldi eds., 1989).

49. Corte di Cassazione, *supra* note 44, at 26-28.

50. *Id.* at 27.

financial consequences of COVID-19 from one contractual party to the other, in this case, the lessor. However, as expressly pointed out by the Report, this solution is rather inspired by common sense related considerations rather than by legal grounds.[51]

The Report is noteworthy, namely for two reasons: firstly, it was issued by the Italian distinguished judicial authority of last resort.[52] Secondly, it was issued by the judicial authority of a civil law country where the legislative format is still the prevailing one, and where judicial decisions do not amount to formal sources of law.[53] Indeed, the inconsistencies and the piecemeal approach of the legislative intervention charged upon Italian judges the task to directly deal with the needs of the Italian society in light of the pandemic and the relevant lockdown measures. However, the Report has raised perplexities in the minds of scholars, emphasizing the lack of normative grounds for the judicial power to amend the contract, thus substituting the will of the parties.[54] In fact, Article 1467 of the Civil Code only provides for the judicial termination of the contract should the counterparty not be available to renegotiate the terms of the contract. Similarly, the norms about the *impossibilità sopravvenuta* do not recognize such judicial power. This issue has been one of the most debated on both national and international stages. For example, the

51. *Id.* at 4.

52. This authority prevails in cases of civil law disputes, criminal trials and tax law controversies. The Court is also entitled to rule about conflict of jurisdictions between the ordinary judge and the administrative judge or the foreign judge. For further details, *see* Regio decreto Jan. 30, 1941, n.12, G.U. Feb. 4, 1941, n.28.

53. *See* ANTONIO GAMBARO & RODOLFO SACCO, SISTEMI GIURIDICI COMPARATI 4-8 (2nd ed., Utet Giuridica 2004); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (1991) (highlighting that the primary purpose of comparative law is the acquisition of knowledge and that, in order to gain proper knowledge of a legal system, the connected "legal formants" must be considered). In particular, legal formants are those elements concurring to characterize a particular legal system. Examples are, in addition to legislative provisions, court rulings, academic writing, professional and administrative practice developed in a particular context.

54. This gap within the Italian legal framework had been previously pointed out by a significant part of the Italian doctrine. Some of these remarks can be found directly on the website of *Civilisti Italiani*, an organization promoting the development of the culture of civil law.

association for the study of Italian civil law—*Civilisti Italiani*[55]—has issued a proposal focusing on the need to introduce conservative remedies within the Italian contractual framework, to properly deal with the COVID-19 emergency. Such remedies are specifically grounded in the duty of the parties to renegotiate in good faith, and, absent such an agreement, in the judicial authority to amend the contract.[56] In particular, this proposal has highlighted that existing remedies are inadequate to manage the topic of supervening events, with peculiar reference to lease contracts and/or supply contracts.[57]

Furthermore, the European Law Institute (ELI)[58] has outlined specific recommendations aimed at dealing with the COVID-19 outbreak. Among them, Principle 13(2) suggests that:

> Where, as a consequence of the COVID-19 crisis and the measures taken during the pandemic, performance has become excessively difficult (hardship principle), including where the cost of performance has risen significantly, States should ensure that, in accordance with the principle of good faith, parties enter into renegotiations even if this has not been provided for in a contract or in existing legislation.[59]

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55. For further information, *see* the official website of *Civilisti Italiani*, available at: https://perma.cc/FJ7S-M8GP.

56. The proposal, titled *Una riflessione ed una proposta per la migliore tutela dei soggetti pregiudicati dagli effetti della pandemia* [A reflection and proposal for the better protection of those affected by the effects of the pandemic] (2020), is accessible online at https://perma.cc/8RVB-QUMZ. In particular, according to the *Civilisti Italiani* organization, the duty to renegotiate in good faith and the related judicial power to amend the contract absent a new agreement between the parties should be provided for by a new article, to be added to the IT. CIV. CODE. Namely, art. 1468-bis should fill the void, as already set forth in the Draft Law for the Reform of the Civil Code: art. 1, letter i), Disegno di legge Mar. 19, 2019, n.1151 (available at: https://perma.cc/GZ84-7565). Pages 7-8 of the Proposal are especially relevant.

57. Civilisti Italiani*, supra* note 56, at 5-6.

58. The European Law Institute (ELI) is an independent non-profit organization established to provide practical guidance in relation to European legal development. The organization's official website offers valuable information, available at: https://perma.cc/5HAB-YKZ3.

59. European Law Institute, *ELI Principles for the COVID-19 Crisis* (April 27, 2020), available at: https://perma.cc/K7LJ-N38F. The footnotes 57-70 and the corresponding text reproduce in brief, sometimes verbatim, some remarks expressed more in detail in Laura Maria Franciosi, *The Effects of Covid-19 on*

The current general favor towards the renegotiation of contractual terms is affirmed, on one side, by the rules developed to provide for international business contracts and, on the other, by the recent legislative reforms that occurred, for example, in France and in Germany.

The 1980 Vienna Convention for the International Sale of Goods ("CISG") purposely neither adopts the terminology of any national legal doctrines nor specifically refers to *force majeure* and/or hardship.[60] Instead, it rather opts in favor of a functional approach: Article 79, which is included within Section IV dealing with "Exemptions," provides a description of circumstances whereby the non-performing party is exempted from liability. The text of the provision is based on the concept of "impediment," which is required to be beyond the control of the non-performing party. The relevant burden of proof is then charged upon that party.[61]

Under the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles"), *force majeure* and hardship are provided for separately.[62] In particular, hardship is dealt with in Chapter 6, Section 2, which encompasses three articles—Articles 6.2.1–6.2.3. Article 6.2.1. stresses the importance of the *pacta sunt servanda* maxim, and the exceptional nature of a hardship. On the contrary, pursuant to Official Comment 2 of the article, supervening

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International Contracts: A Comparative Overview, 51 VICTORIA U. WELLINGTON L. REV. 413 (2020).

60. *See* Ingeborg Schwenzer, *Article 79*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 1130 (Schlechtriem & Schwenzer eds., 4th ed., Oxford U. Press 2016).

61. *See* Peter Schlechtriem & Petra Butler, UN LAW ON INTERNATIONAL SALES 288 (Springer Berlin 2009). *See also* Marcel Fontaine, *The Evolution of the Rules on Hardship*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS: DEALING WITH UNFORESEEN EVENTS IN A CHANGING WORLD 17 (Fabio Bortolotti & Dorothy Ufot eds., Wolters Kluwer 2018) (stressing that "the term *impediment* has been chosen by drafters to replace the wider term *circumstances* which was used in the earlier Hague Convention, in the deliberate intent to express the condition for exemption a more restrictive way," and that, in the opinion of some commentators, "the newly chosen term remained imprecise enough to apply not only to force majeure, but also to hardship").

62. UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2016*, available at: https://perma.cc/874N-P3LH.

circumstances—in order to allow for the application of hardship—must lead to a fundamental alteration of the equilibrium of the contract in order to give rise to an exceptional situation. On the other hand, the UNIDROIT Principles provide for cases amounting to *force majeure* in Article 7.1.7, under the chapter devoted to non-performance. However, since the distinction between hardship and *force majeure* is not always easy to make sense of, the UNIDROIT Principles adopt a functional approach, and highlight in an Official Comment that:

> . . . under the Principles there may be factual situations which can at the same time be considered as cases of hardship and of force majeure. If this is the case, it is for the party affected by these events to decide which remedy to pursue. If it invokes force majeure, it is with a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms.[63]

Consequently, it will be up to the non-performing party to invoke either *force majeure* or hardship in light of the pursued remedy. Generally, should a force majeure event occur, the contract is terminated, or its effects are suspended in case of temporary impossibility to perform.[64] On the contrary, in case of hardship, the UNIDROIT

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63. UNIDROIT Principles, art. 6.2.2, Official Comment 6 and art. 7.1.7, Official Comment 3. Regarding the difficulty of distinguishing hardship from force majeure, *see* Ugo Draetta, *Hardship and Force Majeure Clauses*, 347 INT'L BUS. L. J. (2002).

64. UNIDROIT Principles, art. 7.1.7:

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

Principles provide for three different remedies: 1) renegotiation by the parties of the contractual terms, which is not mandatory; 2) termination of the contract; 3) judicial adaptation of the contract. However, the latter does not restate the settled practices of the international business community but is rather the outcome of a specific choice made by the drafters of the UNIDROIT Principles.[65]

The ICC model clause on hardship—on the declared assumption that judicial intervention is highly controversial—purposely allows the parties to choose among three different alternatives:[66] (a) should the renegotiation fail, the party invoking the hardship is entitled to terminate the contract; (b) should the renegotiation fail, either party is entitled to request the judge or the arbitrator to adapt the contract or to terminate it; or (c) should the renegotiation fail, either party is entitled to request the judge or the arbitrator to declare the termination of the contract.

Article 1218 of the French Civil Code provides that *force majeure* justifies suspension or termination of a contract, even if the contract does not contain any provision in that respect. Three conditions must be met for an event to qualify as *force majeure*: 1) the event must have been beyond the control of the debtor; 2) the event must not have been foreseeable by the parties at the time of the conclusion of the contract; and 3) the event must be unavoidable. If the impossibility to perform the contract is temporary, performance of the obligation is only suspended, unless the resulting delay justifies

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terminate the contract or to withhold performance or request interest on money due.

65. *See* Fabio Bortolotti, IL CONTRATTO INTERNAZIONALE 285-286 (2nd ed., CEDAM 2017); *see also* ICC, *Final Award in Case 8873*, *in* 10(2) ICC INT'L CT. ARB. BULL. X 81 (1999), holding that the UNIDROIT Principles on hardship do not correspond, at least in their current state, to current business practice in international trade ["ne *correspondent pas, au moins à l'état actuel, à la pratique courante des affaires dans le commerce international*"].

66. International Chamber of Commerce, *ICC Force Majeure and Hardship Clauses* (March 2020), available at: https://perma.cc/8K2C-8QQ9:

> Since one of the most disputed issues is whether it is appropriate to have the contract adapted by a third party (judge, arbitrator) in case the parties are unable to agree on a negotiated solution, the clause provides two options between which the parties must choose: adaptation or termination.

termination of the contract. If it is permanent, the contract is terminated by operation of law, and the parties are discharged from their obligations. In addition, under Article 1195 of the French Civil Code—titled *Imprévision*—a party to a contract entered into on or after October 1, 2016 may ask their counterparty to renegotiate the contract if a change of circumstances, unforeseeable at the time of the conclusion of the contract, renders performance excessively onerous and if that party did not agree to bear the risks of such a change of circumstances.[67] If the other party refuses, or if the negotiation fails, then the parties may either terminate the contract at a date and under conditions that they agree on, or they can ask a judge to adapt the contract to the new circumstances. If the parties do not reach an agreement within a reasonable period, then either party may ask a judge to revise the contract or to terminate it, at a date and under conditions determined by the judge. Pending the negotiation, however, the parties must keep on performing the contract.[68] French law thus shows a legislative inclination in favor of the renegotiation by the parties and judicial intervention, following the development led by model rules and principles for international contracts.[69]

Similarly, through a 2002 reform of the law of obligations, the German legal system formally recognizes the doctrine of

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67. Public law has recognised the doctrine of *imprévision* since a judgment of the French Council of State in 1916. The theory is nowadays codified in the Public Procurement Code, entered into force on 1 April 2019. Article L.6,3 of the Public Procurement Code provides that an agreement can be modified when an event "exterior to the parties, unpredictable and temporarily disrupting the balance of the contract" takes place. In this case, the other party is entitled to compensation. In exchange for this, the latter is required to keep executing the agreement and all the related obligations.

68. *See generally* Pascale Accaoui Lorfing, *Article 1195 of the French Civil Code on Revision for Hardship in Light of Comparative Law*, 2018 INT'L BUS. L. J. 449 (2018) (stressing the role of the parties' when searching a solution to the change of circumstances in light of the duty to renegotiate and arguing about the role of the judge in revising the contract).

69. *See* Tom Hick, *The Coronacrisis and Its Impact on Creditors: Frustration of Purpose*, *in* 3 EUR. REV. PRIV. L. 389 (2022) (expressing critical remarks about the French and Belgian legal systems due to their adoption of a "debtor centrist" approach, while the German, Dutch and English legal systems, seem to "allow for a doctrine that takes the materialization of the creditor risk, the frustration of purpose, into account").

"foundation of transaction," or *Lehre von der Geschäftsgrundlage*. Consequently, the *Bürgerliches Gesetzbuch*—German Civil Code or "BGB"—now deals specifically with the impossibility of performance under § 275 of the BGB on one hand, and with unforeseen circumstances affecting the contractual equilibrium under § 313 of the BGB[70] on the other.[71]

IV. THE LEGAL IMPLICATIONS OF VACCINATION, WITH PARTICULAR REFERENCE TO THE CONSENT OF INCAPACITATED PERSONS

Vaccination has been, absent a specific remedy, a fundamental tool to fight against COVID-19. As previously recalled, the Italian government has organized, since the beginning of 2021, a massive vaccination campaign that has raised several legal issues. Examples include the liability regime of healthcare professionals involved in the vaccination process, legal remedies available in case of side effects after the vaccine, consequences triggered by the worker's decision not to be vaccinated, and so on.

One of the most significant issues of such scenarios deals with the consent to vaccination, in particular with consent of the elderly in nursing homes or, in broader terms, of incapacitated persons.[72]

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70. The new provision requires a fundamental change in circumstances upon which a contract was based and that it is unreasonable to hold the party to its (unchanged) duty. *See generally* Tom Hick, *supra* note 69, at 389-418 and, in particular, 404-05.

71. For an analysis of the doctrine of the foundation of transaction and the German legal system before the 2002 reform, *see* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 218 (3rd ed., Clarendon Press 1998). For an analysis of the current role of the *Bürgerliches Gesetzbuch* (German Civil code, also known as BGB), *see* Philip Ridder & Marc-Philippe Weller, *Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law*, *in* 22 EUR. REV. PRIV. LAW 371 (2014). *See also* Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 659 (1992), arguing that Germany has experienced three waves of great importance regarding the question of contract adaptation: first, the phenomenon of inflation post World War I, second, the oil crisis in the seventies, and third, the collapse of the socialist system.

72. *See* the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) (1999), commonly known as "Oviedo Convention."

Article 1-quinquies of Law 29 January 2021 n. 6[73] has specifically provided for the consent to anti-COVID vaccination of incapacitated persons recovering in sheltered housing.[74] This provision works hand in hand with Law n. 219/2017 on medical informed consent in general,[75] according to which the person in question must be involved in the consent-acquisition process as far as is possible with regards to her mental and/or physical condition.[76]

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73. Legge Jan. 29, 2021, n.6, G.U. Jan. 30, 2021, n.24. For a comment of this law, *see* Francesco Spaccasassi, *Ospiti delle RSA e consenso alla vaccinazione anti Covid-19: un percorso ad ostacoli?*, QUESTIONE GIUSTIZIA (July 27 2021), https://perma.cc/D22C-Q2PR.

74. *See* Nunzia Cannovo et al., *Consenso alla vaccinazione anti Covid-19 di ospiti e personale delle RSA*, *in* RESPONSABILITÀ CIVILE E PREVIDENZA 1421 (2021).

75. *See* Michele Graziadei, *Il consenso informato e i suoi limiti*, *in* TRATTATO DI BIODIRITTO 191 (Giuffrè 2011).

76. Multiple countries have taken this requirement into account in their legal framework: the UK Mental Capacity Act 2005 (https://perma.cc/KC5Z-3HJ3), the French *Code de la santé publique* (https://perma.cc/K3S4-93AB), the German *Ratgeber für Patientenrechte* (https://perma.cc/DPN7-5RX5), and the Spanish *Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica* (https://perma.cc/6SEU-9XK4), are various examples. About the UK Mental Capacity Act 2005, *see* Piers M. Gooding, *International Comparison of Legal Frameworks for Supported and Substitute Decision Making*, 44 INT'L J. L. AND PSYCHIATRY 30 (2018), comparing the legal frameworks of Ontario, Canada; Victoria, Australia; England and Wales, United Kingdom (UK); and Northern Ireland, and arguing that:

> Ontario has developed a relatively comprehensive, progressive and influential legal framework over the past 30 years but there remain concerns about the standardisation of decision-making ability assessments and how the laws work together. In Australia, the Victorian Law Reform Commission (2012) has recommended that the six different types of substitute decision-making under the three laws in that jurisdiction, need to be simplified, and integrated into a spectrum that includes supported decision-making. In England and Wales, the Mental Capacity Act 2005 has a complex interface with mental health law; while in Northern Ireland it is proposed to introduce a new Mental Capacity (Health, Welfare and Finance) Bill that will provide a unified structure for all substitute decision-making.

About the French legal framework, *see* Gilles Raoul-Cormeil & Laurence Gatti, *Covid-19: le consentement à l'acte vaccinal des majeurs vulnérables ou l'éprouvante réception du régime des décisions de santé des majeurs protégés*, *in* RGDM 121 (2021); Olivier Drunat et al., *Le consentement à l'épreuve de la vaccination contre la Covid*, ESPACE ÉTHIQUE (Dec. 18 2020), available at: https://perma.cc/6BL7-CVG4; Gilles Raoul-Cormeil, *Le régime des décisions médicales concernant les personnes majeures protégées*, JCP G 2020, act. 331 (LexisNexis 2020). About the German legal framework, *see* Benedict Buchner &

The prerequisite for the application of Article 1-quinquies is recovery in a sheltered house, to be interpreted broadly—nursing home, residential care home, long-term care facilities, etc. The norm distinguishes between incapables subject to a legal form of tutorship, guardianship or other forms of legal assistance or representation, on one side, and natural incapable persons, on the other. In the first case, the consent to vaccination shall be expressed through the tutor, the guardian, or the other representative in compliance with the will—presumed or pre-recorded—of the ward. In the second case, absent a tutor, guardian, trustee for medical treatment[77] or other representative, the consent to vaccination shall be expressed by the director of the nursing house, by the chief medical officer of the ASL—the public entity in charge of the control of hospitals and other healthcare institutions—or by a delegate of the latter, with the involvement of the incapacitated person in question as well. This provision is to be applied even if the tutor, guardian, or trustee for medical treatment is unreachable for 48 hours, for example, for hospitalization purposes.

Article 1-quinquies raises an issue in the event of a conflict between the will of the representative and that of the ward on the question of vaccination, since it fails to provide guidelines to handle such

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Merle Freie, *Informed Consent in German Medical Law: Finding the right path between patient autonomy and information overload*, *in* PROC. YOUNG US. FOR FUTURE EUR. (YUFE) L. CONF. 2021 (2022); Kevin De Sabbata, *Dementia, Treatment Decisions, and the UN Convention on the Rights of Persons with Disabilities. A New Framework for Old Problems*, 11 FRONTIERS PSYCHIATRY 1, 9 (2020) (describing European efforts to change professional standards when obtaining informed consent to encompass supported decision-making for persons with dementia so that medical professionals will not fear liability, and the issuance of guidelines by German medical associations on how to support people with dementia in making choices about health care). About the Spanish legal framework, *see* Federico De Montalvo, *La Competencia Constitucional de Coordinación Sanitaria en Tiempos de Pandemia: Análisis de la Naturaleza Y Eficacia de la Estrategia Nacional de Vacunación Frente a la Covid-19*, *in* REVISTA DE DERECHO POLÍTICO 43 (2021). For an interesting analysis of the US legal system taking into account other foreign experiences, *see* Morgan K. Whitlatch & Rebekah Diller, *Supported Decision-Making. Potential and Challenges for Older Persons*, 72 SYRACUSE L. REV. 165 (2022).

77. Legge Dec. 22, 2017, n.219, G.U. Jan. 16, 2018, n.12, art. 4.

a scenario. Should this conflict occur, it will be fundamental to refer the matter to the judge supervising guardianship cases.[78]

A further issue deals with the consultation of a spouse, a partner to a civil union, a *more uxorio* cohabitant or, absent these figures, of a relative within the third degree. Their opinion is useful in order to ascertain the will of the ward about vaccination. However, should the prevailing categories of spouse and similar figures fail, the law does not point out who—among relatives of the same degree—shall be prioritized. It has been highlighted that this gap risks burdening the guardian and/or the other representatives with excessive discretional power. According to the scholars' majority opinion, in this event, the representative shall refer the matter to the judge as well.[79]

V. CONCLUSION

COVID-19 has dramatically hit Italy, urging the adoption of measures aimed at limiting its dissemination as well as dealing with the myriad of legal concerns connected to both the pandemic and lockdown provisions. The legislative power has undertaken several initiatives, but the unprecedented emergency and the piecemeal nature of such interventions did not allow for a consistent and systematic response. Accordingly, the judicial power has been called to deal with such extraordinary scenario, with the contribution of the Italian doctrine. Both the field of commercial lease contracts and that of informed consent of incapacitated persons to the anti-COVID-19 vaccination, though extremely different, are paradigmatic expressions of such phenomenon.

78. The Tribunal of Milan has outlined guidelines based on a case-by-case approach, https://perma.cc/M4N4-496J.

79. *See* Paola Frati, *Risvolti etici e medico-legali nelle vaccinazioni anti Covid-19 nei pazienti delle RSA*, *in* RESPONSABILITÀ CIVILE E PREVIDENZA 590 (2021); Angelo Venchiarutti, *Una disciplina speciale per la manifestazione del consenso dei soggetti incapaci al trattamento sanitario del vaccino anti Covid-19*, *in* LE NUOVE LEGGI CIVILI COMMENTATE 76 (2022).