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Liabilities and remedies of the changed circumstances caused by the COVID-19 in construction projects around the world

Pasivos y remedios por el cambio de circunstancias a causa del COVID-19 en los proyectos de construcción alrededor del mundo

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Abstract:
Essentially, the loss suffered by the global construction industry during the time when the COVID-19 is spread is not caused by that pandemic itself but caused by a changed circumstance which mainly resulted by anti-COVID-19 policy or law conducted by different jurisdictions.
Where contract keeps silent in this regard, legal solution should be made by contemplating the law in different jurisdictions toward changed circumstances, which commonly includes situations where performance of contract become more onerous or impossible, and taking account of the factual environment which determines or impacts the changed circumstance. This paper, from a comparative law perspective, discusses and concludes the doctrine of changed circumstance in some typical jurisdictions, and, by taking consideration of law and fact, provides some approaches and potential legal solutions to deal with that loss.

Resumen:
Esencialmente, la pérdida sufrida por la industria de la construcción global durante el tiempo en cual se propaga el COVID-19 no es causada por la pandemia en sí, sino por un cambio de circunstancias que resultó principalmente de la política o ley anti-COVID-19 llevada a cabo por diferentes jurisdicciones.
Cuando el contrato guarda silencio al respecto, la solución legal debe hacerse contemplando la ley en diferentes jurisdicciones hacia el cambio de circunstancias, que comúnmente incluye situaciones en las que la ejecución del contrato se vuelve más onerosa o imposible, y teniendo en cuenta el entorno fáctico que determina o impacta la circunstancia cambiada. Este documento, desde una perspectiva de derecho comparado, analiza y concluye la doctrina del cambio de circunstancias en algunas jurisdicciones típicas que al tomar en consideración el derecho y los hechos, proporciona algunos enfoques y posibles soluciones legales para hacer frente a esa pérdida.

Keywords:
The effect of COVID-19 – Construction projects in the world – Changed circumstances – Force Majeure – Hardship doctrine - Remedies in costs and time

Palabras clave:
Los efectos del COVID-19 – Proyectos de construcción en el mundo – Cambio de circunstancias - Fuerza mayor – Doctrina del *hardship* – Remedios en costo y en tiempo

Summary:

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1. Introduction

In 2020, the most overwhelming event in the world must be the pandemic of COVID-19, which militates disastrous impact to social life of almost all countries across the world. Without exception, it also inflicts an unprecedented impact and brings about great losses to the international construction market. It is common that in many countries activities of construction projects are, partially or completely, suspended or even terminated, caused by the governments' policy of curfew or developer's finance difficulty. Even though in some countries activities of construction projects are still allowed by governments, contractors commonly cannot sustain the scheduled progress of works due to the additional burden to defend the COVID-19, or shortage in construction resources including labor, materials, and equipment which are necessary for construction projects. Therefore, practitioners of construction projects have to be confronted by great losses in both time and cost.

As the time elapsed, it seems that the impact of the pandemic gradually becomes week, while parties have to start to be busy in allocating the liability of such loss. Superficially, it is a quite simple question since as many practitioners suggest that it is, of course, an event of Force Majeure, therefore the corresponding remedies, established by the law or contract, toward Force Majeure should be applied. That argument is often made based on common sense by common practitioners and is rather questionable from an in-depth legal perspective. This paper aims to conduct an in-depth legal analysis in this question through a close and careful scrutiny, it starts from concluding the general theory of changed circumstances in the world, then examines different extent of impact rendered by COVID-19 to construction projects in different countries, and ended by a detailed discussion of the liability and remedies in projects in different typical jurisdictions.

2. Theory of changed circumstances

2.1. Concept of changed circumstances

It is a general principle applied in both Civil Law and Common Law systems that a private contract has the force of law between parties of the contract, i.e. *pacta sunt servanda* or sanctity of law.[1] However the *pacta sunt servanda* is not absolute, inter alia in Civil Law system, due to a strict application of the same would bring about an undue result and therefore renders the necessity for courts to intervene a private contract when the contract is silent or to maintain necessary justice, reasonableness, and good faith. Therefore, both legal theory and practice developed a compromise between such principle and the other canon rule, i.e. the *clausular rebus sic stantibus*, which means that the contract contained an implied term (*clausular*) that certain important circumstances must remain unchanged (*sic stantes*)[2], and therefore the *pacta sunt servanda* is limited by the *clausular rebus sic stantibus* in different jurisdictions to different extent, in many jurisdictions legal provisions were introduced to regulate exoneration from the performance of a contract where performance becomes onerous or impossible because of the changed objective circumstances,[3] which, in essence, brings about the disequilibrium between parties including an increased costs to performance or a diminution of the value of performance[4].

In the modern time, different jurisdictions have established different legal mechanism to address the changed circumstances, which include two situations, i.e., the performance becomes much more onerous or impossible.

2.1.1. Hardship doctrine

The principle of hardship is to deal with the first situation, however, the term of hardship is not a fixed legal concept in each jurisdiction[5] but rather a collective term in English to describe the situation of fundamental changed circumstances renders "performance of the contract obligation much more burdensome, so that continued performance by the party impacted becomes an undue hardship"[6]. The concept of hardship is collectively used is due to it was established by the UNIDROIT Principles of International Commercial Contracts and therefore can reflect the international character of the this legal doctrine in relation to the

1 Egidijus Baranauskas y Paulius Zapolskis, "The effect of change in circumstances on the performance of contract", *Jurisprudence* 4, 118, (2009): 198.
2 Frederick R. Fucci, *Hardship and Changed circumstances as grounds for adjustment or non-performance of contracts*, American Bar Association Section of International Law Spring Meeting (April 2006), 3.
3 Baranauskas y Zapolskis, "The effect of change in circumstances…", 198.
4 Daniel Girsberger, "Fundamental alteration of the contractual equilibrium under hardship exemption", *Jurisprudence* 19, 1 (2012): 123.
5 Harold Ulman, "Enforcement of hardship clauses in the French and America legal systems", *California Western International law Journal* 19, 1 (1988): 83
6 Fucci, *Hardship and Changed circumstances as grounds*…, 3.

situation under discussion",[7] and in the practice the changed circumstances are addressed by different terms in different countries, such as *wegfall der Geschaftsgrundlage* in German, *imprevision* in France, frustration of purpose in England, impracticability in the US[8].

In the Civil Law system, French law has an extreme strict and conservative position to the cumbersome situation of performance, no specific rule or guidance have been particularly provided by the law to deal with such situation and therefore the theory of hardship is not recognized in French. In both legal mindset and practice, the courts hold on a strict rule of contract interpretation as established by the doctrine of *clause Claire et precise*, which means that a clear and precise clause is interpreted by its plain meaning, therefore legal practitioners can employ it to achieve a narrow interpretation of contract provisions and give less chance for the court to intervene the contract and to adapt or create the contract in relation to hardship[9]. A party may be exonerated from the performance of a contract only in the case of Force Majeure, almost all attempts made by the courts to extend the doctrine of Force Majeure to the situation of hardship and therefor to adapt the contract or exonerate the liability of the party affected were failed[10]. However, in accordance with the theory of *imprevision* that allows an administrative contract between a private and public party to be modified in term of changed circumstances[11]. Comparatively, in other Civil Law countries, including Germany, Netherlands, Italy, Greece, Portugal, Austria as well as the Scandinavian countries, the theory of hardship is widely accepted to a different extent[12], and it is found that these countries commonly follow a more flexible approach and established special changed circumstances provisions in their national legislation[13]. For instance, the right to adapt a contract upon changed circumstances was codified in 2002 by the doctrine of contractual foundation under the first paragraph of section 313 of BGB in Germany. Moreover, in case of hardship, with some exceptions, the adaption of contract to changed circumstances is primary remedy to courts in many Civil Law countries, and the termination of contract is mere the last resort "if an adaption of the contractual terms is either not possible or not just and reasonable having regard to the respective interests of the parties"[14]. In China[15], the principle of changed circumstances is called as *Xinshi biangeng* principle, in accordance with the Contract Law[16], against supervening events arising from changed circumstances, parties' liability can be exempted from Force Majeure or express exemption terms of contract only, while upon the hardship courts are not empowered to adapt the terms of contract or terminate it, therefore the principle of changed circumstance was not accepted by the legislation. However, it is obviously against Chinese traditional culture, under which a dynamic business flexibility is commonly accepted and conducted. Therefore, the notion of *Xinshi Biangeng* principle is still broadly used by courts in the practice of litigation, and its application was expressly endorsed by the Super People's Court (SPC) through Article 26 of judicial explanation of CCL[17], Therefore, in essence, the doctrine of hardship was recognized by the litigation practice in China despite it was namely recognized in term of another fundament contract principle - the principle of fairness. However, it was further explained that its application should be limited with highly prudence, and the significant change should not be a Force Majeure or normal commercial risk.

In the Common Law system, the hardship doctrine is highly restrained to be recognized or applied. In England, like in France, there is no legal principle of hardship either, English law seems to reject any notion of relief for changed circumstances that do not amount to impossibility[18]. However, English law acknowledges the doctrine of frustration and implied conditions for performance, which also primarily focuses on the impossibility of performance[19]. In the history an absolute sanctity of contract prevailed in England, the rigid position was modified to some extent until the middle of the 19th century when the courts developed the doctrine of frustration of contract through the case of *Taylor* v *Caldwell*, which held that "a condition was implied in the contract that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance"[20]. Subsequently, the ambit covered by such doctrine

7 Girsberger, "Fundamental alteration of the contractual equilibrium…", 122.
8 Baranauskas y Zapolskis, "The effect of change in circumstances…", 198.
9 Ulman, "Enforcement of hardship clauses in the French and America…", 86.
10 Baranauskas y Zapolskis, "The effect of change in circumstances…", 199.
11 Ingeborg Schwenzer, "Force Majeure and hardship in international sales contracts", *Victoria University Wellington Law Review* 39, 709 (2008-2009): 720.
12 Schwenzer, "Force Majeure and hardship in international sales contracts", 711.
13 Baranauskas y Zapolskis, "The effect of change in circumstances…", 207.
14 Schwenzer, "Force Majeure and hardship in international sales contracts", 723.
15 China is a Civil Law country but has a relative character of hybrid of Civil Law and Common Law due to its civil code and contract law were highly affected by the CISG and UNIDROIT Principle of International Commercial Contract
16 Enacted in 1999
17 The SPC's Interpretation about problems arising from application of CCL (The Second Issue, Fashi [2009] #5）
18 Schwenzer, "Force Majeure and hardship in international sales contracts", 711.
19 Baranauskas y Zapolskis, "The effect of change in circumstances…", 207.
20 Baranauskas y Zapolskis, "The effect of change in circumstances…", 202.

was extended from physical disappearance of the subject matter of the contract to frustration of purpose of contract by the case of *Krell* v *Henry* and therefore provided legal ground for the systemic branch of the frustration doctrine-the frustration of purpose and implied conditions for performance[21]. However, despite such doctrine provides grounds for courts to release the parties from their contractual obligations in case of fundamental changed circumstances, courts in English law are still generally reluctant to interpret it in a broad way[22], in fact they do not recognize the commercial impracticability as establish by US contract law[23].

Comparatively, as a typical Common Law country, the law of US takes a rather flexible attitude toward the hardship doctrine. The Article 2.615 of the famous Uniform Commercial Code articulates that a contracting party is relived from the liability for delayed performance or non-performance where his performance has become commercially impracticable because of unforeseen supervening circumstances which was not in the contemplation of the parties at the time of contracting. However, interestingly, there is a clear distinction between that Code and litigation in this regard, in the practice very few courts like to construe that rule liberally when they deal with case of changed circumstances, they normally impose a strict threshold of the hardship and refuse to excuse non-performance which is simply caused by cost increasing or collapse of market[24].

2.1.2. Force Majeure and impossibility

Comparatively, another situation of changed circumstances is an extreme situation where the performance become impossible or the purpose of contract is frustrated. Upon this situation, without exception, countries in both legal systems commonly established legal mechanism to exonerate either party's liability of non-performance.

In Civil Law system, French law, through Article 1148 of the Civil Code, established a mandatory doctrine of Force Majeure, which means "future events outside the control of the parties and it results the impossibility of the execution of the contract".[25] Pursuant to that rule, upon changed circumstances, a party of contract can be exonerated from the duty of performance only in the case of Force Majeure, accident event, or an external cause, while in effect these three events are interchangeably to describe a same extreme situation of changed circumstances where the performance of a contract become impossible[26]. In German law, a complete legal system of impossibility of performance had been established by the old version of German Civil Code and it was substantially inherited by the new version despite its name was changed to non-performance system. In accordance with Section 323, where an impossibility of performance is caused by an event to which are not liable by both parties, the obligation of performance is discharged. In China, the Article 94 of the Contract Law specifies that a contract can be terminated in term of Force Majeure, Article 117 specifies that if the non-performance is resulted by Force Majeure, the liability is exempted. Similarly, in almost all other Civil Law countries similar principle of Force Majeure are commonly established by their codified law to a different extent.

In the Common Law system, against the extreme changed circumstances of impossibility, English law developed doctrine of frustration of purpose, it operates to discharge contractual obligations where an event that is unforeseeable and transfigures the obligations impossible, or drastically modifies the parties' initial purpose for entering into the contract. It is also called as doctrine of impossibility. In effect, it excuses the non-performance and automatically discharges a contract except where the terms of contract have a provision to the contrary, such doctrine was therefore developed to "mitigate the rigor of the common law's insistence on literal performance of absolute promises"[27]. In practice, the application of that doctrine is broadly limited due to some conditions precedent have to be met, i.e. the obligation of parties must be radically altered, the event resulting in frustration must be unforeseeable when the contract is formed, no express existing contract provisions have been agreed to deal with the event leading to frustration, and the occurrence of the event must not be liable by either party[28]. Its practical significance is also limited by courts' reluctance due to the draconian consequences of such doctrine that brings the contract automatically to an end, irrespective of the true intention of the parties, and due to courts try to "avoid it becoming an escape route for a party

21 Baranauskas y Zapolskis, "The effect of change in circumstances…", 202.
22 Baranauskas y Zapolskis, "The effect of change in circumstances…", 203.
23 Baranauskas y Zapolskis, "The effect of change in circumstances…", 203.
24 Fucci, *Hardship and Changed circumstances as grounds*…, 6.
25 Tekla Papp, *Frustration and hardship in contract law form comparative perspective*, http://acta.bibl.u-szeged.hu/34808/1/juridpol_077_421-430.pdf , 426
26 Baranauskas y Zapolskis, "The effect of change in circumstances…", 199.
27 Papp, *Frustration and hardship in contract law form*…, 422.
28 Papp, *Frustration and hardship in contract law form*…, 422.

who has entered into a bad bargain"[29]. Therefore, courts in England tend to treat the doctrine of frustration as the last resort which should be used rarely so that to maintain the traditional principle of sanctity of contract[30]. Actually, in England such doctrine has mostly been applied by courts to consumer contracts but not to commercial contracts[31].

2.1.3. Relation between concepts

In the international society, the relation between Force Majeure and hardship is always a hot debated topic. Theoretically, hardship means a circumstance where the equilibrium of the contract is fundamentally altered and renders the performance becoming excessive onerous; the Force Majeure means an unavoidable accident, is a common clause in contract to essentially free contracting parties from liability where an extraordinary event or circumstance, which is uncontrollable by the contracting parties, to prevent the parties to perform the contract[32]. Due to some characters are shared by both concepts, e.g. the risk of the event is not assumed by either party when the contract is concluded, it is not caused by either party, and the changed circumstance should have a fundamental impact to the performance, many practitioners like to treat them as synonym, and legislations in some jurisdictions also like to extend the remedies of Force Majeure to hardship. For instance, in accordance with Brazilian law, upon the hardship which renders the performance become excessive onerous, the disadvantaged party are entitled to claim termination of the contract. In academic perspective, some scholars, e.g., Ingeborg Schwenzer, consider that the hardship can be conserved as a special group of cases under the general Force Majeure provisions[33].

Nevertheless, the academic idea above is rather questionable due to the clear distinction existing between two concepts. Normally the hardship means that although it becomes onerous and costly to one party to perform its obligation, it is still possible to be conducted. The Force Majeure indicts an event or circumstance, no matter foreseeable or unforeseeable during contracting period, under which both parties cannot overcome it and therefore the performance of contract has to be suspended. Furthermore, the doctrine of hardship is established on the rational that a contract should be established and conducted based on a certain contractual equilibrium, i.e. an economic balance, in the meantime it also should contain an implied term that certain important circumstances must remain unchanged (*sic stantes)*, therefore it should be dynamically adapted with the changed circumstance so that to protect either party's benefit, it more caters to the principle of good faith, which is the basic legal rule in the Civil Law jurisdictions. By contrasting, the doctrine of Force Majeure aims more to relieve parties' liability of non-performance occasioned by the circumstance where performance become, temporarily or eventually, impossible to be conducted.

Under Common Law system, there is also a clear distinction between the two situations of changed circumstances. In the UK, courts make a significant distinction between frustration of contract and cumbersome hardship (a counter concept of commercial impracticability in the US), which, in the English law, means that a situation where the equilibrium of a contract is fundamentally altered by changed circumstances and renders an excessive burden to a contracting party despite the performance is still possible to be delivered, the law commonly "recognize that parties must perform their contractual obligations even if events have rendered performance more onerous than would reasonably have been anticipated at the time of the conclusion of the contract"[34]. Such a strict approach to apply the doctrine of frustration of purpose of contract just, on the other hand, reflects the underlying jurisprudence of English law, which is reluctant to broadly apply the general principle of good faith and fairness[35], and the approach of contract interpretation insisted on by English courts, which generally insist on to strictly interpret contracts through plaining meaning of contract terms.

It is noted that as to the extreme changed circumstances, the concept of Force Majeure under Civil Law system does not necessarily coincide with the principle of frustration under Common Law. Firstly, in the Common Law system there is no precise definition of Force Majeure, if a contract includes a Force Majeure clause, the coverage of Force Majeure is purely rested with the contract. While in Civil Law system, the Force Majeure is a mandatory legal rule and operates independently of contract, even though there is no Force Majeure contract provision parties will still be protected by it[36]. Secondly, the application of the principle of

29 Ewan McKendrick, *Contract Law, Text, Cases, and Materials*, 4th edition (Oxford University Press, 2007), 700.
30 Papp, *Frustration and hardship in contract law form*…, 423.
31 Baranauskas y Zapolskis, "The effect of change in circumstances…", 203.
32 Refer to https://encyclopedia.thefreedictionary.com/force+majeure
33 Schwenzer, "Force Majeure and hardship in international sales contracts".
34 Siddhant Nanodkar & Divya Tyagi, An analysis of the concept of commercial hardship in law of contract, http://www.academia.edu/20411887/Analysis_of_the_Principle_of_Hardship_in_Law_of_Contracts , last visit on 21st Feb.2019
35 Baranauskas y Zapolskis, "The effect of change in circumstances…", 203.
36 Caslav Pejovic, p.817

frustration will merely bring about a termination of the entire contract but not to discharge a certain part of obligation, while the application of Force Majeure principle in Civil Law system means to relieve liability from both parties, and the rest contract terms may be still kept valid to be conducted[37]. Thirdly, the scope of circumstances where Civil Law concept of Force Majeure is applied is much wider than that of the frustration of contract, it can be applied in all changed circumstances where the performance of contract becomes impossible, but not limited in the situation which has not been envisaged when the contract was formed[38].

2.2 Remedies of changed circumstances

Historically, in both legal systems the paradigm of *pacta sunt servanda* or sanctity of contract simply places the burden of changed circumstances on the party on which it falls. While the old Roma principle of *impossibilium est obligation*[39] provided a leeway to the disadvantaged party to be relieved from the liability of nonperformance upon a fundamental changed circumstance, therefore principles of impossibility, Force Majeure or the like have become ground for exemption in every legal system[40].

Upon changed circumstances, the first remedy is exemption from liability. Nowadays it seems to be undisputed that, wherever the right to claim performance would undermine the obligor's exemption from the liability of nonperformance, performance cannot be demanded as long as the impediment exists, it is unanimously applied to both impossibility and hardship. Therefore, upon impossibility or Force Majeure, the disadvantaged parties are commonly discharged from the liquidated or unliquidated damages arising from the liability of nonperformance or delay in performance.

In some jurisdictions avoidance of the contract is a primary remedy upon hardship. In Brazil and Italy, the disadvantaged party's entitlement of avoidance of contract is extended from Force Majeure to excessive onerous hardship, and then the unaffected party can offer an adjustment to the terms of contract to preserve its viability[41], however in practice it is a risky business for the aggrieved party to do so due to whether such hardship can be awarded an avoidance depends on the circumstance of the individual case[42].

Alternatively, in many other Civil Law jurisdictions, upon hardship calling on renegotiation of contract by the aggrieved party or adaption of contract by the court are primary remedies, courts are primarily called on to adapt the contract to meet the changed circumstance, it is merely a last resort to avoid the contract where adaption of the contractual terms is either impossible or not just and reasonable having consider parties' interest[43]. In these jurisdictions, upon excessive onerous hardship the aggrieved party is entitled to request renegotiation with the other party so that to maintain the original contract equilibrium is a primary approach to the disadvantaged party. Should the unaffected party accept the offer to adapt the contract terms provided by the party affected by the hardship, depends on whether courts are empowered to adapt the contract upon a changed circumstance through taking account of the fact whether that offer is reasonable and acceptable in accordance with good faith principle. In some countries, e.g., France, the other party is obliged to offer a serious diligence to reach a new agreement with the aggrieved party under the principle of good faith and cooperation. However, in practice, it was suggested that many Civil Law countries, inter alia in some typical jurisdictions such as German, Italy, and Holland, parties are not obliged to renegotiate the contract. Alternatively, the aggrieved party may directly seek resort to courts to adapt the contract[44].

By contrasting, in Common Law system, a contract is understood as allocating the risk of sorts of foreseen or unforeseen events between parties, it is commonly understood by practitioners in these jurisdictions that except the most extreme circumstances, the terms of the contract should be enforced, parties are guarded against risk through inserting price adjustment and like clauses to cater to changed circumstances[45]. Unlike Civil Law system, in the English law even when the doctrine of frustration is applied, the court still has no right to adapt a contract, through modification of rights and duties of parties, due to its traditional rigid approach of contract interpretation. In case of a frustration, the contract is normally terminated by the court directly, and therefore parties of contract in the English law are commonly encouraged to exhaustively establish risk allocation and contract adaption provisions, for instance construction contract provisions about extension of

37 Idem
38 idem
39 i.e. parties are not obliged to perform impossible things
40 Schwenzer, "Force Majeure and hardship in international sales contracts…", 710.
41 Fucci, *Hardship and Changed circumstances as grounds…*, 31.
42 Schwenzer, "Force Majeure and hardship in international sales contracts…", 721.
43 Schwenzer, "Force Majeure and hardship in international sales contracts…", 723.
44 Schwenzer, "Force Majeure and hardship in international sales contracts…", 722.
45 Fucci, *Hardship and Changed circumstances as grounds…*, 1.

time and variation toward changed circumstances which facilitate the contract can be still proceeded with[46]. Therefore upon changed circumstances, even in the US, parties may be released from non-performance or delay in performance, while courts rarely like to adjust contract terms[47].

3. The effect of the COVID-19 to construction projects

With a superficial sense, the COVID-19 brings about a drastic impact to the construction industry in many countries and therefore results in a great loss to practitioners, *inter alia* contractors, therefore many practitioners are likely to attribute the loss to the COVID-19 and allege it is a Force Majeure. However, having a careful contemplation, it is found that COVID-19 is a new disease with a relative low mortality rate[48], it is not a fatal disease in itself due to its high level of cure rate, therefore such allegation is improper. However, the true problem caused by COVID-19 to the human society is it creates a serious social panic due to its highly infectivity. Upon such social panic, government in many countries take different level measures to deal with it. In essence, it breaks the normal external circumstance, which was contemplated by contracting parties as a fundamental implied condition to perform the contract at the time of contracting, therefore results in a changed circumstance which prevent contracting parties to perform their obligations.

Furthermore, having a careful examination, it is found that the effect caused by the COVID-19 is not in a uniform level in international market, it varies from countries to countries and projects to projects. As discussed above, different situation of changed circumstances may bring about different remedies in different countries, it entails to examine the extent of the changed circumstance caused by the COVID-19 and therefore to determine the liability and remedies toward the loss.

Particularly, different factors determine the effect of COVIDI-19 in construction projects, that effect in turn determines the level of changed circumstances in different projects.

Among all factors, the strongest one is the government policy. Comparatively, China is the first country which was greatly afflicted by the spread of COVID-19 from January 2020. To prevent it the government conducted an extreme rigid lockdown policy from the end of January, almost all outdoor business activities are banned, all residents are prohibited to walk out of houses, therefore almost all construction projects were unconditionally suspended for about 1.5 months. The rigidness of lockdown policy was gradually alleviated from the middle of March, construction projects were allowed to re-sum works but obliged to conduct severe anti-COVID-19 measures, the progress of projects was affected to different extent due to many factors, e.g. shortage of construction resources caused by the market was not completely resumed and the transportation was still not completely allowed, such circumstance was continuously assuaged but not completely completed until the end of May. Therefore, in China, in different stages the government's policy imposed different level of changed circumstances to construction projects. In the first stage projects were commonly suspended and therefore experienced a pure delay to completion, therefore, in accordance with definition above, the changed circumstance in this stage commonly amounts to a Force Majeure to almost all construction projects due to it was impossible for practitioners to continue its physical works. In fact, in accordance with legal explanation provided by Legal Committee of the NPC Standing Committee of China on 10th February, the COVID-19 in that stage was defined as an unforeseeable, unavoidable, and insurmountable event and therefore is a Force Majeure, parties of contract should be partially or completely exonerated from the non-performance by taking account of its factual effect created by it[49].

In the second stage construction works were able to be conducted, but the progress was disrupted by many factors such as abnormal market and other anti-COVID-19 measures, therefore it became rather burdensome to proceed with the works, nevertheless the performance of works became possible since the impediment of works could be overcome, therefore the changed circumstance in this period constituted a hardship.

After the spread of COVID-19 was gradually controlled in China, unfortunately it became a worldwide problem due to it fast spread. To prevent it, countries adopted different policy. In some countries, like Italy, Spain, Serbia, Russia and UK in Europe, Iran, India, Nepal in Asia, US, Argentina, Peru, Honduras, Bolivia, and Columbia in America, South Africa, Botswana, Algeria, Libya, Egypt and Sudan in Africa, governments conducted different level of radical anti-COVID-19 policy, including lockdown, curfew or state of emergency policy, in a certain

46 Baranauskas y Zapolskis, "The effect of change in circumstances…", 203-204.
47 Baranauskas y Zapolskis, "The effect of change in circumstances…", 203-204.
48 It is reported that in China until the end of June 2020 there were total about 85,000 infectors, about 80,000 of them are cured, the cure rate is up to more than 94%, the cure rate in the international scope is maintained in an approximate same level also.
49 http://www.gov.cn/xinwen/2020-02/11/content_5477092.htm

stage. Under these policies, normally physical activities in construction projects, which usually should be conducted by group of workers, are not allowed to be conducted, therefore. Like the first stage to defend COVID-19 in China, the external circumstance in these countries amounts to a Force Majeure or impossibility to contracting parties, inter alia contractors, to perform the obligation in construction contracts. Recently, in some countries, like Italy, UK, US, the impact of COVID-19 is reduced and therefore the rigor of lockdown policy is alleviated, it renders projects are able to resume some works, therefore, like the second stage of defending COVIDI-19 in China, the circumstance in these countries constitutes a hardship to construction contract parties to perform their obligation.

By contrasting, governments in many other countries or states, e.g. Japan, South Korea, Singapore, Pakistan, United Arab in Asia, Niger, Chad, Zambia and Mozambique in Africa, Scandinavian Countries in Europe, and some states in US, adapt relative moderate policy against the spread of COVID-19. In these countries, people are called on to defend the spread of COVID-19, public spaces are closed, social gathering and group activities are not encouraged or even prohibited, some measures such as quarantine inspection and isolation of potential infectors and new entrants, however no policy like curfew is performed, normal business include construction is allowed to be operated despite the operation is greatly affected by social panic and relevant anti-COVID-19 measures. Interestingly, in some countries the government even take a rather conservative attitude to defend the COVID-19. For instance, in Brazil, it is called on by the President that the society should get rid of the panic of COVID-19, people should not keep in house, business and social life should be kept in the normal level, therefore despite there are great number of infectors and a serious social panic, the Brazilian central government refuses to conduct the rigid anti-COVID-19 policy. In Tanzania, no anti-COVID-19 policy or measures are taken by the government, contrarily, any anti-COVID-19 measure taken by private entities is treated as an illegal action because it may create social panic. To sum up, in these countries, construction projects are allowed to be performed, but contracting parties have to bear additional burden to overcome the spread of COVID-19, the extent of the burden by and large depends on the stringency of the anti-COVID-19 measures imposed by the government of the host countries. Under such circumstance, on the one hand, since no severe policy or law is enacted by the government, in absent of express otherwise contract term contractors commonly have no right to reject to continue the performance. On the other hand, if the performance is continued, contractors have to bear a great risk that the COVID-19 may spread among their workers and their obligation of health keeping becomes unachievable. Furthermore, they have to suffer from additional costs caused by anti-COVID-19 measures, lost in productivity, and prolongation in construction caused by slow progress. Therefore, in countries where the policy is rather stringent, it may amount to a hardship preventing contractors to perform their obligation.

The above suggests that in different countries or states, against the COVID-19 the government's policy plays a fundamental factor to determine the extent of impediment to practitioner's performance. However, it is notable that the extent of impediment caused by government's policy may also be alleviated or reinforced by some other factors, such as characters of individual projects, contract administrator's determination and etc. For instance, civil works in downtown may be more affected by the anti-COVID-19 policy, while engineering works in remote area can receive much less impediment. Projects which need relative less workers or to be conducted indoor, such as electricity-mechanic installation or maintenance projects, may be rather less affected, while traditional labor-intense works such as dam and bridges works have to be more affected. An international project which involves a great number of international professionals and workers or should be incorporated with by equipment or materials imported from internal market, is much likely to be impeded. Furthermore, even in countries where the anti-COVID-19 policy is rather moderate, contractor's burden may be still significantly increased by contract administrator's instruction. Therefore, it is infeasible to try to conclude and recognize a uniform effect of COVID-19 in every construction projects due to it is a question of fact and depends upon the actual extent of the changed circumstance of each individual project, and therefore should be examined case by case.

In countries where the changed circumstance amounts to Force Majeure or impossibility, except some indoor works such as design or contract negotiation, construction projects commonly should be substantially suspended. It therefore brings about a substantial delay to the critical path and accessary prolongation costs to contractors, which include but not limited to time-related costs, costs of idle construction resources, and relevant maintenance and security costs.

In countries where the changed circumstance does not amount to impossibility, contract administrators, on behalf the clients, commonly like to compel contractors to continue the performance so as not to delay the completion. However, due to the changed circumstances, the performance have to be impacted by anti-COVID-19 measures mandatorily imposed by government or voluntarily conducted by construction projects,

e.g. additional time of virus detection of workers, refusal of entrance or isolation of key personnel who infect COVIDI-19 or are potential infectors, and shortage in construction resources supply and etc. therefore it still may result in a delay in critical path, or at least creates disruption to the progress, which in turn brings about lost productivity. Furthermore, to prevent the COVID-19, contractors also must spend additional costs in providing relevant medical facilities and materials.

4. Liabilities and remedies to the loss caused by the COVID-19

4.1. Where the COVID-19 results in a Force Majeure

In Civil Law jurisdictions, in projects where the COVID-19 results in a Force Majeure, in absent of an express contract term of Force Majeure, contractors are entitled to raise its claim pursuant to relevant legal rules about Force Majeure. In accordance with the common principle of Force Majeure, the obligor is exonerated from the duty of non-performance, if projects are suspended by the Force Majeure, contractors should be exonerated from the liability of delay during that period, therefore an according extension of time should be awarded so that to exonerate delay damages which levied from contractors.

Regarding the question whether contractors are entitled to be compensated for the loss resulted by the Force Majeure, it firstly depends on the risk allocation made by the contract. In the Common Law system construction contracts commonly follow a strict liability approach to impute parties' liability, generally follow a balanced risk allocation upon changed circumstances including hardship and Force Majeure. For instance, under FIDIC form of contract[50], upon the Force Majeure caused by the COVID-19, contractors may rely on sub-clause 13.6 (Adjustment for Changes in laws) to claim additional costs incurred by government's policy or law regarding lockdown or state of emergency and rely on sub-clause 13.7 (Adjustment for Changes in cost) to claim the increase cost resulted by the spread of COVID-19. Alternatively, they can also claim compensation by relying on the paragraph of sub-clause 17.2 (about the natural force could not expected by the Contractor) and Sub-Paragraph (d) of sub-clause 18.1(strike or lockout). For instance, As per the latter sub-clause that:

> "If the Contractor is the affected party and suffers delay and/or incurs Cost by reason of the Exceptional Event[51] ------, the Contractor shall be entitled subject to Sub-clause 20.2 (Claims for Payment and/or EOT) to:
>
> (a) EOT; and/or
>
> (b) If the Exceptional Event is of the kind described in sub-paragraphs (a) to (e) of sub-clause 18.1 [Exceptional Events] and, in the case of sub-paragraphs (b) to (e) of that sub-clause, occurs in the country, payment of such cost"**.**

since the suspension of works resulted by the Government's policy of lockdown or curfew meets the description of Sub-Paragraph (d) of sub-clause 18.1 that "strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors", contractors therefore should be entitled to both extension of time and payment of compensation, which may include direct loss resulted by the suspension, prolongation costs, costs of demobilization the works, and reasonable costs to defend or mitigate the effect of the COVID-19.

Comparatively, construction contracts under the Civil Law system may follow a fault-base liability imputation approach. For instance, under a contract which uses the form of VOB/B in German, if the COVID-19 causes a Force Majeure or other unavoidable circumstance which prevents the contractor from performance of the works and therefore results in a suspension, in accordance with the Article 6 the execution period should be extended, the contractor must do everything that can be fairly expected to enable the further performance of work. In the case of the pandemic COVID-19, as soon as its extreme effect is eliminated, the contractor must readily start the work again without delay. The extension of execution period is calculated in accordance with the duration of the suspension of caused by the COVID-19 plus reasonable time of resumption by taking account the factors of the favorability of season for construction. In the aspect of the loss caused by the suspension, it is established by that article that the original contract price of the completed works should be applied. If costs, which has been contained by the contractor price and already spent by the contractor but has not resulted in a valid performance due to the changed circumstance, it should also be compensated. In this case, it means that the costs spent by the contractor to any work, which cannot be incorporated into the eventual completed work due to the spread of COVID-19, should

50 For instance, 2017 edition FIDIC Red Book, it is noted that the FIDIC form contract is drafted based on common law.
51 It was described as "Force Majeure" by the past versions of FIDIC form contract.

be compensated. While as to other costs and loss incurred by the contractor caused by the spread of COVID-19, such as prolongation costs or costs of anti-COVID-19 measures, since the employer has no fault or negligence toward such circumstance, the contractor is not entitled to compensation of these costs and indemnification for loss of profit.

If there is no contract term available to deal with risk allocation about the costs incurred by an event of Force Majeure, it will be much more questionable due to the answer should depend on whether an according remedy has been provided by the applicable law of the contract or industry practice in this regard, construction projects in different countries therefor have different remedies toward the COVID-19 due to the divergence in law and practice in different countries.

For instance, in China, pursuant to the Article 94,111 and 117 of the Contract Law, upon a Force Majeure or an impossibility, parties are allowed to terminate the contract, the oblige should not request the obligor to continue the performance before the Force Majeure is finished, and the obligation of non-performance resulted by the Force Majeure should be exonerated. Obviously, the law focuses on the exoneration of liability of non-performance, while keep silent on who should bear the loss caused by the Force Majeure, it therefore provides a hot debate in China and depends on judges' discretional power. In practice, it is submitted that in accordance with the principle of good faith and fairness[52], and the Article 132 of the General Rules of Civil Law that "where both parties have no fault to the loss, the civil liability may be shared by parties according to the actual circumstance", the costs and loss caused by the COVID-19 should be fairly shared by contracting parties. Based on this principle, government authorities of different provinces in China recently enacted some cost estimate guidance regarding cost estimate during the period of spread of COVID-19. For instance, it is specified by the DOHURDs (Department of Housing and Urban-Rural Development) of Hainan Province and Hubei Province that where projects were suspended, parties should reasonably share the loss based on remedies of Force Majeure established by the law or contract[53].

However, how to reasonably share the loss is still questionable due to there is no clear standard has been provided by Chinese law based on which to conduct it, in many Chinese construction cases upon neutral events judges commonly incline to determine that each party should bear its own loss and no compensation is made to each other. Under that approach, in the case of loss caused by the Force Majeure resulted by the COVID-19, employers should bear the loss resulted by delay in receiving the completed projects, while contractors should bear the loss incurred by the suspension and defending the COVID-19. However, it seems that approach in Chinese legislation is not in line with the industry practice adopted by the Chinese construction industry to deal with Force Majeure. In China, the industry practice of cost estimate is mainly established by the CCEBQCP[54] which was enacted by MOUHURD[55]. In accordance with the Article 9.1 and 9.10 of CCEBQCP, parties should adjust contract price upon a Force Majeure or change in law, the approach of risk allocation and price adjustment should be: 1) employers should bear the loss of damage to the works and a third party, on-site materials and equipment which are going to be incorporated into the works, costs of clearance and repair, and contractor's costs to maintain necessary management and maintenance personnel at the site; 2) each party should bear its own personnel's injury and casualty, 3) contractors should bear the damage to its own construction machine and plant as well as the loss caused by suspension of works (i.e. prolongation costs). 4) if no extension of time is awarded for the period of suspension, employers should bear the costs of acceleration of works to facilitate contractors to finish works by the original completion time. Therefore, in absence of contract terms and award by courts, the CCEBQCP provides a rather clear guidance to allocate the loss caused by the suspension of works resulted by COVID-19.

Comparatively, it is rather questionable in other Civil Law jurisdictions whether the loss incurred by the Force Majeure is compensable. In many countries, e.g., Brazil and Argentina, the law merely establish that upon a Force Majeure both parties are relieved from the non-performance, while keep silence on how to allocate the loss caused by the Force Majeure. Therefore, in these jurisdictions, on the one hand employer are not entitled to delay damages incurred by COVID-19, on the other hand contractors, in absence of parties' agreement in contract price adjustment, contractors have no express legal entitlement to payment for loss in prolongation or additional costs. Therefore, in these countries, in absence of express contractual remedies about the loss caused by Force Majeure, contractor should prudently use the legal ground of Force Majeure to claim the reimbursement of loss due to it may bring about nothing to them.

52 The Article 4 of the General Rules of Civil Law and the Article 5 of Contract Law

53 Refer to http://zjt.hainan.gov.cn/szjt/0410/202002/fc3dcbe0c6324c098862a9b7e144af94.shtml and http://www.zjszj.com/detail/2895.html

54 Code for cost estimate of bill of quantities of Construction projects, GB 50500-2013

55 Ministry of Housing and Urban-Rural Development of Republic of China

Under the Common Law system, if no contract term about remedies of Force Majeure is available, upon the suspension of construction projects caused by the COVID-19, in accordance with the doctrine of frustration of contract or impossibility, since the implied conditions assumed by parties that the works should not be impeded by an unforeseen factor, contractors should be relieved from the liability of non-performance or delay in delivering the completed project, therefore an EOT should be awarded. Comparatively, contractors under Common Law jurisdictions should act more prudently to claim the reimbursement by relying on the legal ground of frustration of contract or impossibility. In the English law countries, as discussion above, contractors may allege that the government's policy of lockdown or state of emergency has imposed an impossibility for their performance, the implied condition[56] that no construction activities should be prohibited by the law or policy has broken, the circumstance therefore constitutes an impossibility to performance[57]. Upon such claim, judges have no right to intervene contract clause but merely determine whether to terminate the contract. If the contract is terminated, the original contract terms becomes invalid, parties should re-negotiate the contract terms about the payment of the entire works, in absence of its contractors may be paid based on a Quantum Meruit approach. Clearly, such result will be too rigor for both parties of many construction contracts to accept since most of projects are merely temporarily suspended, parties of contracts may not wish to end the business unless either of them has suffered an unbearable loss. Furthermore, it is noted that the threshold of frustration of contract is rather strict in the English law, if no extreme stringent curfew or lockdown policy is issued, but contractors have to be confronted by delay or disruption and bear additional burden and costs, in accordance with the case of *Davis Contractors Ltd*. V *Fareham U.D.C*, it does not amount to a frustration, the contract should not be terminated, and the works should not be paid on quantum meruit basis. In the English law, it is recognized that some delay or change is very common in human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree, the alteration of circumstances must be such as to upset altogether the purpose of the contract. It makes the court rather cautious in discharging parties from their contract[58].

In the US, parties should also act prudently to claim loss based on impossibility. In some states, construction projects may be temporally suspended by the government's policy, it may amount to a Force Majeure as defined by a contract, e.g., FIDIC or AIA form of contract, while it does not amount to a frustration of contract due to most projects can be resumed after the policy of the emergency is changed. Alternatively, in accordance with the Article 2.615 of the famous Uniform Commercial Code, the suspension of construction projects may amount to a commercial impracticality, therefore, in absent of contract clause about Force Majeure or hardship, it is suggested to be dealt with by hardship doctrine as established by the US law.

To sum up, in countries the governments enact stringent anti-COVID-19 policy and result in a suspension of construction projects, it amounts to Force Majeure, in absence of contract terms about it, pursuant to the applicable law contractors commonly are relived from delay damages and are entitled to an extension of time to completion of projects. While contractors should prudently rely on the law about Force Majeure or impossibility to claim reimbursement of loss. Alternatively, they are suggested to use clause of change in legislation, price adjustment and even try to use contract mechanism of variation or change order to claim the reimbursement of their loss.

4.2. Where the COVID-19 results in a hardship

In constructions projects where the stringency of government's anti-COVID-19 policy is in a relative low level or projects are not fundamentally affected by the COVID-19, contractor's performance is allowed to be continued but they have to be confronted by additional burden to different extent. As discuss by heading 3 above, contractors may intend to claim reimbursement of loss caused by delay or disruption as well as additional costs of anti-COVID-19 measures.

To demonstrate claims, contractors should always primarily rely on contractual risk allocation in relation to hardship. For instance, under the NEC4 contract in the UK, pursuant to sub-clause 60.1 (19)[59], the event of anti-COVID-19 amounts to a compensation event therefore contractors may be entitled to compensation in both time and payment.

56 Refer to the case of *Taylor v Caldwell* (1863),

57 Refer to the case of *Baily V De Crespigny* (1869), under which the defendant's liability of non-performance is excused by the court due to the non-performance was caused by an act enacted by the government.

58 Dr R.K. Bangia, *Contract-I*, 6th Edition, (Allahabad Law Agency, 2015), 338.

59 It is an event which: 1) stops contractor to complete the works, 2) neither party can prevent it, and 3) an experienced contractor believed at the Contract Date that it would have a small chance of occurring.

However, very few other standard forms of contract, like FIDIC, JCT, and AIA contract, have express term to support contractors to be reimbursed from the loss resulted by the epidemic. Therefore, under these forms of contract, contractor may rely on some other existing contract mechanism to reimburse the loss to some extent. For instance, under FIDIC contract, contractors may rely on clauses of price adjustment caused by market price inflation or exchange rate or change in legislation to reimburse their loss in these aspects. Furthermore, they may also rely on clause of variation or change order to claim the additional costs arising from anti-COVID-19 measures due to contractors' obligation in HSE has been substantially extended. However, as to some indirect loss such as the lost productivity caused by disruption of works as well as prolongation costs caused by an overall delay in completion, it is too difficult, if not impossible, to rely on an express contract term to support the claim, it therefore results in a contract grey area in risk allocation.

In absence of contract terms in this regard, contractors may further seek recourse of the applicable law or industry practice. For instance, for projects which are still run in the period anti-COVID-19, some local governments in China provided guidance to allocate the increased direct costs. Amongst others, the Government of Hubei province stipulates that during the period of spread of COVID-19: 1) parties should negotiate and determine a reasonable extension of time for completion, 2) costs of anti-COVID-19 measures and increased labor and materials costs should be paid based on Quantum Meruit approach[60]. However, the compensability of loss in indirect costs, such as prolongation and lost productivity, is still blank in law, policy and industry practice, therefore contractors may further rely on the *xinshi biangen* principle in China to demonstrate their claims, the result will rest with judges' discretional power, it is expected that based on the basic legal principle of good faith and fairness such claims will have great chance to be supported.

In some other Civil Law jurisdictions, where no contract terms are available contractors may resort to the applicable law to directly request the courts to allow their claims for reimbursement. For instance, in the Spain there is a legal rule that "the terms of a contract may be modified by the judge to re-establish the preceding equilibrium under the following conditions: (a) an extraordinary alteration of circumstances between the time of performance of the contract and its signing; (b) an exorbitant disproportion between the parties' performance which annuls the pre-existing equilibrium----; that this situation be caused by events that are patently unforeseeable"[61]. Therefore, contractors in the Spain may directly claim to increase the contract price to recover its loss and costs caused by the COVID-19 through resorting to legal proceeding.

In the Holland, the law also empowers courts to revise contract terms due to a hardship. In accordance with Article 258 of Book 6 of the Dutch Civil Code, upon the request by one contracting party, courts may modify the terms of a contract or partially or completely terminate the contract against an unforeseen circumstance under which it is unfair and reasonable to expect the disadvantaged contracting party to maintain the original terms of contract, such termination or modification may be given retrospective effect. Therefore, in construction projects in the Holland where works are still kept run in the period of anti-COVID-19, contractors may rely on the law to increase contract term about the remedies of additional costs and loss caused by the unforeseen COVID-19.

In the German, the hardship of doctrine is established by the Section 313 of BGB that if the circumstances which became the basis of a contract have significantly changed, the contract may be adapted taking account of all circumstance of the case and risk allocation made by the law or contract. If the alternation of contract is impossible or no agreement can be achieved by parties, the disadvantaged party may terminate the contract. Therefore, in the German, where projects kept run in the time of the spread of COVID-19, in absence of contract terms in this regard, contractors do not have to resort to courts but may directly request to change the contract terms so that to reasonable share the loss and additional costs incurred by the COVID-19, if such attempt fails, they may request to terminate the contract.

In the French, in projects which still run in the period of state of emergency, against the hardship there are different scenarios in different types of contract. In projects where both contracting parties are private entities, in absence of a contract clause of hardship, contractors have no mandatory legal ground to be reimbursed for the additional burden and loss, despite they may be relieved from the liability of non-performance[62]. However, in accordance with the French administrative law hardship is a mandatory part of administrative contracts, it establishes that a private contractor has a right to be indemnified from the state or its enterprise if an exceptional and unforeseeable hardship has upset the financial equilibrium of the

60 http://www.zjszj.com/detail/2895.html

61 Fucci, *Hardship and Changed circumstances as grounds*…, 25.

62 It is established by Article 1147 of French Civil Code that one contracting party will be relieved from the liability of non-performance or delay in performance if he demonstrate that the non-performance comes from an external cause which may not be imputed to it.

contract[63] Therefore, in projects where employers are government entities or state-owned enterprises, even no contract term of hardship can be relied on by contractors, they may resort to the legal rule and principle established by the administrative law to claim reimbursement of the loss and additional costs incurred by the spread of COVID-19.

In Italy, the first country of the Europe experienced the serious impact of the pandemic of COVID-19, many construction projects have to suffer from great troubles to continue the works not only in the time of the COVID-19 crisis but also after that time, for instance market price of labor and materials may have a disproportionate inflation when the crisis is finished. It is established by the Italian Civil Code Art.1467 that:

> "In contracts with continuous or periodic execution or with deferred execution, if the performance of one of the parties has become excessively burdensome due to the occurrence of extraordinary and unforeseeable events, the party who is responsible for this service may request the termination of the contract, with the stability effects from Art.1458.
>
> The termination cannot be asked if the onerous claim falls within the normal scope of the contract. The party against whom the resolution is requested can avoid it by offering to change the conditions of the contract fairly".

Therefore, in absence of a contract term in relation to hardship, contractors in Italy may rely on that legal rule to try to indirectly compel employers to amend the contract terms regarding remedies of their loss and additional costs incurred by the COVID-19, or otherwise claim to terminate the contract.

It is noted that it is essential to discuss principles and practice which may be adopted by typical Civil Law countries above due to the law of these countries has a substantial inspired effect to and even is transplanted to legal systems of many former colony of these countries, and many Civil Law jurisdiction countries in Latin America or Africa also like to import or take reference to legal principles from Civil Law countries in Europe.

For instance, like Italian Civil Code, against excessive hardship the Brazilian Civil Code establishes that:

> "Article 478: For contract of continuing or deferred performance, if the performance by one of the parties become excessively onerous, providing an undue advantage to the other, and as a result of extraordinary and unforeseen events, the disadvantaged party may request the termination of the contract. The effects of a judgement of termination shall be retroactive to the date of the summons.
>
> Article 479: Termination can be avoided if the defendant agrees to modify equitably the terms of the contract.
>
> Article 480: If, in a contract, the obligations of performance apply only to one of the parties, such party may request that its obligations be reduced or modified as to its performance in order to avoid excessive burden"[64].

In fact, despite there are a great number of infectors of COVID-19 in Brazil, since no policy of lockdown is enacted by the government, contractors in many construction projects have to keep on work while bear a great additional burden and loss. Therefore, in the Brazil if contractors' burden caused by the spread of COVID-19 become excessive onerous but have no contract terms to remedy it, pursuant to the law they may have two options, the first is to claim termination of contract, however the termination maybe not take place provided that employers agree to change the terms of contract, e.g., to provide reimbursement of the additional costs and loss to some extent. The second is to claim reducing the scope of works which are substantially impeded by the spread of COVID-19, contractors merely need to conduct the remaining works which are not substantially affected.

The Argentine Civil Code contains a similar legal provision of hardship also, the Article 1198 establishes that if the burden of one party in performance becomes excessively onerous resulted by extraordinary and unforeseeable events, the disadvantaged party may request to terminate the contract, while the other party may offer an equitable term so that to frustrate that request[65]. Therefore, contractors in projects in Argentina which still run in the period of spread of COVID-19 may resort to that clause to compel employers to change the term of contract by increasing the contract price caused by the COVID-19.

63 Fucci, *Hardship and Changed circumstances as grounds*…, 5.
64 Fucci, *Hardship and Changed circumstances as grounds*…, 10.
65 Fucci, *Hardship and Changed circumstances as grounds*…, 13.

In fact, in many Civil Law countries, like Italy, Brazil and Argentina, where hardship doctrine is applied, the disadvantaged parties may not directly claim to renegotiate the term of contract but are allowed to claim termination of contract[66]. If the other party does not like to do so, parties may sit down to renegotiate terms of contract. Therefore, in these countries, in the circumstance of the spread of COVID-19 it is a quite subtle but practical question to contractors, who intend to claim hardship, whether to continue the works and then claim reimbursement of the consequent additional costs or losses, or directly claim termination of the contract and therefore to compel the other party to renegotiate contract terms. To answer such question, contractors should carefully scrutinize the fact and contemplate whether the COVID-19 has indeed brought about an "excessive onerous" hardship to their performance, without a complete confidence they should work very prudently due to an unjustified act of termination of contract will amount to a repudiatory breach of contract. In fact, in accordance with cases in many countries, it is very subtle to determine whether a circumstance has constituted hardship due to it needs to jointly contemplate the fact and contract, therefore the legal uncertainty impose a great risk to contractors who intend to terminate the contract. In such case, contractors are recommended to request the tribunal of courts or arbitration to provide partial determination or special performance upon the question whether the contract should be terminated. Of course, even the contract is terminated, contractors still have the right to claim reimbursement as per other relevant terms or mechanism established by the contract, law, or even industry practice.

Comparatively, in some other jurisdictions, like German and French, upon hardship aggrieved parties are not allowed to terminate the contract but allowed to renegotiate contract terms. On the one hand they have to continue the performance, on the other hand they are allowed to claim renegotiation with the other party, if it fails, they may seek recourse of the courts to adapt it. Among all countries following this approach, upon an exceptional onerousness the Algerian law establish an extreme statute rule which empowers the judge to modify the scope of works and void any contravention contract terms in relation to hardship, it establishes that by the Article 107 (3) of Algerian Civil Code:

> "When------ as a result of exceptional and unforeseeable events of general character, the performance of the contractual obligation, without becoming impossible, becomes exceptionally onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interest of both parties, reduce to reasonable limits, the obligation that has become excessive, any Agreement to the contrary is void"[67].

Accordingly, in Civil Law jurisdictions where upon hardship of COVID-19 the contractor is allowed to claim renegotiate contract terms, the employer cannot simple dismiss it, otherwise it may amount to a refusal of renegotiation, which may render the court to determine the employer has a breach of the principle of good faith.[68] It is held by one decision of the French Court of Appeal that a hardship clause "obliges the parties renegotiate the contract in good faith"[69]. In such case, based on principle of good faith and cooperation, parties are obliged to offer a serious intention and diligence to reach agreement, otherwise the tribunal would hold the oblige, who refuses to undertake any reasonable action to adapt the contract terms in the changed circumstances, to be abusive. Nevertheless, parties are not obliged to ensure the renegotiation is successful, in absent of a new agreement the performance should be proceeded with by parties according to original contract terms until an otherwise determination is provided by the tribunal of courts or arbitration.

Furthermore, despite it is a practical approach for contractors to seek compensation arising from the spread of COVID-19 through relying on legal principle of hardship, they should clearly understand that it is merely a last resort, they are more recommended to rely on other alternative contract terms or even industry practice. In many countries, upon hardship claims it is exceedingly difficult, if not impossible, for courts to adapt the contract or instruct parties to renegotiate the contract unless the contract provide an express term to that effect. In many cases the courts will prudently test whether the event or circumstance is "excessive onerous" or unforeseeable or has not been assumed by the affected party or alternate fundamental contract equilibrium. Therefore, unless the spread of COVID-19 imposes a fatal impact to a construction project, it will be really hard for contractors to win the claim of extra costs occasioned by COVID-19 by seeking recourse of hardship doctrine in a Civil Law jurisdiction.

66 E.g. in accordance with Brazilian statute

67 Fucci, *Hardship and Changed circumstances as grounds*…, 11.

68 Refer to a French case Cass. Com.,3 nov.1992: Bull. Civ.IV, no 338, the good faith principle was articulated by Article 1134 of the Civil Code.

69 CA Paris, 28 sept. 1976: JCP G 1976 II, 18810 note J. Robert

Under the Common Law system, as discussed above that in the English Law in absent of contract terms or mechanism courts hardly like to adapt contract terms, despite there is doctrine of implied conditions which should be maintained to assure the performance can be proceeded with, courts commonly believe that change in human social life is rather natural and therefore parties should have assumed normal commercial risk at the contracting time, and therefore commonly dealt with it with highly caution.

In the US law, against the hardship caused by the COVID-19 contractors may be pursuant to Article 2.615 of the Uniform Commercial Code (Excuse by failure of presupposed conditions) to claim reimbursement of additional costs and loss. Indeed, as per the Comment 4 of the same article, since the spread of COVID-19 is an unforeseen contingency, and if it results in a several shortages in construction resources or a disproportionate increased cost, contractor's liability to none or delayed completion of the project will be excused, therefore no delay damages should be paid to the employer. However, in absent of contract terms, against the spread of COVID-19, if the contractor continues the works and keep all contract terms valid by continuing the works, and therefore is going to receive all payment of the original contract price plus its expected profit, they will have no legal ground to furtherly claim additional costs and loss caused by the COVID-19. Such point was well endorsed by the case of *Transatlantic V United States*[70], under which the plaintiff Transatlantic entered into a contract with the government of United States to ship a batch of cargo from the United States to a harbor of Iran in 1956, while due to the war of the Middle East, the plaintiff had to take a much longer way of Cape of Good Hope to the destination, and then claimed the increased cost of the transportation based on Quantum Meruit approach. The claims were rejected by the court, it was held that upon the occurrence of an unforeseen emergency, if there is an alternative performance and it merely increased the costs of performance, it would not constitute an commercial impracticability. Furthermore, it was explained that even if an event resulted in an impracticability, the existing contract should have been terminated and became invalid, no original contract price and expected profit should be paid. Alternatively, the total transportation should be paid in Quantum Meruit base due to either party was liable to that neutral event. It is held that upon a natural event the US law held a balanced risk allocation principle, it was no ground for the plaintiff firstly to claim the presupposed profit of the original contract, and then claim the increased costs caused by a neutral event based on Quantum Meruit, essentially it was trying to exclusively allocate all responsibility of a commercial disaster to one party and therefore was unacceptable. Therefore, under the US law, in projects which run in the period of spread of COVID-19 with increased costs and burden to contractors, it will be rather difficult, if not impossible, for contractors to claim compensation of their loss by relying on the law only.

5. Conclusion

Based on all above, it is found that the worldwide spread of COVID-19, mainly through governments' anti-COVID-19 policy or law and subject to impact imposed by individual factors of projects, brings about changed circumstances to construction projects in the world and alts the presupposed conditions for contractors' performance in construction projects to different extent.

Under extreme changed circumstances, parties are recommended to allocate the liability and seek the remedy by exhaustively relying on contract terms. In absent of contract terms, parties have to rely on the applicable law of contract in relation to Force Majeure, impossibility, hardship, or impracticability to do so.

Generally, if no contract terms can be resorted to, in accordance with relevant legal rules or principles in different jurisdictions, contractors are likely to be relived from the liability of none-performance or delayed completion of works, while there is no fixed rule about the compensability of the additional costs and loss caused by such event, in fact it is a subtle and controversy question, its' answer depends on both the applicable law and fact, and subjects to judges' discretion power as well as industry practice in different jurisdictions.

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70 *Transatlantic Financing Corp. V United States*., 363 F.2d.312

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