The Effects of the Corona Crisis on Contractual Obligations under Japanese Law

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I. INTRODUCTION: THE EFFECT OF THE CORONA CRISIS ON CONTRACTUAL RELATIONSHIPS

The COVID-19 pandemic has greatly impacted our society and is likely to continue to do so at least for the time being. After the outbreak, many countries adopted necessary measures, such as travel restrictions, closure of workplaces and educational institutions, prohibitions on group gatherings, and even stay-at-home orders, to prevent the spread of the Coronavirus disease. These restrictions on our social activities have had catastrophic effect on many industries. As a result, Japan's GDP for the second quarter of 2020 decreased at an annual rate of 29.2%,[1] the largest decline in recorded history.

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1 Released on 8 December 2020 by the Cabinet Office of Japan, at *https://www.esri.cao.go.jp/en/sna/data/sokuhou/files/2020/qe203_2/gdemenuea.html*.

Since contract is a basic legal instrument to support and facilitate our social and economic activities, the Corona crisis inevitably affects legal rules on contractual obligations. The effect of the crisis on contractual relationships is multifaceted.

First, the crisis may affect the solvency of contracting parties. As a consequence of the crisis, a party may incur a shortage of funds, and this may prevent the party from performing its contractual obligations by the due date. To deal with such situations, at least two options are available. The first option is simply to supply funds to the parties in need. Most governments, including Japan's, have adopted various financial relief measures to deal with the Corona crisis. As important as these measures may be, they have little relevance to contract law and therefore will be mentioned only briefly in my presentation (see III.1.). The second option is the introduction of a temporary moratorium, namely to allow parties to refuse performance of monetary obligations. As will be discussed by Professor SCHMIDT-KESSEL in detail, German legislators promptly adopted this option with regard to monetary obligations arising from essential long-term contractual relationships (Art. 240 para. 1 of the Introductory Act to the German Civil Code [EGBGB]) and consumer loan contracts (Art. 240 para. 3 of the Introductory Act) for the protection of consumers and small enterprises.[2] In Japan, on the other hand, the Act on Special Measures concerning the New Influenza[3] provides for the authority of the Cabinet to take necessary measures, including the postponement of the due date of monetary obligations, by way of Cabinet Order (Art. 58 of the Special Measures Act). This measure, however, is considered as a true last resort and its implementation has not been seriously considered under the pandemic of COVID-19. Nevertheless, as far as contracts to supply essential services are concerned, such as water supply contracts, many local authorities and large enterprises in Japan have allowed for postponement of payment on a voluntary basis.

The second effect of the crisis is that it may become very burdensome or even impossible for a party to perform its obligation as a result of the in-

2 M. SCHMIDT-KESSEL / C. MÖLLNITZ, Besonderes Corona-Vertragsrecht in Deutschland – warum genügt das allgemeine Vertragsrecht nicht?, in: Effinowicz / Baum, Reaktionen auf Corona im japanischen und deutschen Recht – Beiträge zur virtuellen Tagung am 19. und 20. August 2020 in Hamburg, Max Planck Private Law (Research Paper No. 20/20), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745631,* 26–44.

3 新型インフルエンザ等対策特別措置法 *Shingata infuruenza-tō taisaku tokubetsu sochi-hō*, Law No. 31/2012. This Act was amended in March 2020 so as to be applied to the new Coronavirus diseases (Law No. 4/2020). The Act was further amended in February 2021 to reinforce the authority of the local governors (Law No. 5/2021).

crease in the cost of performance caused by the pandemic. From the viewpoint of contract lawyers, it is a significant question whether the party is still bound to fulfill its obligations under these circumstances or whether the party's non-performance is excused.

Third, even when a contractual obligation is performed, under the pandemic the performance may have become meaningless or the value of the performance may have decreased significantly for the receiving party. In such a case of frustration of purpose, it must be questioned whether the party receiving the performance is entitled to terminate the contract or whether the party is nevertheless under a duty to perform its own obligations, mostly monetary obligations, in full.

Based on the perspective described above, in my presentation the relevant rules in Japanese contract law will be explained. The next section deals with the general rules which are applied to all types of contracts. The primary focus is on the second question above, namely under which conditions non-performance is excused under Japanese contract law. In section III, rules on specific contracts will be discussed. Since labour contract law will be dealt with by Professor KUWAMURA in the next session,[4] my presentation will focus on the rules on lease contracts (*Mietvertrag*). Under the pandemic, disputes regarding rent owed on retail shops and restaurants have also been the focus of considerable public attention in Japan.

II. GENERAL RULES ON CONTRACTS

1. General Remarks

The Japanese Civil Code[5] is the basic legislation providing the general rules on contracts. The general part of the law of obligations (Art. 399 to 520-20) and the general provisions on contracts (Art. 521 to 548-4) provide for rules applied to all types of contracts. In this section of the presentation, it will

4 Y. KUWAMURA, Antworten des japanischen Arbeitsrechts auf die Corona-Krise, ZJapanR / J.Japan.L. 51 (2021) 33 (in diesem Heft).

5 民法 *Minpō*, Law No. 89/1896 and No. 9/1898. The law of obligations in the Japanese Civil Code (part 3) was amended in 2017 (Law No. 44/2017). This was the most wide-ranging amendment since the enactment of the Code in 1896. The revised Civil Code came into force as of 1 April 2020. On the reform of contract law, see T. UCHIDA, Contract Law Reform in Japan and the UNIDROIT Principles, Uniform Law Review 2011, 705; T. YOSHIMASA, The Reform of Japanese Contract Law and the Principle of Self-responsibility, in: Yamamoto / Nishitani / Baum (eds.), Gegenwärtiger Stand und Aufgabe der Privatautonomie in Japan und Deutschland, ZJapanR / J.Japan.L. Special Issue 14 (2019) 27.

be examined whether non-performance caused by the pandemic is excused under these rules.

It is also noteworthy here that whereas some codifications, such as the German Civil Code (BGB) (see § 314), stipulate a special termination ground for long-term contracts (so-called "termination for cause"), the Japanese Civil Code does not adopt such a general rule for termination of long-term contracts. Under Japanese contract law, therefore, parties may terminate long-term contracts only when the conditions stipulated in the general provisions on termination of contract for non-performance (Art. 541 to 543) are met, unless the special provisions on termination of specific types of contracts are applied.[6]

2. Exemption of Damages[7]

Art. 415 of the Japanese Civil Code prescribes that in cases of non-performance, the creditor is entitled to damages unless the non-performance is due to "grounds not attributable to the debtor". Regarding this tautological provision, there was a harsh conflict of opinions in the course of the reform of the Civil Code in 2017. The traditional view saw the prerequisites for damages provided in Art. 415 as a manifestation of the fault principle, i.e. a non-performing party is held liable only when it is at fault. More recent authors, on the other hand, argued that the criteria should not be whether the debtor is at fault in a strict sense but whether it is in breach of an obligation arising from the contract. As a result of an unsophisticated compromise, the revised Art. 415 para. 1 of the Japanese Civil Code provides that the debtor is excused when the non-performance is due to "grounds not attributable to the debtor in light of the contract or other sources of obligation and the established common practice". While the Ministry of Justice (MOJ), the ministry in charge of the reform, states that it has no intention to change the status quo,[8] it remains to be seen how the new provision will be applied in the courts.

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6 With regard to certain types of long-term contracts, such as distributorship contracts, many lower courts in Japan have stated that long-term contractual relationships may be terminated only when there are "unavoidable grounds", although no such rule is provided in Japanese legislation. It is debatable whether the Japanese Supreme Court has approved such a rule. See the judgment, Japanese Supreme Court, 13 December 1998, 民集 Minshū 52, 1866.

7 For the law on damages for breach of contract in Japan, see K. NAKATA, Performance and Monetary Remedies for Breach of Contract in Japan, in: Chen-Wishart / Loke / Ong (eds.), Studies in the Contract Laws of Asia I: Remedies for Breach of Contract (2016) 107, 112–115, 121–138; H. SONO / L. NOTTAGE / A. PARDIECK / K. SAEGUSA, Contract Law in Japan (2019) 152–159.

After the outbreak of COVID-19, it has been debated whether the instances of non-performance caused by the pandemic are excused under Art. 415 of the Japanese Civil Code. The answer to the question depends upon the content of the contract and the direct cause of the non-performance. For instance, in the case of a sales contract, even when the cost necessary for the material procurement has substantially increased because of the pandemic, in most cases the manufacturer (seller) is a superior risk-bearer compared to the demander (buyer), and the former is likely to have assumed the risk of the change in the market price of the material. On the other hand, when it has become impossible to perform a contractual obligation due to special measures taken by local governors based on the Special Measures Act, e.g. a request or order by a governor not to use public facilities (see Art. 24 para. 9, Art. 45, and Art. 31-6 of the Special Measures Act) or an expropriation of the necessary goods (see Art. 55 of the Special Measures Act), it is hard to imagine that either party had assumed the risk of such an impediment before the outbreak. In such a case, therefore, the non-performance may be regarded as having been caused by "grounds not attributable to the debtor", and the liability of the debtor to pay damages hence may be exempted.

3. Force Majeure Clauses

As is clear from the previous subsection, Japanese legislation does not adopt the concept of *force majeure* as a criterion to determine whether non-performance is excused. Nevertheless, many standard contract terms used in Japan stipulate the notion of *force majeure* (不可抗力 *fuka kōryoku*) as a ground of exemption for contracting parties. While *force majeure* clauses are often used in practice, it is not always clear whether the parties intended to provide for a rule different from Art. 415 of the Japanese Civil Code. It is, therefore, necessary to determine by way of contractual interpretation whether the parties actually intended to opt out of Art. 415. Only after that would it be possible to determine whether non-performance caused by the pandemic should be exempted under a *force majeure* clause.

As one of the prominent standard contract terms used for construction contracts (*Bauwerkverträge*), the Standard Contract Terms for Construction prepared by the Central Council for Construction Business, an independent council within the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), provide that, in a case of *force majeure*, the contractor may ask for

8 See T. TSUTSUI [筒井健夫] / H. MURAMATSU [村松秀樹], 一問一答民法(債権関係)改正 [Questions and Answers: The Reform of the Civil Code (Law of Obligations)] (2018) 74–75.

postponement of the completion date and that the loss resulting from the *force majeure* is to be borne by the orderer.[9] In April 2020, the MLIT announced its position that when it has become impossible for a contractor to continue the construction due to the COVID-19 pandemic, it should be regarded as having been caused by *force majeure* as provided in the Standard Contract Terms for Construction.[10] Although the MLIT is not an authoritative body for contractual interpretation in any sense, its opinion should have a certain practical significance, and is likely to affect parties' negotiations outside the courts and arbitration tribunals resolving the disputes on construction contracts. The MLIT's announcement may also affect – both within and outside the courts – the interpretation of other standard contract terms with similar *force majeure* clauses, such as the terms prepared by the Committee on General Conditions for Construction Contracts,[11] which are probably the most widely used private contract terms for construction contracts in Japan.

4. The Limits on the Right to Specific Performance[12]

Just as in the case of other civil law jurisdictions, a creditor is entitled to ask for specific performance under Japanese contract law. Regarding the limits on the right to specific performance, Art. 412-2 para. 1 of the Japanese Civil Code prescribes that "a creditor may not ask for performance of an obligation when the performance is deemed impossible in light of the contract or other sources of obligation and the established common practice". Art. 412-2, which is a new provision inserted by the reform in 2017, is a codification of the impossibility doctrine established by Japanese academia under the influence of German law.[13]

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9 See Art. 21 and 30 of the Standard Contract Terms for Private Construction Contracts (1) (民間建設工事標準請負契約約款[甲] *Minkan kensetu kōji hyōjun ukeoi keiyaku yakkan* [*kō*]).

10 Announcement on 17 April 2020 from MLIT, Real Estate and Construction Economy Bureau, Real Estate Industry Division, available at *https://www.mlit.go.jp/common/001341805.pdf* (in Japanese).

11 民間(七会)連合協定工事請負契約約款 *Minkan (nana-kai) rengō kyōtei kōji ukeoi keiyaku yakkan*. Art. 21 and 28 of these standard contract terms provide the same rule as the Standard Contract Terms for Construction on *force majeure*.

12 For the rules on the right to specific performance in Japan, see NAKATA, *supra* note 7, at 115–121.

13 For the codification of the new Art. 412-2 para. 1, see T. YOSHIMASA, Der Erfüllungsanspruch und seine Grenzen, in: Yamamoto/Koziol (eds.), Das reformierte japanische Schuldrecht – Erläuterungen und Text (forthcoming in 2021). For the reception of German legal theory in Japan in general, see Z. KITAGAWA, Rezeption und Fortbildung des europäischen Rechts in Japan (1970).

Although Art. 412-2 para. 1 adopted a text similar to Art. 415 on damages, most Japanese lawyers believe that the criteria provided in both provisions are not the same. As to the former provision, one author, who was a member of the working group preparing the draft of the reform in 2017, asserts that the exclusion of the right to specific performance should be decided based on a comparison of the value of the performance for the receiving party (creditor), on the one hand, and the cost that will be incurred by the counterparty (debtor) in performing the obligation, on the other.[14] Based on this view, which is explicitly influenced by the rules prescribed in § 275 para. 2 of the German Civil Code and Art. 1221 of the new French Civil Code, a creditor's right to specific performance is excluded when the cost of performance has become grossly disproportionate to its value under the Corona crisis.

5. "The Principle of Change of Circumstances"

In Japanese contract law, "the principle of change of circumstances (事情変更の原則 *jijō henkō no gensoku*)", a doctrine which allows parties to terminate or adapt a contract under a severe change of circumstances, has been established by the courts and academia. While the doctrine is widely acknowledged by Japanese lawyers in general terms, the number of court judgments which have actually applied the doctrine is very limited when compared to the corresponding German doctrine, *Lehre von der Geschäftsgrundlage*. As far as the highest courts in Japan are concerned, it is reported that only one old court decision has allowed a contracting party to terminate a contract by application of this doctrine.[15]

Based on this fact, the Japanese courts would probably be very reluctant to draw upon this doctrine even under the COVID-19 pandemic. If there is any chance that the courts may apply the doctrine under the pandemic, it is likely to be in the case of frustration of purpose because the repercussions of allowing a party to terminate a contract in such a case are relatively small in comparison to other cases.

III. The Effect of the Crisis on Lease Contracts

In the remaining part of my presentation, issues related to the duty of lessees to pay rent under a lease contract are discussed.[16]

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14 Y. Shiomi [潮見佳男], 新債権総論 I [New Law of Obligations, General Part I] (2017) 285–288.

15 See Japanese Imperial Court, 6 December 1944, 民集 Minshū 23, 613.

16 For the rules on lease contracts in Japan in general, see Sono et al., *supra* note 7, 206–216.

1. Rent Subsidy Benefits Program

In July 2020, the Ministry of Economy, Trade and Industry (METI) launched a new financial relief program, the Rent Subsidy Benefits Program (家賃支援給付金 *yachin shien kyūfu-kin*),[17] to financially support small and medium-sized enterprises as well as self-employed who must continue to pay rent for their offices and shops in spite of the decrease in profit under the pandemic. Under this program, enterprises and self-employed whose profit has decreased at a certain percentage (50% in a month or 30% on average for three consecutive months compared to the same period a year earlier) may receive up to a maximum of Yen 6,000,000 (approx. Euro 47,000) (for enterprises) or Yen 3,000,000 (for self-employed) as a subsidy for rent. This program is a measure to support lessees of buildings and lands through public expenditure without affecting the rights and obligations between the contracting parties.

2. Reduction of Rent

A tenant (lessee) who is unable to make profits in a rented building due to the pandemic has a number of potential avenues to reduce the rent to which the parties had agreed.

First, if the owner (lessor) is willing to consent to the reduction of the rent, the lease contract may be modified based on the mutual agreement of both parties. The Japanese government is offering preferential tax measures to owners so as to create an incentive to agree upon a reduction.

Second, where the parties are unable to come to an agreement, it is discussed whether rent is reduced by application of Art. 611 para. 1 of the Japanese Civil Code. Art. 611 para. 1 provides that if it has become impossible to use the object of a lease contract, the rent is reduced in proportion to the value of the part that can no longer be used. This article is based on the idea that a lessor is under an obligation to make the object of a lease contract available for the lessee to use, and that if the object is unavailable for use, the lessor is not entitled to ask for the rent. This means that as long as the object is available for use, the risk of not being able to make benefit by using the office or store is assumed by the tenant. According to the prevailing view, therefore, even if the profit of a tenant has decreased under the COVID-19 pandemic, the rent may not, in principle, be reduced by applying Art. 611 para. 1. On the other hand, however, where the object of a lease contract is not available for use, e.g. due to the closure of a large commercial facility upon the request or order of a local governor based on the Special Measures Act, it is likely that the tenants may ask for reduction

17 See *https://yachin-shien.go.jp/* (in Japanese).

of the rent under this article because in such a case the owner is in breach of its obligation under the lease contract.[18]

Third, a tenant may ask for a decrease in rent based on the Act on Land and Building Leases,[19] the special legislation providing for rules on lease contracts for lands and buildings. Art. 32 para. 1 of the Act on Land and Building Leases provides that when the rent of a building has become unreasonable due to the fluctuations in economic circumstances or in comparison to the rents on similar buildings in the vicinity, the parties may request future increases or decreases in the rent (Art. 11 para. 1 of the Act stipulates the same rule for lease contracts of lands). If the economic deterioration caused by the COVID-19 pandemic results in a decline in market price of rent, the lessee may request the lessor to reduce the future rent to a reasonable amount based on this provision.

3. Termination of Lease Contracts for Non-performance

When a lessee does not perform its obligation to pay rent, the lessor is entitled to terminate the lease contract based on the general rules on termination of contract for non-performance (Art. 541 to 543 of the Japanese Civil Code).[20] As far as termination of lease contracts for buildings and lands is concerned, however, the Japanese courts have established "the doctrine of breach of mutual trust (信頼関係破壊の法理 *shinrai kankei hakai no hōri*)", according to which a lessor may terminate a lease contract only when the non-performance of the lessee amounts to a breach of mutual trust between the parties.[21] Under this doctrine, the Japanese courts have allowed landlords to terminate lease contracts for the reason of non-performance of the lessee's obligation to pay rent only when the non-payment continued for a certain period of time (approximately three months) and when it amounted to a certain sum.

As a matter of course, "the doctrine of breach of mutual trust" will be applied to cases of non-performance by lessees under the COVID-19 pandemic as well. When applying this discretional doctrine, the courts may permit non-payment of rent for a lengthier period of time under the Corona crisis and may even consider the financial situation of each lessee when deciding whether mutual trust has been breached and hence that the lease

18 For a similar interpretation of Art. 611 para. 1 by the MOJ, announced in May 2020, see *http://www.moj.go.jp/content/001320302.pdf* (in Japanese).

19 借地借家法 *Shakuchi shakuya-hō*, Law No. 90/1991.

20 The termination of a lease contract also has an *ex nunc* effect under the Japanese Civil Code (see Art. 620).

21 As a leading case on a lessee's non-performance of the obligation to pay rent, see Japanese Supreme Court, 28 July 1964, 民集 Minshū 18, 1220.

contract may be terminated.[22] Whereas German legislators promptly adopted a new measure to protect lessees in financial difficulties (see Art. 240 para. 2 of the Introductory Act), it is judge-made doctrine that is expected to play a corresponding role under Japanese law.

IV. Concluding Remarks

As these contrasting attitudes of German and Japanese law demonstrate, it could be said that Japanese legislators are more reluctant to change the basic legal rules on contracts and that Japanese jurists are more inclined to respond to the crisis by applying the existing rules flexibly when compared to their German counterparts. This may be a reflection of the preference of the Japanese MOJ to maintain the coherence of legislation under its jurisdiction, i.e. the Civil Code and other basic codes, and thereby to retain the political independence of the ministry. Examining the pros and cons of such an attitude would certainly make for an interesting research agenda.

More importantly, we must examine not only how contract law reacts to the crisis but also how it enables us to reconstitute our society. The COVID-19 pandemic requires us to reinvent many aspects of our social and economic relationships. Contract law, which provides the legal foundation on which our mutual relationships are built, must play its role as a cornerstone of "post-Corona society".[23]

Summary

The Corona pandemic has impacted contract law in many respects: Moratoria due to a shortage of funds caused by the pandemic are just as much at issue as the termination of existing contracts, either because the cost of performance has risen significantly or because the pandemic has rendered performance meaningless or decreased its value significantly. With regard to the increased cost of performance, the question arises whether the debtor's obligation to pay damages for non-performance under Art. 415 of the Civil Code ceases to apply if the non-performance is due to the effects of the pandemic. On the other hand,

22 For application of the doctrine of breach of mutual trust under the pandemic, see also A. Yamanome [山野目章夫], 不動産賃貸借 [Lease Contract of Immovables], ジュリスト Jurisuto 1547 (2020) 53–54.

23 For the author's analysis of the outlook of Japanese contract law, see T. Yoshimasa [吉政知広], 新型コロナウイルス感染症の契約関係への影響と契約法 [The Effect of COVID-19 on Contractual Relationships and Contract Law], 法学教室 Hōgaku Kyōshitsu 486 (2021) 20–21.

the question also arises whether the increased cost renders performance impossible within the meaning of Art. 412-2 para. 1 CivC, releasing the debtor from his obligation to perform.

In the context of lease contracts, a reduction of rent can be considered in accordance with Art. 611 para. 1 CivC if the object of the lease contract has become impossible to use. While the lack of profitability alone does not constitute impossibility according to the prevailing opinion, the impossibility of use may be considered when the object of the lease contract is not available for use due to a request or order of a local governor. Furthermore, if rent payments are not made and the lessor intends to terminate the lease contract as a result, the non-performance of the lessee has to amount to a breach of mutual trust between the parties under the relevant case law. It can be assumed that the courts will further raise the already high requirements for such a breach of trust in light of the pandemic.

Overall, the impression is that Japan, unlike Germany, prefers to deal with pandemic-related contract disruptions through a more flexible application of already existing regulatory models. Further, in the current period of crisis management, the potential of contract law to be a cornerstone of the "post-Corona society" should not be overlooked.

(The editors)

ZUSAMMENFASSUNG

Die Corona-Pandemie macht sich in vielerlei Hinsicht im Vertragsrecht bemerkbar: Moratorien aufgrund pandemiebedingter Liquiditätsengpässe stehen dabei ebenso in Rede wie Möglichkeiten, sich vom Vertrag zu lösen, sei es, weil die Erfüllungskosten deutlich gestiegen sind, oder sei es, weil aufgrund der Pandemie das Leistungsinteresse gesunken oder gar weggefallen ist. Hinsichtlich der im Schwerpunkt behandelten Frage der gestiegenen Erfüllungskosten stellt sich im allgemeinen Leistungsstörungsrecht zum einen die Frage, ob die Schadensersatzpflicht des Schuldners wegen Nichtleistung nach Art. 415 ZG entfällt, wenn diese auf den Auswirkungen der Pandemie beruht. Zum anderen stellt sich die Frage, ob pandemiebedingt gestiegene Erfüllungskosten zu einer Unmöglichkeit der Leistung im Sinne des Art. 412-2 Abs. 1 ZG führen und der Schuldner infolgedessen von seiner Leistungspflicht befreit wird.

Im Rahmen von Mietverträgen kommt als Teil des dortigen besonderen Leistungsstörungsrechts eine Mietminderung nach Art. 611 Abs. 1 ZG in Betracht, die die Unmöglichkeit des Gebrauchs der Mietsache voraussetzt, welche nach herrschender Meinung nicht schon bei mangelnder Rentabilität vorliegt, wohl aber bei dem Verlust der Gebrauchsmöglichkeit aufgrund einer öffentlichen Anordnung. Bleiben Mietzahlungen aus und beabsichtigt der Vermieter auf-

grund dessen eine Kündigung, ist dies nach der Rechtsprechung nur dann möglich, wenn sich die ausbleibenden Mietzahlungen zugleich als Bruch des gegenseitigen Vertrauens darstellen, wobei zu vermuten ist, dass die Rechtsprechung die ohnehin hohen Anforderungen an einen solchen Vertrauensbruch im Lichte der Pandemie weiter hochsetzen wird.

Insgesamt entsteht der Eindruck, dass Japan es anders als Deutschland vorzieht, pandemiebedingten Vertragsstörungen durch eine flexiblere Anwendung bereits bestehender Regelungsmodelle zu begegnen. Bei der gegenwärtigen Krisenbewältigung sollte zudem nicht das Potential des Vertragsrechts übersehen werden, einen wichtigen gesellschaftlichen Grundpfeiler auch nach der Pandemie zu bilden.

(Die Redaktion)