Frustration of purpose and the French Contract Law reform: the challenge to the international commercial attractiveness of English law?

Please do not disseminate – work in progress

Mitja Kovac

University of Ljubljana, Faculty of Economics, Department of Law;
e-mail: mitja.kovac@ef.uni-lj.si

Abstract:

Frustration of purpose remains one of the most ill-defined concepts in the English law of contracts. The same problem has recently attracted also the attention of the French legislature in its modernization of the Code Civil. The French reform entitles courts with broad powers to adjust the contract when unforeseen contingencies have made the bargain unduly costly. This article argues that the introduction of an economically inspired adjustment rule in English contract law should be re-considered in order to maintain its current superior commercial position. If implemented than the “ex ante division of surplus” should be the governing principle in adjusting contract price, since such a remedy will not affect the agreed-upon division of the surplus. Moreover, paper suggests that the recent French reform is indeed a long-awaited step towards a more effective regulation of the notorious “unforeseen contingencies” phenomena, but also suggests that further improvements might be needed. Furthermore, it offers a set of arguments suggesting that the English law in its current form might still be the preferred option in the world of international business transactions. The international commercial attractiveness of English contract law, while being challenged by the new French Civil Code, remains undisputed.

JEL classification: C23, C26, C51, K42, O43
Keywords: Frustration of purpose, unforeseen contingencies, imprévision, commercial attractiveness, comparative contract law and economics
1. Introduction

The 11th of February 2016 was a historical day that trembled the French and worldwide legal practitioners, judiciary and academia. The French government had on that day launched a comprehensive reform and modified the law of obligations in the French Civil Code that have been unchanged since its adoption in 1804. This long-awaited modification has several different aims and motives.1 It seeks to reconcile the current French law of obligations with the Civil Code, it wants to enhance the competitiveness of the French economy by improving the readability of the law and the predictability of economic transactions, it seeks to render the French legal tradition internationally attractive and finally it wants to make French contract law more attractive to the international businesses as the English common law.2

In order to achieve these multiple aims and to encourage traders to choose French contract law as the governing law in international transactions French legislator introduced several groundbreaking changes and innovations. Among them is also the much-debated Article 1195 that introduces the theory of imprévision into French contract law. This new provision enables judges, after a compulsory renegotiation to adjust or to a discharge the agreement that became due to unforeseen contingencies excessively onerous. Namely, under English law the judge can only upheld or terminate the contract or parties can voluntarily negotiate and agree to amend their contract whereas under the new French provision a judge has a power to adjust or to terminate such a contract.

Moreover, it can be also argued that the modern theory of imprévision shows to have internalized the idea of favor contractus following international texts, such as the PICC, the PECL and the DCFR where, in cases of unforeseen contingencies, the need to maintain the contract is notoriously prevailing over other considerations. In this respect the English doctrine of frustration of purpose under which a contract may be only upheld or discharged may be seen as completely old-fashioned and an outdated one.

Yet, one may wonder whether this novel Article 1195 will indeed encourage traders to choose French contract law as the governing law in international transactions, will this provision really re-establish the lost prestige and international influence and boost the competitiveness of the French economy as initially planned? Does the revision make the Code Civil more attractive for international contracting than the English law of contracts? Is the recent introduction of “imprévision” provision in Article 1195 indeed such a fairness and contractual certainty increasing enterprise with overwhelming positive economic effects, which should stop the eclipse of the influence of the French Civil Code on the global legal stage?

One may say that only time will tell whether business find the reformed law more attractive than current law. Yet, there are reasons to be skeptical. This article, while employing inter-

---

disciplinary dynamic analysis, argues that the recent French law reform is indeed a correct, long-awaited step towards more effective regulation of the notorious “unforeseen contingencies” phenomena, but also suggests that further improvement of the current Article 1195 might be needed. Namely, performed analysis shows that the introduced doctrine of imprevision and the novel Article 1195 might fail to boost the business attractiveness and reestablish the lost prestige of French contract law. Moreover, the “old-fashioned” English law might still be the preferred and more economically effective one in the world of international business transactions. In addition, paper suggests that the “adjustment” remedy should be reconsidered also in English contract law in order to secure its current superior international commercial position.

However, if such an adjustment would be introduced also into the English law of contracts than the most triggering question is how the court should actually adjust the contract? This paper argues that ex ante division of surplus should be the governing principle in adjusting contract price, since such a remedy will not affect the agreed-upon division of the surplus. Such an adjustment will warrant, preserve the initial benefits of transaction, solving the problems of windfall gains and losses (risk sharing), deterring the promisee’s opportunistic re-negotiation and preserving the promisor’s substantial relation-specific investments.

The main findings are following: (1) the Article 1195 of Code Civil might be open to criticism since it might represents a source of potential inefficiencies; (2) it might induce different forms of opportunism and may lead to strategic behaviour that shrinks cooperative surplus and minimizes social wealth; (3) the renegotiation requirement should not be part of the Article 1195; (4) clear hierarchy should be introduced where discharge of a contract should be employed as the prime remedy and adjustment merely as an exceptional one; (5) from the business perspective the English “discharge or upheld” of a contract in comparison to the new French provision features as a superior one; (6) the introduction of the economically inspired “adjustment” option could be as an exceptional instrument re-considered also in English law; (7) the ex ante division of surplus should be the governing principle in adjusting contract price; and (8) the new Article 1195 in its current form might fail to enhance the competitiveness of the French economy by improving the readability of the law and the predictability of economic transactions and finally it might not make French contract law more attractive to the international businesses as the English common law.

The new Article 1195 of the Civil Code actually deals with the problem of excuse for non-performance of contracts caused by unforeseen contingencies, which is for many legal scholars and practitioners regarded as one of the vaguest, most difficult and controversial doctrinal concept areas of law and legal practice, presents extraordinary theoretical difficulty. However, although the topic has fascinated legal scholars for centuries, and although it is recognized in one form or another by many modern legal systems, the attempts to explain which contracts should be adjusted by the courts in terms of whether their performance is possible or

---


not have been a failure.® This failure, coupled with commenting misinterpretations and inconsistent terminology, is a source of much confusion® and calls for further investigation.

Consequently, in order to avoid ambiguities in the article, paper will conventionally use the expression ‘unforeseen contingencies’ and defines an unforeseeable event as an ex post verifiable event where the ex ante processing/description cost exceeded the ex ante expected benefits of having provided for such unforeseen contingencies. Furthermore, paper defines “excessively onerous performance” as such where costs of performance increase to a level where they exceed the initial net value of performance. This situation should be analytically distinguished from the cases where such costs became infinite. Namely, if the costs of performance become infinite then analytically speaking one should define such case as the instance of force majeure – impossible performance.®

In this article, the analysis is as positive as it is normative. Moreover, the analytical approach employs inter-disciplinary dynamic® micro-comparison® and enriches it with the concepts used in the economic analysis of law.®

The first part of the paper (Section 2) offers a set of criteria for judicial revision or discharge of contracts. In the second part, these criteria are employed in the assessment of the current French and English contract law. A concise survey compares each legal system, which is then followed by a comparative legal and economic assessment of the general provisions and the related case law (Section 3). A conclusion is provided in section 4.

2. Towards an optimal discharge or adjustment doctrine

This section offers a set of economically based principles for an optimal regulatory intervention in case of unforeseen contingencies where a court should decide whether to discharge or to adjustment the promisor’s obligations. These economic principles may also serve as a business attractiveness benchmark that show what kind of rule commercial parties would like to have as their default rules in the world of international transactions and what kind of rule would boost the competitiveness of an economy.

---

® Whereas legal term of force majeure is generally admitted, as accurate description of complete impossibility of performance.
® Force majeure or impossible performance should be define as one where costs of performance increase to a level where they are infinite – i.e. when no one can perform it.
® Dynamic part of analysis employs recent behavioral insights that offer a novel assessment of how will parties react in their daily behavior upon different set of rules and norms.
1.a Preliminaries

The application of an optimal remedy in instances of unforeseen contingencies that rendered performance excessively onerous should not be unconditional and should fulfill the following preconditions:

(1) Aleatory nature of a contract
If the contract is an aleatory one, where the risk is part of the contract itself, implying an implicit agreement on risk allocation, then enforcement of such contracts regardless of how unforeseeable or onerous they become is suggested.\(^{11}\)

(2) Risk allocated explicitly by parties’ agreement or by well-established rules of law
If the risk was assigned expressly by parties’ agreement or by well-established rules of law on one of the parties, then wealth-maximization requires enforcement of such an agreement.\(^{12}\)

(3) Verifiability and foreseeability
If the answer to the first two requirements is negative, then the question of whether such an event should be regarded as an unforeseeable one should be addressed next. Obviously, the event should be \textit{ex ante} unforeseeable and \textit{ex post} verifiable. I define an unforeseeable event as an \textit{ex post} verifiable event where the \textit{ex ante} processing/description cost exceeded the \textit{ex ante} expected benefits of having provided for such a contingency (i.e. a sort of a processing trade-off).\(^{13}\)

(4) Superior risk bearer capacity
If all previous preconditions are satisfied, then the further requirement is that neither party is clearly the superior risk bearer. In principle if the risk was preventable or insurable then wealth-maximization requires shifting it to the party which is in a better position to prevent the risk from materializing (at lower cost than the other party) or if he is in a better position to insure against the risk (the superior/cheaper insurer).\(^{14}\)

(5) Exogenous contingency
Exogeneity of an event should be considered as a further necessary precondition for the operation of provided optimal rule. If the contingency in concern was due to one party’s fault and was thus not an exogenous one, then no excuse of such a contract should be granted.\(^{15}\) This requirement ensures that the precaution and mitigation decisions are not distorted. Besides, it provides the promisee with an incentive to curtail her reliance investments and hence deters opportunism.

1.2 Merely more onerous performance – no excuse

---

\(^{11}\) If the contract was purely aleatory where the risk of ruinous losses is part of the contract itself, parties, while actually even gambling on future materialization of risks, should be aware and no excuse of performance should be granted.

\(^{12}\) Then there is no occasion to inquire which party is the superior risk bearer, since it is one which has expressly accepted the risk and should thus bear it. See R. Posner and A. Rosenfield, “Impossibility and Related Doctrines in Contract Law: An Economic Analysis,” \textit{Journal of Legal Studies} 88 (1977), p. 90.

\(^{13}\) Hence, the application of the optimal rule requires that the risk in concern must be an unforeseeable one, where \textit{ex ante} processing/description costs exceed expected benefits of having processed/described for such a contingency.

\(^{14}\) As a result of lower risk-appraisal and transaction costs, through self- or market insurance; see Posner and Rosenfield, note 9 above.

Consider a contract in which the promisor agrees to supply the promisee with one unit of a specialized goods or service. The net value of the contract to the promisee is the difference between value and the price, whereas the net benefit to the promisor is the difference between the price and costs of performance. It may also be assumed that the value of performance exceeds the contractual price and the price exceeds the costs of performance. The promisor and promisee would negotiate a Pareto-efficient contract. Such contract would require the promisor to perform if and only if the costs of performance were no greater than the value of performance. Having said all that, assume that an unforeseen event causes a slight rise in costs of performance for such a magnitude that they exceed the contract price, whereas the value of performance remains unchanged and is still above the new costs of performance. Contract is still efficient and should be upheld. Promisor should either perform or breach the contract and pay expectation damages.  

1.2.a. Excessively onerous performance  

Assume that the net value of performance remains fixed, but an unforeseen event raises cost of performance by such a magnitude to significantly exceed the net value of performance. In such circumstances contract should not be performed, since costs of the performance are well above the net value of performance. The contract should be discharged or the promisor should, according to efficient breach theory, breach the contract and pay expectation damages to the promisee. However, I argue that the discharge of promisor's obligation is, in cases of unforeseen contingencies, which simultaneously increases also the value of performance, due to its risk-sharing function, by letting each party bear the risk of not attaining its initial expected profit, a superior remedy.  

Moreover, if the remedy of specific performance is not given, then the promisor could, according to 'efficient breach theory,' breach the contract and pay expectation damages. In this case he will sustain a loss in amount of the difference between the value and the cost of performance with the respect of his initial expectancy. This will then also represent the limit of his risk. However, if due to the same supervening event which increased the cost of performance the value of performance also increases to a new value, which still does not exceed the increased costs of performance, then the situation becomes much more complicated. As an illustration of this example consider events such as generalized inflation which does not merely affect an individual promisor but causes an extraordinary change in market price, where the promisee's benefit expressed in monetary terms, also normally increases. In these circumstances the limit of the promisor's risk in the case of expectation damages has increased.

---


too. The promisor now bears the entire risk of increased cost of performance\(^\text{18}\) and the promisee gains his benefit\(^\text{19}\) with certainty. The promisor, as Trimarchi indicates, in such instance acts not just as an insurer of the promisee's initial expectancy, but also as an insurer of his windfall benefits.\(^\text{20}\) The principles of insurance would simply not warrant imposing a monetary transfer on the promisor in order to grant a promisee a windfall gain.\(^\text{21}\) Hence, in such circumstances a discharge of a contract features as a superior remedy.

1.2.b Performance useless

Imagine an example where after the conclusion of contract an unforeseen contingency materializes, causing a sharp drop of the promisee's value of performance to zero, whereas price and cost of performance remain unchanged. In this case performance for the promisor is perfectly possible since there were no increases in the cost of performance, whereas for the promisee it becomes absolutely useless. However, the mere fact that performance became for the promisee less valuable should not provide for any excuse of performance. Contract should be upheld and promisee should either perform or should breach the contract.\(^\text{22}\) Excuse of performance in such instances may create serious moral hazard problems, provide incentives for opportunistic behavior, sub-optimal amount of contract entry, precaution and damage mitigation, increase transaction costs and assign the risk upon the party who is not the superior risk bearer.

The only possible exemption could be the case where the promisee would also act as an insurer of the promisor's windfall gains. For example, it may happen that after the promisee's breach, the promisor negotiates the contract with another party, using the same object as in the previous contract. The promisor would thus gain a share of the total benefit from the transaction, which is unlikely to differ much from what he would have gained under the initial contract, thus earning profit twice over. He would earn profit through the damages and secondly, through a substitute contract with another promisee. Then the promisee's ‘insurance’ of initial expectancy would give him an ‘unjustified’ gain.\(^\text{23}\) It is, then, only in these rare cases where discharge of such an inefficient contract may be allowed.

1.2.c Adjustment or discharge?


\(^{19}\) Equal to the difference between increased value of performance and the price.


\(^{21}\) Supra note at p. 69.

\(^{22}\) Contrary to the previously discussed issue of excessively onerous performance the promisee is now the one who bears the risk of unforeseen contingencies and who acts as de facto insurer of the promisor, but the main difference is that he only insures the promisor's initial expectancy and not, as before, also his windfall gains. The promisee now bears the unpreventable risk for which he was offset by the ex ante discount in price and where the principle of insurance would then apply.

\(^{23}\) Actually, this situation may represent or correspond to what actually happened in the famous ‘Coronation’ cases.
Finally, assume that again due to an unforeseen contingency both cost and value of performance have increased dramatically, but the value for such a magnitude that exceeds even the new costs of performance, whereas price remains unchanged. Although an unforeseen event caused the dramatic rise in cost of performance, the value of performance for the promisee has risen by an even bigger proportion, so that contract performance is still justified. However, who shall then bear the risk of exceptionally increased cost of performance? Should then the promisor bear all the ruinous losses, also acting as an insurer of the promisee’s unexpected, exceptional windfall benefits? Should the promisor resort to breach or is a discharge or even an adjustment of a contract by a third party a better remedy?\(^2^4\)

First, since the new value exceeds even the new costs of performance, the promisor is caught between the damn of the contract and the “expectation damage” remedy. Namely, either he must perform a contract and due to a sharp increase in cost of performance sustain ruinous losses, or he must pay even bigger expectation damages.\(^2^5\) The promisor is now bearing the entire risk of increased cost of performance and the promisee again gains contractual benefit with certainty. The promisor thus acts not just as *de facto* insurer of the promisee’s initial expectancy, but also as an insurer of his windfall gains. Furthermore, since he has no way of avoiding those ruinous losses, he may, in the most extreme case, even go bankrupt. Over and above the financial shock harms the promisor’s planning and organization, and this implies the destruction of value, which is not offset by any corresponding additional promisee’s gain. In such instance rational, risk-averse parties will prefer risk-sharing. Also, the notion that the promisor would be compensated for his insurance of the promisee’s gains by an *ex ante* increase in price (insurance premium) cannot sustain any critical assessment.\(^2^6\) Hence, in such circumstances, discharge of a contract, which implies risk sharing, is an optimal solution.

However, one may argue that, if we discharge such a contract, then also the useful result of the transaction would be lost. Yet, this may be achieved by a voluntary *ex post* renegotiation of such a contract, or by an adjustment of contract price or of terms of performance.\(^2^7\) If the contractual performance has not yet been made, and there are no windfall losses and gains yet, and if no relation-specific investments on both sides were made either, and all other assumptions stay the same, then a discharge is the optimal solution.

Third, if the promisor has already made a substantial relation-specific investment in preparation for contractual performance, but did not yet perform the contract itself, then the adjustment of a contract price would be the optimal solution. Though a useful result of the transaction may be achieved by free re/negotiation (following discharge), the promisor’s

\(^2^4\) Obviously, if the contingency was due to the promisor’s fault, or if the risk was assigned to him by well-established legal rules, or express provisions, or he was clearly superior risk-bearer, then no excuse should be allowed.

\(^2^5\) Since new value exceeds new costs of performance they would even exceed the dramatically increased cost of performance. Amount is the difference between the new value of performance and contractual price.

\(^2^6\) In addition, Sykes and Goldberg stated that the promisee may lack incentives to mitigate damages and may also over-invest in performance reliance; Sykes, note 20 above, p. 63. See also V. Goldberg, “Impossibility and Related Excuses,” *Journal of Institutional and Theoretical Economics*, 14 (1988).

\(^2^7\) Trimarchi even proposes a rule, entitling the party seeking relief to discharge and the other party to prevent it by offering an adjustment to the contract price, and then transaction costs would be lower than those of free renegotiation, and presumably much lower than the loss which would result from performing the initial contract: Trimarchi, note 20 above, p. 75.
substantial relation-specific investments may be lost as well. Since (a) the promisor may negotiate it with another promisee (then this investment represents pure net loss) or (b) substantial relation-specific investment may affect the promisor’s bargaining position, creating incentives for the promisee’s opportunistic behavior and (c) the fact that the promisor may bear also the loss of those investmens still implies risk-sharing but in different proportions. In order to preserve a useful result of transaction, prevent opportunistic behavior, save substantial relation-specific investments and save transaction costs, the contract price might be adjusted by a third party in order to reflect new market conditions and to achieve socially desirable risk-sharing among the parties.

1.2.d Decrease in costs of performance – no excuse

One should also discuss the decrease in cost of performance due to materialization of exogenous, unforeseen contingencies. This would be the case where costs of raw materials or some other goods needed for production of good or service in question would, due to such a contingency, significantly decrease, thus granting to the promisor some unexpected gains. Although risk materialization causes a sharp decrease in cost of production, this does not affect the overall efficiency of a contract. On the contrary, the contract should be upheld since the performance is still perfectly possible.

1.2.e Which role for the courts in adapting contracts an effect of unforeseen contingencies?

The most triggering question is how the court should adjust the contract and if it is feasible to do so? Will the judges be up to the task to adjust the contract when parties do not reach a negotiated agreement? Will the judges have better information than parties themselves to effectively intervene? The detailed discussion on all of these questions exceeds the scope of this article yet this paper argues that this indeed might be feasible for courts to do. Assume, for illustrative purposes, several different situations.

(1) If performance has not started yet, than a discharge of a contract is, as shown previously, the optimal solution.

(2) If the promisor has already incurred a substantial relation-specific investments than such a contract should be adjusted. Such an adjustment will reflect new market conditions and simultaneously also achieve risk sharing. However, if one opts for an adjustment the pressing question of how to adjust the contract price in order to reflect new market conditions arises. In such circumstances, Bar-Gill and Ben-Shakar propose the so called “ex post equal split” division of ex post gains and losses. However, this paper argues that one should rather employ

---

28 An alternative option would be to discharge the contract coupled with the reimbursement of reasonable reliance expenditures.
30 Numerous studies have demonstrated that a condition concept of ‘equal split’ is the most ‘fair’ one: Guth, W., Schmitberger, R., and Schwartz, B., ‘An experimental analysis of ultimatum bargaining’, J.E.B.O. 3, 367, 1982; Kahneman, Knetsch, and Thaler 1986a; Ochs and Roth, 1989. ‘Equal split’ is by no means unique to the modification context, since it is also prevalent in general bargaining problems. As Gibbard puts it, ‘individuals
the “ex ante division of surplus” mechanism which would achieve also ex post proportional division of new surplus and corresponding loss.\(^{31}\) Indeed, if ex ante division of surpluses agreed by initial contract was already an ‘equal split’ one, then application of this ‘ex ante division of surplus’ rule would also in the adjustment procedure re-produce the initial ‘equal split’ division of surpluses and losses.

According to the notion of the ‘ex ante division of surplus’ the contract price should, in cases when the promisor experiences an excessively onerous increase in costs of performance, be modified to a newly adjusted contract price, which should not affect the agreed-upon division of the surplus and satisfies the following:

\[
\text{New adjusted contract price} = \text{new excessively high costs of performance} + (\text{new net value of performance} - \text{new excessively high costs of performance}) \times (\text{agreed ex ante price} - \text{initial cost of performance}) / (\text{initial net value of performance} - \text{initial cost of performance})
\]

Thus, adjusting the price of such a contract will warrant, preserve the initial benefits of transaction, solving the problems of windfall gains and losses (risk sharing), deterring the promisee’s opportunistic re-negotiation and preserving the promisor’s substantial relation-specific investments.

However, after this neat analytical discussion one may actually wonder whether a judge should be entrusted with such economic decisions, whether he would be capable of employing such a sophisticated analysis, solving complicated equations and adjusting the contract according to this complicated formula? Will judges have enough economic expertise and information to make wise decisions? It may be argued that an experienced, well-trained judge in the developed world might well be up to the task.\(^{33}\)

---

\(^{31}\) This notion that the price at the modification stage should depend on the original transaction relates to the empirical findings regarding the strong influence of the reference points of the transaction on people’s conception of ‘fair’ outcomes. Moreover, these findings suggest that exogenous shocks, leading to an increase in the cost of performance, justify an increased price that maintains the reference point: Kahneman, Daniel, Knetsch, L. Jack and Thaler, H. Richard, *Fairness as a constraint on profit seeking: Entitlements in the market*, American Economic Review 76, 1986b, pp. 728-41.

\(^{32}\) In mathematical terms newly, adjusted price should satisfy \(P_{n} = C_{pn} + (V_{n} - C_{pn}) \times (P - C_{p}) / (V - C_{p})\). Let \(V\) denote the net value of contractual performance, \(P\) denote the agreed price, \(C_{p}\) the initial cost of performance, \(C_{pn}\) denote the new excessively high costs of performance and \(V_{n}\) denote the new net value of performance. Suppose that the original contract price, denoted by \(P\), allocates a larger share of the ex ante surplus, denoted by \(V - C_{p}\), to the promisee. If the promisee is to receive a fraction of initial expectancy, denoted by \((P - C_{p}) / (V - C_{p})\) of the actual surplus, denoted by \((P_{n} - C_{pn}) / (V_{n} - C_{pn})\), the changed circumstances should not affect the agreed-upon division of the (new) surplus. Since if \((P_{n} - C_{pn}) / (V_{n} - C_{pn}) = (P - C_{p}) / (V - C_{p})\), then \(P_{n} = C_{pn} + (V_{n} - C_{pn}) \times (P - C_{p}) / (V - C_{p})\).

\(^{33}\) However, Buchanan holds that judges should not be entrusted with economic decisions, since they lack the training and information to make them wisely; Buchanan M. James, “Good economics – bad law,” 60 Virginia Law Review 3, 1974, 483-92.
3. The new French *imprévision* provision for unforeseen contingencies in the reformed Code Civil

In French law the effect of unforeseen circumstances upon existing contractual relations has traditionally been handled through the doctrine of *force majeure*.\(^{34}\) That traditional position of French civil law\(^{35}\) was clear and it produced a clear division: it was all or nothing. French civil law did not allow discharge of, or adjustment to, a contract which becomes excessively onerous.\(^{36}\) A contract had to be performed, however onerous its performance has become. Civil jurisprudence, as opposed to administrative, have been rejecting the theory of *imprévision*; it refused to give the judge the power to revise or discharge the contract even if it has become ruinous for one of the parties.\(^{37}\) The courts could not substitute a ‘presumed agreement’ for the ‘actual agreement’ expressed by the parties and no ‘equitable consideration’ permitted courts to vary the contract.\(^{38}\) This rigid approach was followed until 2016,\(^{39}\) although certain latest decisions may be interpreted as slowly starting to recognize the moderating power of the courts, pursuant to Articles 1134, al. 3 and 1135 C. civ.\(^{40}\)

3.2 Recent modernization of Code Civil

Under the impression of the international success of provisions on unforeseen contingencies many French scholars had argued for a long time that the before mentioned decision in *Canal de Craponne*\(^{41}\) and the subsequent case law has to be abolished.\(^{42}\) These attempts at reform actually began more than hundred years ago and have intensified greatly in the last 15 years. Finally, on 11 February 2016 the French law of obligations as reflected in the French Civil Code has been after 200 years finally modernized and the revised section came into force on 1 October 2016.\(^{43}\) French jurisprudence while recognizing the obsolete principles and serious

---

\(^{34}\) See David, René, ‘Frustration of Contract in French Law,’ 28 J. Comp. Leg. Pts. III - IV, 11, 3\(^{rd}\) ser., 1946. The theory of *force majeure* was construed by French courts around two short Articles of the Code Civil; Article 1147 C.civ. and Article 1148 C.civ; David, *supra* note 1, p. 11.


\(^{40}\) Beale, Hartkamp, Kötz and Tallon, *supra* note 45, pp. 629.


\(^{42}\) See e.g. Philippe, »Changement de circonstances et bouleversement de l'economie contractuelle,« Bruylant, 1986.

incompleteness of the Code offered also set of arguments supporting this long-awaited modernization of the French Civil Code.\textsuperscript{44}

Moreover, French jurisprudence realized that the influence of the Code abroad had declined sharply.\textsuperscript{45} Furthermore, French contract law was perceived to be less attractive than for example English common law as a governing law of choice in international commercial contracts.\textsuperscript{46} It has been perceived as less commercial and to compare unfavorably on measures such a s pragmatism and the promotion of transactional certainty.\textsuperscript{47}

Hence, recent modernization of Civil Code was intended to make it more competitive in a globalizing world and to become more attractive to the international businesses as the laws of some common law countries.

The new Code contains also an innovation on unforeseen contingencies that can be found in Article 1195 of the new Code Civil. This article gives the court broad powers to adjust the contract when unforeseen circumstances have made the bargain unduly costly.\textsuperscript{48}

This Article 1195 departs from the previous French approach and reverses the famous \textit{Canal de Craponne} decision and states:

\begin{quote}
\textit{(1) If an unforeseen contingency that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.}

\textit{(2) In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.}\textsuperscript{49}
\end{quote}

The change is fundamental, as the previous principle was the non-interference of a judge in the contract. As of 1 October 2016 a judge is able to interfere in the contract signed after this date. In fact, as of 1 October 2016, a contract might be revised or terminated due to unforeseen circumstances that make it too onerous for one party to meet its obligations. Parties which cannot agree on this can now ask a judge to adapt or terminate a contract.

\subsection*{3.3. Comment on the new Article 1195 of the Civil Code}

Is the new Article 1195 in line with economic recommendations and will this new provision on change circumstances indeed make French contract law more competitive in a globalizing world and make it also more attractive to the international businesses as the English law?

\textsuperscript{44} Moreover, this disconnect party was blamed for the loss of influence of the Code abroad; Solene Rowan, »The New French Law of Contract,« 46 International and Comparative Law Quarterly 4, 2017.

\textsuperscript{45} Ibid.


\textsuperscript{47} Ibid.

\textsuperscript{48} Rowan, supra note 31.

\textsuperscript{49} New Code Civil, Article 1195, Chapter IV, The Effects of Contracts, Section 1, The Effects of Contracts between the Parties, Sub-section 1.
The new Article 1195 indeed clarifies that parties are free to dissolve their contract if their renegotiation remains fruitless and also allows each of them individually to seek a judicial adaptation of the contract. The new provision also looks very similar to its German counterpart with three main differences. First, the German provision in Article 313 BGB provides a clear hierarchy between its two remedies while the new French provision gives the court absolute discretion on whether to adapt or to discharge a contract. Namely, Article 1195 (2) provides that the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine. Second, the German provision does not contain specific requirement of continuous performance during the re-negotiation stage. Third, Article 313 BGB does not have any requirement to renegotiate whereas its French counterpart clearly requires parties to renegotiate and their failure than triggers the application of adaptation/discharge remedy. Moreover, also several international instruments contain the renegotiation requirement. Lutzi for example even argues that due to this “renegotiation” requirement new Article 1195 may even be more progressive than the German Article 313 BGB. In addition commentators also argue that this emphasis on the renegotiation requirement will also have (in comparison to its German counterpart) a beneficial economic effect and should also reduce transaction costs for commercial parties by minimizing the need for such hardship clauses.

However, rigorous analysis reveals several shortcomings of the new Article 1195. The main shortcoming of the article might be that is central criterions are tautological. There is no definition of “unforeseeable circumstances” and current definition depends on what the law tells to parties that is unforeseeable. Parties may reasonably expect that the law is applied, and therefore the law has to better define what are “unforeseeable circumstances”. A more precise criterion would define an unforeseeable event as an ex post verifiable event where the ex ante processing/description cost exceeded the ex ante expected benefits of having provided for such unforeseen contingencies. Moreover, there is no explanation whether these circumstances must be outside of the control of the parties. The exogeneity of an event should be, besides the unforeseeability, verifiability, and superior risk bearer (prevention, insurance) capacity, considered as a necessary condition of any provision on change circumstances. Namely, if the contingency in concern was due to one party’s fault and was thus not an exogenous one, then efficiency demands no excuse of such a contract. The requirement of exogeneity of an event which renders performance excessively onerous actually ensures that the precaution and mitigation decisions are not distorted. Besides, it provides parties with an incentive to curtail their reliance investments and hence deters serious moral hazard problems. In addition, French provision

---

51 Ibid, at pp. 112.
52 However, Friedman notes that theory viewed as a language has no substantive content and may be regarded as a set of tautologies. These tautologies have an extremely important place in economics and other sciences as a specialized language or analytical filling system for organizing empirical material. Yet, Friedman also stresses that an economic theory must be more than a structure of tautologies if it is able to predict and not merely describe the consequences of action; if it is to be something different from disguised mathematics; Friedman Milton, “Essays in Positive Economics: The Methodology of Positive Economics,” University of Chicago Press, 1966, pp. 3-43.
should also provide, require that an adaptation or discharge of a contract is not possible if the contractual relationship was an aleatory one, if the risk in question was assigned expressly by the parties’ agreement or by well established rules of law, if the event was foreseeable, endogenous, preventable, or insurable.

Furthermore, there is no guidance as to when performance should be considered as “excessively onerous”. A more precise criterion would define “excessively onerous performance” as one where costs of performance increase to a level where those costs exceed the initial net value of performance. There should be also a clear distinction between “excessively onerous performance” where excuse of performance should be granted from the merely “more onerous performance” where contract should be upheld and no excuse should ever be granted. Such merely “more onerous performance” should be defined as the one where the costs of performance exceed the contract price but not yet the value of performance to the promisee. However, if for example the costs of performance due to unforeseen contingencies become infinite then we one should speak about the impossible performance where doctrine of force majeure/impossibility is applicable.53

Another drawback of the new French provision in relation to English and German one is the absence of any clear hierarchy between adaptation and discharge. The employment of these two instruments is actually at court’s absolute discretion. If the adaptation would be regarded (as in the German jurisprudence) as the first remedy and the discharge as merely a secondary option then it should be criticized as a source of potential inefficiencies. That is to say, the adjustment option, as a remedy, should be applied restrictively and only in limited instances where an unforeseen contingency raised exceptionally both the costs of performance and simultaneously also the value of performance by such a magnitude that the new, increased value of performance now exceed the simultaneously increased costs of performance. This implies that the contract is, after materialization of unforeseeable risk, still efficient, socially desirable and hence should take place. Yet the adjustment should be granted only if one of the parties has made reasonable, substantial relation-specific investments, or if the promisor has already performed. In all other instances where relief should be granted, the discharge of contract is the superior remedy. Otherwise, adjusting, for example, a contract which became inefficient would entail direct welfare losses, provide incentive for an inefficient amount of relation-specific investment, deter mitigation of damages, induce opportunistic behavior, would increase transaction costs and will entail inefficient ex post allocation of risk. Such a rule should generally be subjected to severe criticism and should be avoided, due to efficiency-based considerations. In other words, a discharge of a contract is due to its risk-sharing function, by letting each party bear the risk of not attaining its initial expected profit the optimal remedy and achieves the fairest allocation of risks and resources. Hence, clear hierarchy should be introduced in Article 1195 with the discharge of a contract as the prime, first remedy and the adaptation as merely as an exceptional secondary option.54

Last but not the least, the “renegotiation” requirement might induce opportunism, hold up problem and moral hazard. The requirement in Article 1195 that obliges a party that bears

---

53 To satisfy the force majeure threshold, we argue, costs of performance must become infinite.
54 As already stated adaptation should be granted (if at all) restrictively, under severe set of pre-conditions and in a very limited amount of cases.
ruinous losses to ask the other contracting party to renegotiate the contract and even to continue to perform his obligations (although such performance is now excessively onerous) during this renegotiation may destroy the contractual balance, create a superior bargaining position for one party and shift the negotiation position to the detriment of a weaker party (his bargaining position is weakened). Namely, a party's negotiation position is determined by two elements. First, and most importantly, what happen when negotiations fail. The second element is related to time. As negotiations last longer, the opportunity costs of negotiating increases. These costs include lawyer's fees, foregone opportunities to contract with other parties, excessively onerous costs of performance, interest rates on capital ect. These costs can also include the cost of destructive behavior (i.e. You Quit First game). As time goes by, the cooperation surplus may shrink, but not necessarily in a symmetric way. Hence, the party that has least to loose (and those are usually non-performing parties in unforeseen contingencies settings) is in the strongest, superior bargaining position (ceteris paribus) and can extract rents and unjustified gains.

Moreover, renegotiation requirement of Article 1195 has further three backdrops. First, is the fact that renegotiations are costly in time and effort. Second, in a mandatory renegotiation process a danger of the so called “hold up problem” occurs when one of the parties might enjoy an advantage over the other by taking that party for a ride in the renegotiation by demanding for example an unreasonable payment or fulfillment of special conditions. Third, renegotiation may not at all cure problems of undesirable risk bearing. Namely, if specific performance (as in French contract law) or a very high damage remedy is available for a breach of a contract than the promisor while renegotiating might have to pay a very large amount to the promisee to be excused from performance when performance costs would be great.55

However, would than a right to terminate a contract if such renegotiations fail or if one of the parties face such a hold-up problem represent a feasible antidote for such problems? Namely, Article 1195 (2) provides that in “the case of refusal or the failure of renegotiations, the parties may agree to terminate the agreement” and in relation to this provision one may indeed argue that this possibility represents a solution for a hold-up problem since promisor could simply refuse to renegotiate and terminate the contract. Yet, such a termination would provide an equitable solution merely in cases of mutual termination of a contract.56 In other instances such a possibility than induces hold up problem and implies that the other non-terminating party can afterwards claim expectation damages (or even specific performance) and again a promisor would be caught between the damn of the contract and the expectation damage remedy. Namely, either he must perform a contract and due to a sharp increase in cost of performance sustain ruinous losses, or he must pay even bigger expectation damages. This would then constitute a large risk for the promisor, which he never accounted for (he never charged the insurance premium to bear such an increased risk) and which he might not want to bear. Such factors associated with compulsory renegotiation requirement should be taken into account in assessing renegotiation as a device for tackling the problems of unforeseen contingencies. Hence, the renegotiation requirement in Article 1195 might be open to criticism

56 Such a mutual termination requires a consent of a non-performing party which again creates a superior bargaining position for this non-performing party (which than creates a hold-up problem).
since it may open the doors to hold up problems, to different forms of extortions, moral hazard and might deter cooperation, diminish certainty and over all good faith among parties.

In addition, behavioral economics\(^{57}\) offers another set of informative arguments that support critical attitude towards the “renegotiation requirement” contained in Article 1195 of Code Civil. Namely, Nobel prize winners for economics Daniel Kahneman and Amos Tversky have identified in their prospect theory the so called “endowment effect” where asymmetric intensity of the motives to avoid losses and to achieve gains features as typical behavioral pattern among humans.\(^{58}\) Loss aversion, reference points and anchors in individual decision making are according to Kahneman an ever-present feature of negotiations and especially of renegotiations of an existing contract.\(^{59}\) The existing terms define reference points and a proposed change in any aspect of the agreement is viewed as a concession that one side makes to the other.\(^{60}\) Identified loss aversion in the renegotiation process creates an asymmetry that makes agreement extremely difficult to reach.\(^{61}\) Moreover, renegotiations over a shrinking pie, which is the case of unforeseen contingencies where contractual surplus is severely diminished by its excessively onerous performance, are especially difficult because they require an allocation of losses.\(^{62}\) Negotiators in such circumstances when they bargain over losses (i.e. excessively onerous performance) tend to make fewer concessions, find fewer integrative solutions and more often fail to reach agreement than negotiators bargain over gains.\(^{63}\) Such renegotiations may than open the doors to unjust and unfair results, different forms of extortions, opportunism and may lead to strategic behavior that shrinks cooperative surplus and minimizes social wealth.

Hence, a discharge of a contract without the duty to renegotiate appears as the first best solution. Moreover, parties may after the initial contract is discharged freely renegotiate, or negotiate with another contractor in the light of new circumstances a new, first best contract, which would then reflect the new market conditions and achieve wealth maximization.

To sum up, recent modernization of Civil Code and introduction of the new Article 1195 which was intended to make French contract law more competitive in a globalizing world and to become more attractive to the international businesses as the law of England might not

---


\(^{60}\) Ibid.

\(^{61}\) “The concessions you make are my gains, but they are my gains, but they are your losses; they cause you much more pain than they give me pleasure. Inevitably, you will place higher value on them that I do. The same is true, of course, of the very painful concessions you demand from me, which you do not appear to value sufficiently;” Ibid. Neale and Bazerman have also emphasized that the probability of negotiation failure increases when negotiators are both risk-prone; Neale M. A. And M.H. Bazerman, “Cognition and rationality in negotiation,” Free Press, 1991.

\(^{62}\) People tend to be much more easygoing when they bargain over an expanding pie, concessions that increase one's losses are much more painful than concessions that forego gains; ibid.

achieve its goals. However, it should be noted that whether the French judges are up-to-the adjustment task and if they will indeed want to adjust contracts rather than simply discharge them remains to be seen.

4. The English approach

English common law operates with the concept of frustration of purpose which occurs when contractual obligations can no longer be performed as a result of unforeseen, unforeseen contingencies which are beyond the control of either party. The frustration of contract doctrine generally operates to discharge a contract where, after the formation of the contract, an event renders performance of the contract impossible, illegal, or something radically different from that which was in the contemplation of the parties at the time of entry into the contract.

In addition, the common law of contracts proceeds from the basis that liability for non-performance of contractual obligations is strict. Except in cases of personal services, the failure to bring about the state of affairs promised in the contract will amount to a breach of a contract and give rise to a claim for damages. English common law, at least as a general rule, has not developed the doctrine of dissolving or adapting a contract in cases of solely excessively onerous performance. It also appears that there is, at least in legal principle, no full analogue to the French concept of imprévision.

3.2 The economic and commercial attractiveness of English law

Previous insight that the English common law on doctrinal level, at least as a rule, has not developed the doctrine of dissolving or adapting a contract in cases of solely excessively onerous performance, however, calls for further dynamic functional analysis. Insightfully, assessment of English case law reveals that English courts do not always distinguish sharply

---


between excessively onerous performance and impossibility.\textsuperscript{70} One can occasionally find statements in cases, as for example in \textit{Horlock v. Beal}, where Lord Loreburn said that ‘the performance of this contract became impossible, which means impracticable in a commercial sense.’\textsuperscript{71} Stone et al. point out that impossible performance encompass also the notion of ‘commercial impossibility.’\textsuperscript{72} In \textit{Davis Contractors Ltd v Fareham UDC}\textsuperscript{73} for example court clearly stated that merely more onerous performance should not be a ground for relief and that this case was not one of commercial impossibility, since Davis Contractors were able to fulfil their contractual obligation at a cost of just 23 per cent over the contract price. The essence of their claim was that it had become commercially disadvantageous for them to perform the contract at the agreed price. Yet, such a merely ‘more onerous performance’ and not ‘excessively onerous performance’ is not a recognized ground for discharging a contract under the law of England.\textsuperscript{74} Such a rule is also, as discussed previously, also a correct economic solution.

English law generally also requires fulfillment of several preconditions in order to trigger the application of a frustration of purpose excuse. That is to say, a party is released from his contractual obligations if the frustrating event is supervening, not provided for, unforeseen, arises without the fault of the parties, and makes further performance impossible or frustrated.\textsuperscript{75} Moreover, these preconditions also correspond with economically suggested ones discussed in the first section pot the paper, and which should be fulfilled in order to increase its commercial attractiveness.

First, the traditional general rule is that an event cannot normally amount to frustration if it is covered by a term of contract.\textsuperscript{76} If the contract does make express provision for the event in question then it is the contract that will regulate the impact that event will have on the obligations contained in the contract, and not the doctrine of frustration.\textsuperscript{77} Second, an event cannot be treated as frustrating a contract if it was one which was foreseen or foreseeable at the moment of the formation of the contract, and therefore within the contemplating scope of the parties.\textsuperscript{78} Thus, a party cannot treat a risk which could have been foreseen and against which provision could have been made as a frustrating event.\textsuperscript{79} However, it should be emphasized that, as McKendrick points out, English jurisprudence has an obvious difficulty with this formula, namely identifying what is and what is not foreseeable at the moment of entry into the contract.\textsuperscript{80} Bell argues that the doctrine of frustration applies when it

\textsuperscript{70} Treitel, \textit{supra} note 64, pp. 257.

\textsuperscript{71} \textit{Horlock v. Beal} (1916) 1 A.C. 486, 499.

\textsuperscript{72} Stone et al, \textit{supra} note 118 at pp. 486.

\textsuperscript{73} 1 \textit{Davis Contractors Ltd v Fareham UDC} 956 AC 696.

\textsuperscript{74} Stone et al, \textit{supra} note 67 at pp. 486.


\textsuperscript{76} McDermott, \textit{supra} note 63, p. 1021.

\textsuperscript{77} However, if an event in concern became by operation of law illegal then its \textit{ex ante} assignment will not prevent the operation of the frustration doctrine: McKendrick, \textit{supra} note 92, p. 860.

\textsuperscript{78} Bell, \textit{supra} note 125, pp. 208. See generally Hall, G. Clifford, 'Frustration and the Question of Foresight,' 4 L.S. 300, 1984.

\textsuperscript{79} Treitel, \textit{supra} note 64, pp. 466 \textit{et seq}.

\textsuperscript{80} McKendrick, \textit{supra} note 65, p. 862.
would not be reasonable to have expected the parties to have made specific provision for a risk, or to have treated it as an ordinary risk which they expected to have run. However, McKendrick argues that the question of how foreseeable an event has to be before it prevents reliance being placed upon the doctrine of frustration is one of degree. On the other hand, Beatson argues that this is just a question of a construction of contract. Furthermore, sometimes it is suggested that, in order for frustration to occur, an event in question should be unforeseen or unexpected. In McGuill v. Aer Lingus & United Airlines, McWilliam J. spoke in terms of an unexpected event and held that if a party anticipated or should have anticipated the possibility of an event, he should not be permitted to rely on the happening of the event as causing frustration.

However, in the much criticized decision Ocean Tramp Tankers Corp v. V/O Sovfrach, Lord Denning MR surprisingly suggested that the requirement that the event should not have been foreseen essentially means that the parties should not have made a provision for it in the contract. He states:

*It has frequently been said that the doctrine of frustration only applies when the new situation is ‘unforeseen’ or ‘unexpected’ or ‘uncontemplated,’ as if that were the essential feature. But it is not. It is not so much that it is ‘unexpected,’ but rather that the parties should have made no provision for it in their contract.*

This reasoning, despite invoked criticism, may correspond with previously emphasized economically inspired foreseeability definition and also fulfills the necessary preconditions.

Third, it is well established that a party may not rely on an event as frustrating the contract if it is due to his own conduct or to the conduct of those for whom he is responsible (self-induced). In order to raise a plea of frustration, it is essential that the event is outside the control of either party, with no fault of any kind; even negligence would suffice.

Fourth, according to English law a frustrating event must be such as to render performance radically different from that undertaken by the contract. Although, as commentators agree, the mere fact that the performance of a contract becomes just more onerous does not suffice, it is, however, far from clear whether excessively onerous performance might count for

---

81 Bell, *supra* note 74, pp. 208.
82 McKendrick illustrates this with an example of an earthquake which is foreseeable since we are all aware they may take place. But in some parts of the world they are more foreseeable than in others: McKendrick, *supra* note 65, pp. 862.
83 Whether contract was intended to continue to be binding in that event or whether, in the absence of any express provision, the issue has been left open and thus allowed to be determined by the law of frustration: Beatson, *supra* note 92, pp. 548.
84 McDermott, *supra* note 63, pp. 1020.
85 (3 October 1983, unreported), High Court; quoted in McDermott, *supra* note 63, pp. 1020.
87 (1964) 1 All ER 161.
88 (1964) 1 All ER 161 at 166.
89 See Treitel *supra* note 64, pp. 468.
90 Treitel, *supra* note 64, pp. 682 et seq. See also McKendrick *supra* note 65, pp. 866; Beatson, *supra* note 65, pp. 550; Smith, *supra* note 67, pp. 186; Whincup, *supra* note 74, pp. 266.
91 McDermott, *supra* note 63, pp. 1024. See also Bell, *supra* note 74, pp. 209.
92 It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must also be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing than that contracted for; Lord Radcliffe, *David Contractors Ltd. v. Fareham U.D.C.* (1965) AC 696, 729.
93 Treitel, *supra* note 64, pp. 244 et seq.
'something radically different,' and its final assessment is at the end left to the ‘law in action.’

Moreover, English commentators, while discussing the issue of increased costs of performance alone, and while agreeing that English law does not grant any relief in such a case, always utilize the phrase ‘a more onerous performance.’ It should be emphasized that the condition that just a more onerous performance does not suffice for a plea of frustration completely corresponds with economic suggestions. In such circumstances a promisor should not be excused and should bear the risk of the increased cost of performance. However, when these costs increase to a level where they also greatly exceed the initial net value of performance, then the case of ‘excessively onerous performance’ occurs. In this case an excuse under severe conditions may be granted.

If one employs such a definition of “excessively onerous performance” and analyses English cases designated in the comparative literature as the “impossibility ones” than one finds striking results. For example, the notorious Taylor v. Caldwell, employed in English contract treatises as an illustration of the scope and the basis of the doctrine of frustration and regarded as the origin of the modern English doctrine of frustration offers a first evidence. Certainly it is beyond the scope of this paper to discuss the numerous legal comments this landmark decision has produced; however one should note that English literature regards this case as a classic example of a frustrated contract that has become impossible to perform. Yet if one compares the facts of this case with the “excessively onerous performance” definition, then it becomes evident that performance did not become impossible since the costs of performance did not become infinite, but rather excessively onerous, where the costs of performance greatly exceeded the initial net value of performance. For example, the defendants could actually build a similar concert hall, but in doing so this would indeed entail great expenses, where the costs of performance would not be infinite but merely excessively onerous. Thus, analytically speaking this case should be discussed as one of “unforeseen contingencies” or of “excessively onerous performance” and not as one of the absolute impossibility.

As a further illustration that English law offers relief in cases of unforeseen contingencies where performance has not been impossible but “excessively onerous,” consider the Jackson v. Union Marine Insurance Co Ltd. case. Although legal commentators employ this case as an example of how a contract may be frustrated where the subject matter of the contract is unavailable for use in the performance of the contract, Economic assessment reveals that actually this is again a case where costs of performance became not infinite (impossibility), but rather excessively onerous where costs of performance greatly exceed the initial net value of performance.

---

94 Recall that when the costs of performance, due to the risk of materialization, suddenly increase in excess of the contract price but not above the initial net value of performance, one deals with the case of merely more ‘onerous performance.’
95 Taylor v. Caldwell, 3 B & S 826, Queen's Bench (1863). Reported in McKendrick, supra note 65, pp. 871.
96 See e.g. McKendrick, supra note 65, pp. 869.
98 See e.g. McKendrick, supra note 65, pp. 894.
100 See e.g. McKendrick, supra note 64, p. 894.
Finally, it should be stressed out that it is impossible to formulate an exhaustive list of possible frustrating events, yet the following ones have been recognized by the courts as capable of amounting to frustrating events: impossibility; destruction of subject matter, death or incapacity, unavailability or delay, government intervention, supervening illegality and frustration of purpose. However, one should also note that the self-induced frustration, foreseen events and events provided for represent the limitations on the doctrine of frustration.

Having said all that, the economic and commercial attractiveness of English law in comparison to its French counterpart appears as obvious. Namely, definitions of “foreseeability” and of unforeseeable circumstances are not tautological. The requirement that event has to be exogenous, non-aleatory, not provided for and not specifically accepted, allocated by parties agreement or by a specific legal provision clearly corresponds with the economic suggestions for an increased economic and commercial attractiveness. Moreover, such requirements actually ensure that the precaution and mitigation decision are not distorted; provide incentives to curtail party’s reliance investments and deter serious moral hazard problems. Furthermore, English law in line with previously discussed economic suggestions does not offer any relief in cases where performance became merely more onerous. Yet, it should be emphasized that current English law could be from economic perspective improved further by introducing a clear distinction as to when a performance should be considered “excessively onerous.” In addition, English courts may only upheld or discharge a contract, whereas an adjustment of a contract is yet not applied. It may be argued that such a solution is indeed an optimal one, since it implies stability, predictability and commercial attractiveness. Discharge of a contract is as discussed previously due to its risk-sharing capacity the most preferable and from the economic perspective generally also an optimal remedy.

However, the economic attractiveness of English law could be boosted even further with the introduction of the adjustment possibility. For example, the Dutch and German provisions on adjustment offer a great advantage since they do allow courts to adjust the contract in precisely those previously discussed exceptional circumstances, whereas English law as stated automatically ends the contract. Of course such an adjustment should not be unconditional and should be employed as an exceptional instrument applicable only in circumstances where parties incurred extensive relation-specific investments and where due to an exogenous, non-aleatory, not provided for, unforeseen contingency both cost and value of performance have increased dramatically, but the value for such a magnitude that exceeds even the new costs of performance, whereas price remains unchanged. Although the exogenous, unforeseen event caused the dramatic rise in cost of performance, the value of performance for the promisee has

---

101 As in the Taylor v. Caldwell case, the performance did not become impossible, with infinite performance costs, but actually excessively onerous, where the costs of performance due to perils of the sea greatly increased to exceed the initial net value of performance. Since the ship was after one month refloated and after five months again cargo-carrying, it may be argued that at even bigger expenditures the time necessary to repair her would be even shorter, so it is obvious that the costs of performance did not become infinite, but actually in great excess of the initial net value of performance.
102 Stone et al., supra note 123, at pp. 500 et seq.
risen by an even bigger proportion, so that performance is still justified. Such a desirable performance than calls for an adaptation possibility.

Finally, in comparison to the new French provision, the English law does not have any “renegotiation” requirement, which, as showed, might represent a source of potential inefficiencies, unfairness and opportunism. Under such “renegotiation” requirement, the English “discharge or upheld” rule in comparison to the new French Article 1195 economically speaking still features as a commercially superior one.

7. Conclusions

The debate triggered by recent French law reform on frustrated purpose of contracts is challenging for contemporary legal scholarship. Namely, the new Article 1195 of the French Civil Code deals with the problem of excuse for non-performance of contracts caused by unforeseen contingencies, which is for many legal scholars and practitioners regarded as one of the vaguest, most difficult and controversial doctrinal concept areas of law and legal practice. The importance of the French reform lies in its doctrinal dimension by giving the court broad powers to adjust the contract when unforeseen contingencies have made the bargain unduly costly. It is also praised for the paradigm shift that it marks and for an increase in legal certainty, contractual fairness and for its extension of positive economic effects. Yet, under the traditional English law, in sharp contrast to new French provision, a contract may be only upheld or discharged. Does this English “all or nothing” doctrine in comparison to the new French flexible “adjustment” possibility represents a fist sign of the decline of the famous commercial attractiveness of the English common law of contracts? Is the recent introduction of “imprévision” provision in Article 1195 indeed such a fairness and contractual certainty increasing enterprise with overwhelming positive economic effects, which should increase the commercial attractiveness of the French Civil Code on the global legal stage or should be regarded as a tale of missed opportunities?

This paper develops the idea that recent modernization of French civil code and its introduction of “imprévision” doctrine is indeed a long-awaited step towards more effective regulation of the notorious “unforeseen contingencies” phenomena. However, performed analysis shows that the novel Article 1195 might fail to boost the international business attractiveness of French contract law. The English law which provides that the judge can only uphold or terminate the contract or parties can voluntarily negotiate and agree to amend their contract will still be the preferred option in the world of international business transactions. However, the “adjustment” remedy should be re-considered also in English contract law in order to maintain its current superior international commercial position. As emphasized, if such an adjustment would be introduced also into the English law of contracts than the ex ante division of surplus should be the governing principle in adjusting contract price. Such a remedy will not affect the agreed-upon division of the surplus and will warrant the initial benefits of transaction, solving the problems of windfall gains and losses (risk sharing), deterring the promisee’s opportunistic re-negotiation and preserving the promisor’s substantial relation-specific investments.

The international commercial attractiveness of English contract law, while being challenged
by the new French Civil Code, remains in place. This paper has sought to show that both the current English doctrine and the new statutory *imprévision* provision of Code Civil could be improved and refined further. Paper also emphasizes that whether the French judges are indeed up-to-the adjustment task and if they will indeed want to employ available option to adjust contracts rather than simply discharge them remains to be seen.