

Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?

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Declaration

I, Radosveta Tzvetanova Vassileva, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

While significant doctrinal work has been dedicated to analyzing the feasibility of harmonization of contract law in the European Union and the selection of principles for harmonizing legislation, opportunities for dialogue between Eastern and Western Europe have been missed. This thesis takes a small step to fill in this gap by engaging in a comparative study of the English and Bulgarian approach to changed economic circumstances. A survey of the contemporary legal landscape indicates not only that Bulgaria and England seem to stand on the two opposite sides of the spectrum of jurisdictional responses towards this question of law, but also that the spectrum itself has shifted and no longer corresponds to the traditional dichotomy of legal families. This suggests that there may be conceptual differences between EU's jurisdictions that have not received sufficient scholarly attention—an issue that needs to be addressed since the approach to changed economic circumstances is a long-established barometer of differences between the values of national contract laws.

The study compares functionally the English and Bulgarian contractual principles, which may be applicable to changed economic circumstances, to demonstrate that the conceptual dissimilarities that appear at first glance lead to divergences of outcome. It also examines the contextual factors which may explain the distinct approaches of England and Bulgaria—socioeconomic circumstances, the process of legal development, including the place of comparative law in it, legal theory, and the role of the judge regarding agreements. It then puts forward lessons that can inform the harmonization debate in the EU on the basis of the findings of the comparison—notably, the need for more substantive international dialogue on the implications and compromises which the process of harmonization entails as well as a re-evaluation of the current 'one size fits all' policy endorsed by EU institutions towards contract.

Dedication

I dedicate this thesis to my dear parents. I would like to thank them for encouraging me to be a dreamer, for inspiring me to be a better person and for supporting me at times which have been difficult for our family.

‘Without morality and without law, society does not exist.’

‘...States that blindly copy foreign models of government believing that this approach ensures their future existence should be mourned.’

Lyuben Dikov, *Morality and Law* (Sofia 1934)

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List of Abbreviations

Art.	Article
B2B	Business to Business
B2C	Business to Consumer
BAC	Bourgas Appellate Court
BGB	Bürgerliches Gesetzbuch
CESL	Common European Sales Law
CISG	Vienna Convention on the International Sale of Goods
CJ	Lord Chief Justice
CJEU	Court of Justice of the European Union
Civ.c.	Civil Case
Com.c.	Commercial Case
CRA 2015	Consumer Rights Act 2015
Cr.c.	Criminal Case
CRD	Consumer Rights Directive/ Directive on Consumer Rights
DAC	Domestic Arbitration Case (in Bulgaria)
DCFR	Draft Common Frame of Reference
ECJ	European Court of Justice (now Court of Justice of the EU)
EJTN	European Judicial Training Network
ELI	European Law Institute
EU	European Union
HL	House of Lords
IAC	International Arbitration Case (in Bulgaria)
J	Justice
LC	Law on Commerce (of Bulgaria)
LJ	Lord/Lady Justice of Appeal
LOC	Law on Obligations and Contracts (of Bulgaria)

MEP	Member of European Parliament
MP	Member of Parliament
MR	Master of the Rolls
MS	Member States (of the EU)
OSD	Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods
PAC	Plovdiv Appellate Court
Para	Paragraph
PECL	Principles of European Contract Law
§	Section (of the thesis)
S	Section of an Act of the UK Parliament
SAC	Sofia Appellate Court
SCC	Supreme Court of Cassation (of Bulgaria)
SDC	Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content
SME	Small and Medium-Sized Enterprise
SPV	Special Purpose Vehicle
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCC	Uniform Commercial Code (of the USA)
UCTA 1977	Unfair Contract Terms Act 1977
UKSC	UK Supreme Court
UTCCR 1999	Unfair Terms in Consumer Contracts Regulations 1999
VAC	Varna Appellate Court
WWI	World War I
WWII	World War II

Table of Cited Case Law

Bulgarian Cases

Supreme Court of Cassation

Decisions on Interpretation

Decree of the Plenum 1/1979

Decision on interpretation 1/2010

Decisions

Decision 240/2013 on com.c.259/2011

Decision 6/2013 on com.c.1028/2011

Decision 1/2013 on com.c.921/2011

Decision 81/2009 on com.c.761/2008

Decision 671/2008 on com.c.290/2008

Decision 530/2008 on com.c.242/2008

Decision 115/2008 on com.c.774/2007

Decision 673/2007 on c.324/2007

Decision 531/ 2007 on com.c.284/2007

Decision 829/2006 on c. 2121/2003

Decision 579/2003 on civ.c.1329/2003

Decision 169/2003 on civ.c.2520/2002

Decision 1444/1999 on civ.c.735/99

Decision 82/1999 on cr.c.35/99

Decision 655/1981 on civ.c.203/1981

Rulings

Ruling 55/2014 on com.c.1466/2013

Ruling 763/2013 on com.c.1106/2012

Ruling 3/2013 on com.c.19/2013

Ruling 614/2012 on com.c.259/2011

Appellate Courts

Bourgas Appellate Court

Decision 20/2009 on com.c.86/2008

Sofia Appellate Court

Decision 92/2015 on com.c.4244/2014

Decision 365/2013 on com.c.2115/2012

Decision 399/2010 on civ.c.77/2010

Decision 90/2010 on com.c.738/2009

Decision 1589/2009 on com.c.1008/2009

Ruling 647/2013 on civ.c.826/2013
 Ruling of 19 December 2006 on civ.c.2325/2006

Varna Appellate Court

Decision 192/2010 on com.c.446/2010
 Decision 50/2010 on com.c.10/2010

Veliko Turnovo Appellate Court

Decision 127/2010 on civ.c.247/2010
 Decision 368/ 2008 on com.c.661/2008

Regional and District Courts

Kavarna Regional Court

Decision 18/2014 on civ.c. 485/2012

Kazanluk Regional Court

Decision 161/2014 on civ.c. 1909/2013

Pleven District Court

Decision 73/2010 on c.463/2009

Arbitral Awards

Award on Domestic Arbitration Case 196/2007 of 3 July 2008
 Award on Domestic Arbitration Case 141/2002 of 30 April 2003
 Award on International Arbitration Case 45/98 of 28 April 2000
 Award on Domestic Arbitration Case 16/95 of 1 August 1995

English Cases

Appleby v Myers (1867) LR 2 CP 651

Azimut-Benetti v Healey [2010] EWHC 2234 (Comm), 132 ConLR 113

Banque Financière de la Cité v Parc (Battersea) Ltd [1999] 1 AC 221

Barclays Bank plc v HHY Luxembourg SARL [2010] EWCA Civ 1248

Bell v Lever Brothers [1932] AC 161

Blackburn Bobbin v TW Allen [1918] 1 KB 540

BP Exploration Co (Libya) Ltd v Hunt (No 2) [1981] 1 WLR 232

BP Exploration Co (Libya) Ltd v Hunt (No 2) [1983] 2 AC 352

Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109

Burntcopper v International Travel Catering Association Ltd [2014] EWHC 148 (Comm)

Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ 1

Cavendish Square Holding BV v Talal El Makdessi, ParkingEye Limited v Beavis [2015] UKSC 67

Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130

Chandler v Webster [1904] 1 KB 493

Chappell v Nestlé [1960] AC 87

Chartbrook Ltd v Persimmon Homes Ltd [2009] 3 WLR 267

Davis Contractors Ltd v Fareham UDC [1956] AC 696

DG of Fair Trading v First National Bank [2001] UKHL 52

Dunlop Pneumatic Tyre Co Limited v New Garage and Motor Co [1914-15] All ER Rep 739

Edwinton Commercial Corporation, Global Tradeways Ltds v Tsavlis Russ (The Sea Angel) [2007] 2 Lloyd's Rep 517

English Hop Growers v Dering [1928] 2 KB 174

Fibrosa Spolka Ackcyjna v Fairbairn, Lawson Combe Barbour Ltd [1943] AC 32

Gamerco SA v ICM/Fair Warning (Agency) Ltd [1995] 1 WRL 1226

Giedo van der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB)

Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd [2003] QB 679

Hardy v Motor Insurers' Bureau [1964] 3 WLR 433

Hirji Mulji v Cheong Yue Steamship Company [1926] AC 497

Hollier v Rambler Motors [1971] 2QB 71

Hughes v Metropolitan Railway (1877) 2 App Cas 439

Investors Compensation Scheme v West Bromwich Building Society [1998] 1 All ER 98

J Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1

Jobson v Johnson [1989] 1 WRL 1026

Joseph Constantine SS Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154

Lancashire County Council v Municipal Mutual Insurance Ltd [1996] 3 All ER 545
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548
Lloyds Bank Ltd v Bundy [1975] QB 326
Maritime National Fish v Ocean Trawlers [1935] AC 524
Mertens v Home Freehold Co [1921] 2 KB 526
National Carriers v Panalpina [1980] AC 675
Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia) [1964] 2 QB 226
OFT v Abbey National [2010] 1 AC 696
Orakpo v Manson Investments [1978] AC 95
Paal Wilson v Partenreederi Hannah Blumenthal [1983] 1 AC 854
Paradine v Jane (1647) EWHC KB J5, 82 ER 897
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724
Pitt v PHH Asset Management [1994] 1 WLR 327
Prenn v Simmonds [1971] 3 All ER 237
Printing and Numerical Registering Co v Sampson (1874-75) LR 19 Eq 462
Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570
Roscarrick v Barton (1672) 1 Ch Cas 217
Staffordshire Area Health Authority v South Staffordshire Waterworks Co [1978] 1 WLR 1387
Steria Ltd v Sigma Wireless Communications Ltd [2007] EWHC 3454 (TCC), 118 ConLR 177
Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574
Superior Overseas Development Corporation v British Gas Corporation [1982] 1 Lloyd's Rep 262
Tamplin Steamship Company v Anglo-Mexican Petroleum [1916-17] All ER Rep 104
Taylor v Caldwell (1863) 3 B & S 826
Tennants (Lancashire) v CS Wilson [1917] AC 495
Thames Valley Power Limited v Total Gas & Power Limited [2005] EWHC 2208 (Comm)
The Mayor and Burgesses of the London Borough of Tower Hamlets v The British Gas Corporation (CA, 14 December 1983)
Thomas v Thomas (1842) 2 QB 851

Treseder-Griffin v Co-operative Insurance Society Ltd [1956] 2 QB 127

Walford v Miles [1992] 2 AC 128

Walton Harvey Ltd v Walker & Homfrays Ltd [1931] 1 Ch 274

Wates v GLC (1983) 25 BLR 1

Watford Borough Council v Watford Rural District Council (QB, 18 December 1987)

Williams v Roffey Bros [1991] 1 QB 1

Other

Commonwealth Cases

McRae v CDC (1951) 84 CLR 377

Wong Lai Ying v Chinachem Investment Co (1979) 13 BLR 81

French Cases

Boudier of 1893 (*Cour de cassation*)

Canal de Craponne of 1876 (*Cour de cassation*)

Gaz de Bordeaux of 1916 (*Conseil d'Etat*)

Table of Cited Legislation and Legislative Initiatives

Bulgaria

Codes

Code of Civil Procedure

Code of Commercial Maritime Navigation

Laws

Law on Agricultural Tenancy

Law on Commerce

Law on Consumer Protection

Law on Inheritance

Law on Obligations and Contracts

Law on Public Procurement

Law on Statutory Instruments

Law on the Judiciary System

Abrogated Laws

Law on Acquisition of Uninhabited Land (1880)

Laws on the Court System (1880 and 1883)

Law on Inheritance (1890)

Law on Civil Legal Procedure (1891)

Law on Obligations and Contracts (1892)

Law on Commerce (1897)

Law on Codification (1916)

England

Civil Procedure Rules

Consumer Rights Act 2015

Judicature Acts of 1873-74

Law of Property (Miscellaneous Provisions) Act 1989

Law Reform (Frustrated Contracts) Act 1943

Sale of Goods Act 1979

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contracts Regulations 1999 *SI 1999/2083*

European Union

Directives

Doorstep Selling Directive 85/577/EEC

The Package Travel Directive 90/314/EEC

The Unfair Contract Terms Directive 93/13/EEC

The Timeshare Directive 2008/122/EC

The Distance Selling Directive 97/7/EC

The Price Indication Directive 98/6/EC

The Injunctions Directive 98/27/EC

The Consumer Sales Directive 99/44/EC

Directive on Consumer Rights 2011/83/EC (repealing Directive 85/577/EEC and Directive 97/7/EC)

Proposed Legislation

Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content (SDC)

Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods (OSD)

Regulation on a Common European Sales Law (CESL)

Draft Common Frame of Reference (DCFR)

Treaties

Treaty on European Union

Treaty on the Functioning of the European Union

Other

National Legislation

Bürgerliches Gesetzbuch (BGB) of 1896 (Germany)

Bürgerliches Gesetzbuch (amended version of 2001)

Civil Code of Navarre of 1973

Civil Code of Quebec of 1994

Code civil (France)

Codice civile of 1865 (Italy)

Codice civile of 1942 (Italy)

Código civil of 1889 (Spain)

Dutch Civil Code of 1992

Estonian Law of Obligations Act of 2001

Hungarian Act no IV of 1959

Hungarian Act V of 2013

Hungarian Law of Commerce of 1875

Italian Commercial Code of 1882

Latvian Civil Code of 1937 (re-enacted in 1992)

Lithuanian Civil Code of 2000

Loi Faillot of 21 January 1918 (France)

Ordonnance n° 2016-131 of 10 February 2016 (France)

Polish Code of Obligations of 1933

Polish Civil Code of 1964

Romanian Law of Commerce of 1887

Soviet Civil Code of 1922

Soviet Civil Code of 1964

Soviet Constitution of 1936

Uniform Commercial Code (USA)

International Treaties

San Stefano Peace Treaty (1878)

Vienna Convention on the International Sale of Goods (CISG)

International Soft Law Instruments

The UNIDROIT Principles

Principles of European Contract Law (PECL)

National Legislative Initiatives

Draft of a Bill on the General Part of Civil Law of 1947 (Poland)

Avant-projet Catala of 2005 (France)

Avant-projet Terré of 2009 (France)

International Legislative Initiatives

Franco-Italian Draft Code of Obligations (1927)

Chapter 1

Introduction

1.1 Statement of Purpose

This thesis engages in a comparative study between the Bulgarian and the English approach towards change of economic circumstances with the purpose of informing the debate on the harmonization of contract law in the European Union (EU). In 1996, amidst a severe economic crisis characterized by monstrous inflation,¹ Bulgaria enacted the doctrine of *stopanska neponosimost* which can be defined in English as economic onerosity.² The doctrine can be found in article 307 of Bulgaria's Law on Commerce (LC). This provision allows the judge to modify or terminate an agreement in case of onerous performance due to unforeseen supervening events, without the consent of both parties. The article states:

Economic Onerosity

A court may, upon request by one of the parties, modify or terminate the contract entirely or in part, in the event of the occurrence of such circumstances which the parties could not

¹ Annual inflation was estimated at 338.5% in 1991, 91.3% in 1992, 72.9% in 1993, 96.1% in 1994, 62.1% in 1995, 121.6% in 1996, and 1058.4% in 1997, Kiril Tochkov and Hiranya Nath, 'Relative Inflation Dynamics in the EU Accession Countries of Central and Eastern Europe' (Bulgarian National Bank, May 2011) <http://www.bnb.bg/bnbweb/groups/public/documents/bnb_publication/discussion_2011_84_en.pdf>.

² The term literally means 'economic unbearableness.' I use the term 'economic onerosity' for the sake of coherence of representation of Bulgarian law abroad as the only article on economic onerosity in English opted for this translation. See Silvia Tsoneva, 'Hardship in Bulgarian Law' [2011] 1 Acta Universitatis Danubius. Juridica 126.

and were not obliged to foresee, and should the preservation of the contract be contrary to fairness and good faith.

By contrast, in England, there is no equivalent principle. Instead, English courts have developed the doctrine of frustration, which emerged from the decision of *Taylor v Caldwell*.³ Frustration is applicable to all types of supervening events and acted to alleviate the position that contracts had an absolute force.⁴ However, the doctrine has a very limited scope and criteria of application that are extremely difficult to satisfy.⁵ Furthermore, to this day, English courts have remained reluctant to apply it to cases of supervening onerousness.⁶ English judges traditionally encourage parties to insert detailed force majeure/hardship clauses in their agreements and to distribute risk by themselves.

The thesis undertakes a functional comparison between economic onerosity and frustration to establish whether despite the initial appearance of substantial doctrinal differences, Bulgarian and English law may reach similar results in similar circumstances. It also analyzes the contextual factors that could explain the two jurisdictions' divergent approach. The study considers the impact of history and socioeconomic circumstances on law development in the two jurisdictions. It also explores the relevant differences between Bulgarian and English contract theory— notably, the distinct nature of contract and the different weight of subsidiary principles like fairness and good faith. Moreover, it examines the particular roles that Bulgarian and English judges have acquired regarding agreements, including the relevant question whether English judges may reach similar results to economic onerosity by employing other means like the rules of construction. Finally, it draws conclusions about the lessons that can be learned on the basis of the comparison in light of the process of harmonization of contract in the EU.

In that regard, my thesis has been submitted shortly after the referendum on British membership in the EU held on 23 June 2016 in which the majority voted to leave.

³ (1863) 3 B & S 826.

⁴ The English position towards changed circumstances prior to *Taylor* is elucidated by *Paradine v Jane* (1647) EWHC KB J5, 82 ER 897.

⁵ The modern test of 'radically different' circumstances was laid out in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 729.

⁶ See *Tennants (Lancashire)* [1917] AC 495; *Davis Contractors* [1956] AC 696; *The Eugenia* [1964] 2 QB 226; *Thames Valley Power Limited* [2005] EWHC 2208 (Comm).

While I address, in part, English law's position in the harmonization process, the future legal relationship between the UK and the EU seems difficult to predict at this stage.⁷ Nonetheless, while the process is uncertain, even if the UK renegotiates its position with the EU, it may have to confront the arguments for and against harmonization if it wants to maintain access to the single market and/or benefit from it. As we explain below, the Commission's main motivation to promote broader harmonization is the enhancement of the internal market. Moreover, even if the UK is not part of future harmonization initiatives, it still seems relevant to examine the pertinent differences between English law and the laws of Member States (MS) like Bulgaria. As discussed below, these differences have been ignored by scholarship. Moreover, they may affect trade in Europe.⁸ Furthermore, the Bulgarian experience of rushed law reform, which we examine in Chapter 2, can alert the UK of some of the dangers associated with legal change in case, in the future, it reconsiders EU legislation, which it has implemented.

1.2 Background

For the past 35 years, European scholars and politicians have debated the merits of harmonizing the principles of contract in the EU.⁹ Numerous directives establishing common standards of consumer protection in the EU have been implemented.¹⁰

⁷ The referendum is not binding on the UK Parliament, so theoretically it may not approve the result and allow the Government to trigger the mechanism in Article 50 (TEU) which regulates MS' withdrawal. Moreover, even if Parliament supports 'Brexit,' the conditions and timeframe of the exit have to be negotiated with the EU.

⁸ For instance, the UK is Bulgaria's seventh most important export partner in the EU. See the 'Main Trade Partners' section on the website of Bulgaria's National Statistical Institute <<http://www.nsi.bg/en/content/7991/main-trade-partners>>.

⁹ Moreover, since 1980 various research groups, including the Lando Group, the Von Bar Group, and the Acquis Group, have aimed at drafting common principles of European private law; Non-EU affiliated organizations like the International Institute for the Unification of Private Law (UNIDROIT) have also drafted instruments in an attempt to harmonize commercial contract law on a global scale—notably, the UNIDROIT Principles; The Vienna Convention on the International Sale of Goods (CISG) has also played a role in unifying international sales law. However, it has not been ratified by all EU members—the UK, Portugal, Malta and Ireland are not signatories.

¹⁰ Doorstep Selling Directive 85/577/EEC, Package Travel Directive 90/314/EEC, Unfair Contract Terms Directive 93/13/EEC, Timeshare Directive 2008/122/EC (or Directive 94/47/EC depending on the state of transposition), Distance Selling Directive 97/7/EC, Price Indication Directive 98/6/EC, Injunctions Directive 98/27/EC, Consumer Sales Directive 99/44/EC, and Directive on Consumer Rights 2011/83/EC (repealing Directive 85/577/EEC and Directive 97/7/EC).

Furthermore, almost a decade ago, the Commission emphasized the need for broader harmonization with the purpose of enhancing the internal market—it deemed that the palpable differences between MS’ contractual regimes constituted barriers to trade.¹¹ A Draft Common Frame of Reference (DCFR) was produced,¹² but its subsequent cold reception¹³ forced the Commission to narrow down its ambition and to put forward a draft regulation on a Common European Sales Law (CESL), which has a significantly limited scope.¹⁴ CESL was proposed as an optional instrument which parties could choose for specific types of cross-border agreements: it was supposed to apply only to distance B2C contracts or B2B contracts in which one of the parties is a small and medium-sized enterprise (SME).¹⁵ Although the European Parliament (EP) voted in favor of CESL in 2014, the proposal was not approved by the Council of the EU.¹⁶

In December 2015, nonetheless, the Commission announced two proposals for directives—one pertaining to ‘certain aspects concerning contracts for the supply of digital content’ (SDC)¹⁷ and another one pertaining to ‘certain aspects concerning contracts for the online and other distance sales of goods,’ (OSD)¹⁸ which form part of

¹¹ COM(2001) 398 final and COM(2003) 68 final; These communications resonated prior resolutions of the EP calling for broader harmonization of European private law—A2-157/89, A3-0329/94, and B5-0228, 0229–0230/2000.

¹² Arguably, the DCFR has the scope and purpose of a civil code, Martijn Hesselink, ‘The Common Frame of Reference as a Source of European Private Law’ (2009) 83 TLR 919, 923; Reinhard Zimmermann and Nils Jansen, “‘A European Civil Code in All but Name’”: Discussing the Nature and Purposes of the Draft Common Frame of Reference’ (2010) 69 CLJ 98-112.

¹³ In 2010, the Commission published a green paper proposing seven options for DCFR’s future among which a regulation on a European Civil Code, a regulation on European Contract Law, a toolbox, etc.: COM(2010)348 final; Stakeholders, including the UK, expressed concern about the initiative’s necessity, legal basis and feasibility. See ‘The UK Response’ <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/310_en.pdf>.

¹⁴ COM(2011) 635 final; Resolution P7_TA(2014)0159.

¹⁵ EU recommendation 2003/61 provides the definition of an SME: the main criteria are the number of employees and the company’s turnover.

¹⁶ The Commission withdrew CESL in December 2014 with the announcement of its 2015 Work Program. Its Annex 2 stated that CESL would be modified ‘to fully unleash the potential of ecommerce in the Digital Single Market.’ See COM(2014) 910 final. The European Consumer Association indicated the Commission was forced to abandon CESL due to pressure from the UK, France, Germany, the Netherlands, Belgium, and Austria.

See CCBE Position on Contract Rules for Online Purchases of Digital Content, page 1 <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/20150914_EN_CCBE_Pos1_144_2909360.pdf>.

¹⁷ COM(2015) 634 final.

¹⁸ COM(2015) 635 final.

the Digital Single Market Strategy presented in May 2015.¹⁹ While these proposals supposedly ‘draw on the experience acquired during the negotiations for...[CESL],’²⁰ they have a narrower scope²¹ and aim at maximum harmonization²² with the purpose of enhancing consumer protection.²³ In light of the mixed responses these instruments have received so far,²⁴ however, it seems relevant to take a step back and reconsider the broader implications of the harmonization initiative.

Whereas the Commission remains committed to the harmonization project and tries to gain the support of stakeholders with yet another compromise, the scholarly debates on the merits of harmonization do not seem to be nearing their conclusion. Western commentators remain divided on key issues like the necessity, feasibility and practicability of the initiative. A significant part of literature is dedicated to the common law/civil law divide. Legrand, one of the most fervent opponents of harmonization, argues that the initiative to develop a common civil law for Europe implies a decision to ‘overlook...English exceptionalism and limit alternative visions of social life.’²⁵ He also claims that the idea ‘represents an attack on pluralism, a desire to suppress antinomy, a blind attempt at the diminution of particularity.’²⁶ Other

¹⁹ Whether these proposals will have implications for England will be clear following the renegotiations of UK’s position with the EU.

²⁰ COM(2015) 634 final, page 2.

²¹ They would apply only to consumer agreements and focus primarily on rules on conformity and consumer remedies. While they avoid sensitive issues like the rules on contract formation, the directives go beyond their formally announced scopes, as they provide a definition of contract. SDC’s article 2(7) and OSD’s article 2(h) state: ‘contract means an agreement intended to give rise to obligations or other legal effects.’

²² We discuss the implications of this legislative choice in §6.1 and §6.2.3.

²³ The joint explanatory memorandum indicates that the package offers a ‘high level of consumer protection by providing a set of fully harmonized mandatory rules which maintain and in a number of cases improve the level of protection that consumers enjoy under the existing [Consumer Sales Directive].’ See COM(2015) 634 final, page 6.

²⁴ In its Reasoned Opinion <<http://www.senat.fr/leg/tas15-103.pdf>>, the French Senate criticized the choice of maximum harmonization as it prevents MS to implement higher standards of consumer protection; Scholars criticized the proposals for the unclear definition of ‘digital market,’ for creating two separate regimes of sale of goods (one for digital sales and one for face-to-face sales), and for the vague formulation of the rules on termination. See Rafal Mańko, ‘Contracts for Supply of Digital Content to Consumers’ page 10 <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI\(2016\)581980_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI(2016)581980_EN.pdf)>.

²⁵ Pierre Legrand, ‘Against a European Civil Code’ (1997) 60 MLR 53, 54.

²⁶ *ibid* 53; See also Pierre Legrand, ‘The Impossibility of “Legal Transplants”’ [1997] 4 MJECL 111, Pierre Legrand, ‘Antivonbar’ (2006) 13 JCL 13, Pierre Legrand, ‘What “Legal Transplants?”’ in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2003) 55-70.

authors have provided concrete examples of how the imposition of continental concepts disturbs English law's coherence. For example, Teubner maintains that the principle of good faith, introduced in English contract law through the consumer directives, has become a 'legal irritant' as the term has undergone transformations of meaning and courts diverge on its interpretation.²⁷ Miller contends that while English law is remarkably tolerant of fragmentation, European incursions into it may be problematic as they bring considerable incoherence to key areas of English contract law.²⁸

By contrast, Zimmermann emphasizes that 'any attempt to describe and analyze the Western legal world in terms of a civil law/common law dichotomy is in great danger of considerably underrating the diversity existing within the civil law systems. The differences between French and German law may be as great, or even greater, than those between French and English, or German and English law: on the level both of substantive law and legal style.'²⁹ Despite these differences, Watson highlights that 'it would be relatively easy to draft a civil code for the [EU] that would provide a framework for greater uniformity of private law' and that 'the lesson of comparative law is that it teaches what has been done, therefore what can be done.'³⁰ Likewise, Lando accentuates that globalization 'has led to a convergence of attitudes, which has made it possible to draft common principles favorable to the economy' like the CISG.³¹ He also clarifies:

The opponents of the idea of unification argue that a new contract law in Europe will cost sweat, tears, and money, which of course is true. And many lawyers will hate to see everything they themselves have learned and practiced disappear and to have to learn a new contract law. They will all have to become

²⁷ Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 MLR 11.

²⁸ Lucinda Miller, 'After the Unfair Contract Terms Directive; Recent European Directives and English Law' (2007) 3 ERCL 88-109; Miller, nonetheless, criticizes Legrand for his over focus on culture. She asserts that 'resisting harmonization with arguments based on the maintenance of national legal coherence misrepresents the fluidity and interaction between the levels of governance in Europe,' Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (OUP 2012) 184. She also proposes strategies on how the impact of the differences can be mitigated—notably, through dialogue and mutual learning of best practices, *ibid* 202; We explain what further strategies can be developed in §6.5.

²⁹ Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law* (OUP 2001) 113.

³⁰ Alan Watson, 'Legal Transplants and European Private Law' (2000) EJCL <<http://www.ejcl.org/44/art44-2.html>>.

³¹ Ole Lando, 'Culture and Contract Laws' (2007) 3 ERCL 17.

*law students again, and elderly men and women do not like that.*³²

While these various assertions regarding the feasibility of developing and implementing a common European contract law diverge and may reflect the political views of their authors as much as objective practical or doctrinal assessments, all of them are based on an analysis of the dissimilarities between Western jurisdictions. The over focus on the substantial differences between the classical parent jurisdictions (France, Germany, and England)³³ and their immediate relatives leads to ignoring the particularities of most of the 29 jurisdictions in the EU and to overlooking other axes of difference and ‘exceptionalism’ that should be considered in light of the harmonization process.

1.2.1 Untypical Range of Responses

Examining the range of jurisdictional responses to changed economic circumstances reveals that contrary to popular perceptions regarding the common law/civil law divide, the dividing line in the case of impracticability has gradually shifted. One discerns a variety of solutions, which neither corresponds to the classical categorization of legal systems into Romanistic, Germanic, and common law nor demonstrates a convergence of attitudes. Moreover, England and Bulgaria seem to stand on the two opposite sides of the spectrum.

The concept of economic onerosity, which Bulgaria codified, is a cognate of the *clausula rebus sic stantibus* principle³⁴ whose origin could be traced to the writings of

³² *ibid*; §6.5 shows how the Bulgarian example of educating judges may be helpful for devising strategies for uniform application of harmonizing legislation.

³³ On the theory of legal families, see Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon 1998) 63-73, Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006), Patrick Glenn, *Legal Traditions of the World* (3rd edn, OUP 2007).

³⁴ In Latin, the term literally means ‘things thus standing.’ In contemporary legal theory and practice, the concept is known under different names—impracticability (Section 2-615, the Uniform Commercial Code), commercial impossibility (*Tennants (Lancashire)* [1917] AC 495, 510), hardship (Article 6.2.2, UNIDROIT Principles), excessive onerosity (Article 1467, *Codice civile*), exceptional change of circumstances (III.–1:110, DCFR), etc.

moral philosophers like Seneca, Cicero, and Saint Augustine.³⁵ The *clausula* became a general principle of canon law in the 17th century, possibly in response to devastating wars at the time.³⁶ Although the principle enjoyed success in public international law, its application to private law remained limited. Indeed, the *clausula* fell into oblivion in the 18th and the 19th century.³⁷

After World War I (WWI), the problem of the effect of supervening onerousness on the contractual balance was first raised in Germany and Austria, both of which suffered from very high inflation at the time. German judges relied on theories developed by German scholars—notably, Krückmann’s concept of equivalence of obligations and Oertmann’s theory of the disappearance of the contractual foundation—to provide relief to parties experiencing burdensome performance.³⁸ Various jurisdictions in Europe enacted specific principles to address the issue of changed economic circumstances too. For example, Poland is recognized as the first jurisdiction to codify a principle on onerous performance as article 269 of its 1933 Code of Obligations.³⁹ Italy⁴⁰ and Greece⁴¹ followed suit with their new civil codes of 1942 and 1946 respectively. This approach, however, is not universal.

In contrast to other common law jurisdictions like the USA,⁴² England has not developed a particular doctrine addressing changed economic circumstances. English

³⁵ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta 1990) 579.

³⁶ *ibid* 581.

³⁷ *ibid* 579.

³⁸ John Dawson, ‘Effects of Inflation on Private Contracts: Germany, 1914-1924’ (1934) 33 *Mich.L.Rev* 171-238; Peter Hay, ‘Frustration and Its Solution in German Law’ (1961) 10 *AJCL* 345-73.

³⁹ Alfons Puelinckx, ‘Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances’ [1986] 3 *J.Int.Arb* 47, 54; This article stated: ‘When, as a result of exceptional events, e.g. wars, epidemics, total loss of harvest and other natural catastrophes, the execution of the obligation will encounter excessive difficulties or would threaten one of the parties with enormous loss which the parties were not able to foresee at the time of the conclusion of the contract, the judge may, if he thinks it necessary, in accordance with the principle of good faith and after he has taken into consideration the interest of the two parties, determine the way in which the contract will be executed, and the amount of the importance of the obligation, or he may even decide to terminate the contract.’

⁴⁰ Articles 1467 and 1468; See Elena Zaccaria, ‘The Effects of Changed Circumstances in International Commercial Trade’ (2005) 9 *ITBLR* 135, 147-49.

⁴¹ See Pan J Zepos, ‘Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946 (Article 388)’ (1948) 11 *MLR* 36-46.

⁴² Section 2-615 of the UCC recognizes ‘impracticability’ as an excuse for non-performance in contracts for the sale of goods; See John Wladis, ‘Impracticability as Risk Allocation: The

judges have created the principle of frustration applicable to all types of supervening events. However, its requirements of application are extremely difficult to satisfy—the modern test of ‘radically different’ circumstances, which we analyze in Chapter 3, was laid out by Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC*.⁴³ Furthermore, English judges have traditionally expressed their hostility to recognizing frustration in instances of supervening burdensome performance even in the aftermath of WWI and have encouraged parties to explicitly distribute risk by themselves, as explained in Chapters 2, 3 and 4.

The traditional French approach to impracticability is also restrictive.⁴⁴ French civil courts have refused to recognize the *théorie d'imprévision* proposed by French scholarship.⁴⁵ In the leading decision *Canal de Craponne* (1876), the *Cour de cassation* held that courts, no matter how equitable it seemed, could not consider the time and circumstances in order to modify agreements between parties and substitute freely negotiated clauses with new ones.⁴⁶ Because of civil judges’ refusal to apply the doctrine, in the period during and after WWI, the French government enacted a series of temporary statutes, the most known being the *Loi Faillot* of 21 January 1918, which allowed courts to suspend or terminate certain contracts entered into before 1 August 1914 in case of unforeseen onerousness.⁴⁷ Nonetheless, *ordonnance* n° 2016-131 of 10 February 2016 which implements a major reform in the French law of obligations introduced a principle on changed circumstances as article 1195 of the *Code civil*—

Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods’ (1988) 2 Ga.L.Rev 503.

⁴³ [1956] AC 696, 729.

⁴⁴ Spain and Belgium, which are considered as members of the Romanistic legal family, also refuse to grant relief in case of hardship. See Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP 2014) 126-133, 156-162, 244-45 and 250-51.

⁴⁵ On the concept of *imprévision*, see Denis Mazeaud, ‘La révision du contrat. Rapport français’ in *Le contrat: journées brésiliennes* (Société de la législation comparée 2008) 553-89.

⁴⁶ Contrast with the approach of French judges to impracticability in administrative contracts. With its *arrêt* *Gaz de Bordeaux* (1916), the *Conseil d’Etat* decided that the city of Bordeaux owed an indemnity to a concessioner which maintained the public lights in the city because the price of coal had increased five times since the time of entry, the price in the contract was no longer relevant to the new circumstances, and the change could not have been foreseen. See Yves Lequette, François Terré and Henri Capitant, *Les grands arrêts de la jurisprudence civile* (12 edn, Dalloz Bibliothèque 2008) 183-92.

⁴⁷ Shirley Renner, *Inflation and the Enforcement of Contracts* (Edward Elgar Publishing 1999) 15-17.

whether the principle will result in palpable changes in practice⁴⁸ remains to be seen after 1 October 2016 when the reform enters into force.⁴⁹

On the other end of the spectrum, one finds a historically more generous approach to onerous performance in Germany, Italy, Poland, and Bulgaria—jurisdictions which have different paths of legal development and different historical and ideological influences.⁵⁰ While these jurisdictions have elaborate doctrines applicable to onerous performance, their implementation and scope vary. As indicated above, German courts were the first to intervene in burdensome agreements in the aftermath of WWI by relying on scholarly theories. However, Germany codified an actual principle only in 2001 in its new *Bürgerliches Gesetzbuch* (BGB).⁵¹ The other jurisdictions, which have codified provisions, have enacted them in different time periods and with different wordings. This evidences that while these provisions may have been inspired by German legal theory and practice, legislators considered the particular legal needs of their own country and adapted the principles to the framework and values of their own legal system.

1.2.2 Indication of Substantial Differences in Contractual Values

Historically, the approach towards changed economic circumstances has not only served as a barometer of substantial divergences between the values of different jurisdictions, but also as an indicator of the evolution of the values and principles of contract law within the same legal system. In that light, the idea of developing common solutions to problems of contract law and establishing common rules on contract in

⁴⁸ Contemporary scholars remain divided about the principle's merits, as evidenced by prior scholarly initiatives for the recodification of the French law of obligations. The *avant-projet Catala* (2005) does not accord the judge the right to modify agreements in case of impracticability while the *avant-projet Terré* (2009) does; Considering the traditional hostility of French civil judges towards the principle, one can expect a limited application especially because the article encourages parties to agree on judicial intervention before petitioning the court.

⁴⁹ The doctrine will apply to contracts entered into after that date.

⁵⁰ Both Bulgaria and Poland are former-communist countries. However, as indicated above, Poland enacted a rule on onerous performance in 1933 while Bulgaria codified it in 1996. Italy enacted a rule on supervening onerosity with its Fascist civil code in 1942.

⁵¹ Section 313.

Europe can be traced to the early 20th century.⁵² Concrete, yet small-scale steps were taken in that regard following WWI. For instance, by 1927 a Franco-Italian Draft Code of Obligations was completed⁵³ and in 1933 the Polish Code of Obligations provided the occasion for the First Conference of Slavic Jurists held in Bratislava whose primary topic was the unification of the law of obligations in Slavic countries, including Bulgaria, on the basis of the Polish model.⁵⁴

While such projects failed because of lack of political will, European scholars continued to engage in dialogue and to seek opportunities for mutual learning. For instance, since the mid-1930s the French Association Henri Capitant has been organizing conferences aimed at exchanging ideas and identifying differences between legal systems. During the International Week of Comparative Law in Paris in 1937 organized by the association, one of the six topics of discussion was the right of judges to modify agreements in instances of supervening events. The viewpoints of 14 jurisdictions, including England, were presented and the conference was attended by hundreds of participants from various jurisdictions, including Bulgaria.⁵⁵

The principal *rapporteur* of the panel, Niboyet, also systematized the differences and identified ‘persistent disparities’ between the jurisdictions in favor of judicial intervention and those against it.⁵⁶ He concluded that there was a clear opposition between the Latin Group (France, Italy, etc.) which did not allow contract modification and what he referred to as the ‘Continental Group’ (Germany, Hungary, Poland, etc.) which permitted modification in case of changed circumstances. Paradoxically, the

⁵² At the First International Congress of Comparative Law held in Paris in 1900, jurists declared their ambition to develop ‘a common law for all civilized mankind,’ Xavier Blanc-Jouvan, ‘Centennial World Congress on Comparative Law: Opening Remarks’ (2001) 75 *Tul.L.Rev* 859, 863.

⁵³ Nonetheless, the rise of Fascism and Mussolini’s aspiration to implement a Fascist civil code—the 1942 *Codice civile*—put an end to idealism about unifying the law of obligations of France and Italy. On the project and its merits, see SG Vesey-FitzGerald, ‘The Franco-Italian Draft Code of Obligations, 1927’ (1934) 14 *J.Comp.Leg* 1, Mario Rotondi, ‘The Proposed Franco-Italian Code of Obligations’ (1954) 3 *AJCL* 345.

⁵⁴ While scholars favored the idea, the project was deemed unrealistic due to the political situation in Europe, Yosif Fadenhecht, ‘Unification of Slavic Law of Obligations,’ (1933) XIV (4) *Yuridicheskha misul* 388; Had that idea been accepted, Bulgaria would have enacted a rule on economic onerosity as the 1933 Polish Code of Obligations is the first legal text containing an elaborate provision on supervening onerosity.

⁵⁵ See the list of participants in *Travaux de la Semaine Internationale du Droit* (Syrey 1937) 73-95.

⁵⁶ Jean-Paulin Niboyet, ‘La révision des contrats par le juge. Rapport général’ in *Travaux de la Semaine Internationale du Droit* (Syrey 1937) 8-13.

reason cited for the diverging approach towards impracticability was the interpretation of the principle of good faith itself.⁵⁷ While in the first group the notion of good faith implied that contracts had to be executed and promises kept, in the second group it had acquired a social dimension which permitted contractual modification.⁵⁸ He also asserted that the approach towards supervening events was directly linked to public policy.⁵⁹

It is also interesting that the *rapporteur* placed England in the middle of the spectrum and explained that in many instances of supervening events, such as destruction of physical goods, English and French law reached the same results—the promisor was released from his obligations. However, unlike English judges, French judges could not rely on implied conditions—an approach which, from his perspective, modifies the contract.⁶⁰ Furthermore, English judges refused to intervene in instances of changed economic circumstances. For the purposes of our study, while Bulgaria’s solution was not presented at the conference, it should be clarified that at the time Bulgaria could be put together with the Latin Group. As we explain in Chapter 2, Bulgaria’s original civil law was based on the *Codice civile* of 1865 which largely copied the *Code civil*.

Since this conference, however, the range of responses has significantly altered which seems to indicate an evolution of the values and contractual principles of many jurisdictions. While England may have appeared in the middle of the spectrum at the time, today the English approach seems closer to the non-interventionist camp. With the decision in *Davis Contractors*⁶¹ which established the modern test of frustration, English judges abandoned the idea that frustration was grounded on an implied condition.⁶² Moreover, as explained in Chapter 5, modern attempts to remedy onerous performance by relying on the rules of construction have not been positively received by the English judiciary.

⁵⁷ *ibid* 11.

⁵⁸ See our discussion on the role of good faith in Bulgarian and English contract law in §4.3.2.3.

⁵⁹ Niboyet (n 56) 5.

⁶⁰ *ibid* 6-8; In §5.3.1.2, we argue that French and English law endorse distinct definitions of contractual intention and establish it in different ways. This may clarify why, in Niboyet’s opinion, relying on implied conditions modifies the contract and does not give effect to the parties’ real intentions.

⁶¹ [1956] AC 696.

⁶² Blackburn J who created the doctrine of frustration in *Taylor v Caldwell* (1863) 3 B & S 826 based his decision on the theory of implied condition. See §3.1.

Besides, as mentioned in §1.2.1, Italy left the non-interventionist camp and enacted a principle on changed circumstances in 1942. Bulgaria also gradually moved to the extreme opposite end of the spectrum. As we explain in Chapter 2, since the 1920s, Bulgarian scholars had become hostile to the French law of obligations which Bulgaria had borrowed in the late 19th century. However, it was through the work of Lyuben Dikov that a radical change in attitude towards impracticability was induced. Dikov had dedicated a significant part of his research to *clausula rebus sic stantibus* since 1923. However, as explained in Chapter 5, by the end of the 1930s, he had also rethought the philosophical foundation of contract to suggest ways in which the principle could be properly integrated not only in Bulgaria, but also elsewhere.

Furthermore, the reports of this conference, notably Niboyet's, enraged him and provoked him to write an article, which is highly critical of the liberal individualist model and of Niboyet's 'simplistic' assertions about the differences between the various jurisdictions.⁶³ He argued that the approach towards modification in case of impracticability was neither a question of public policy nor of interpretation of the principle of good faith, but of fundamental differences regarding the nature of contract. We will see in Chapters 2, 4 and 5 that Dikov's ideas had a profound influence on the integration of economic onerosity in Bulgaria and may provide food for thought for the harmonization debate all the more that despite their different purposes and scopes, both the DCFR and the abandoned proposal for a regulation on CESL contain elaborate provisions on changed circumstances.⁶⁴

1.3 Choice of Jurisdictions

The choice of jurisdictions for this study was motivated both by personal reasons and by the ample opportunity for comparative analysis which the differences between England and Bulgaria provide. On the one hand, the work of a comparatist is inevitably influenced by their language skillset, education, and cultural upbringing. I believe that because of these factors, I am in a position to showcase Bulgarian law and to take a

⁶³ Lyuben Dikov, 'Die Abänderung von Verträgen den Richter' in *Hedemann-Festschrift* (Jena 1938).

⁶⁴ See III.-1:110 (DCFR) and Article 89 (CESL); Such a provision did not find its way into the new proposals.

step in re-establishing the substantive dialogue between Eastern and Western Europe which, ironically, was more prominent prior to the creation of the EU than at the moment. On the other hand, comparative law has traditionally been perceived as the study of difference:⁶⁵ juxtaposing English and Bulgarian law indicates important divergences which also seem relevant to the harmonization debate. My study demonstrates not only that Bulgarian and English law have developed different principles and reach different results in similar circumstances, but also that these principles incarnate dissimilar values and serve as evidence of the divergent roles that the two jurisdictions have attributed to contract.

1.3.1 Re-establishing Dialogue between the East and the West

With my thesis, I purport to take a step in re-establishing the active dialogue between Bulgarian and Western scholarship. As I explain in Chapter 2, communism brutally interrupted the intensive intellectual exchange between Bulgaria and Western States. The current limited scholarly discussion between Bulgaria and Western Europe, and notably England, has resulted into lack of mutual understanding and neglect of pertinent differences. These divergences are not only interesting from a comparative perspective and have not been studied before,⁶⁶ but merit more consideration in light of the debate on the harmonization of contract law in the EU.

One of the main issues which stand out when examining the multifaceted harmonization debate is the limited involvement of scholars and interest groups of newly accepted MS, and particularly from Bulgaria, which only joined the EU in 2007.⁶⁷ This is regrettable as Bulgaria's distinct path of legal development, the

⁶⁵ See Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 384.

⁶⁶ My research has not identified articles/monographs dedicated to a comparison between English and Bulgarian law; As explained in Chapter 2, contemporary Bulgarian authorities using a comparative approach content themselves with comparisons of legal texts only, thus ignoring both how foreign texts function in practice and the context in which they operate.

⁶⁷ My research identified only one article in a foreign language which briefly discusses the potential reception of harmonization in Bulgaria on 4 pages: Christian Takoff, 'The Present State of Harmonization of Bulgarian Private Law and Future Perspectives' (2008) 14 *Juridica International* 118; Furthermore, articles on Bulgarian law in foreign languages are rare. By contrast, as discussed in Chapter 2, prior to communism, Bulgarian scholars engaged in

achievements of its jurisprudence and its tendency to ‘mix-and-match’ principles and concepts from various jurisdictions, as I explain in this thesis, may provide valuable insights regarding harmonization’s feasibility.

The relative silence of new MS like Bulgaria may be attributed to ‘wrong’ timing: when the discussion on harmonization was most heated in the 1990s and 2000s, ‘newcomers’ were not part of the EU. Furthermore, scholars from new MS have not yet acquired the confidence to voice their opinion on a pan-European level. In Chapter 2, for example, I clarify how communism closed the door to the dynamic intellectual exchange between Bulgarian academics and their Western counterparts. Unlike Bulgarian scholars, however, academics from new MS have recently started to break the silence.⁶⁸ Nonetheless, more in-depth comparative analyses between East European jurisdictions themselves as well as between East European and West European jurisdictions are still missing from their writing. With few exceptions,⁶⁹ most authors concentrate on the experience of their own jurisdiction without juxtaposing it to the experience of other jurisdictions, thus limiting their audience and missing opportunities for more engaging international comparative dialogue.

On the other hand, while the debate on the necessity and feasibility of harmonization among Western scholars is agitated and applies a sophisticated comparative approach, most academics base their conclusions on comparisons between Western jurisdictions.⁷⁰ Some of them are concerned by the significant divergences between the common law and continental law when in fact by continental law they understand the laws of leading jurisdictions like Germany and France. The over-focus on the

sophisticated comparisons between various legal systems and had the confidence to make recommendations for other jurisdictions.

⁶⁸ For example, Volume XIV (2008) of *Juridica International* dedicated to the ‘European Initiatives (CFR) and Reform of Civil Law in New Member States’ contains contributions from scholars from Estonia, Lithuania, Latvia, Poland, Hungary, Slovenia, Slovakia, and Romania. It also includes the Bulgarian article mentioned in footnote 66.

⁶⁹ For instance, Tichý compares the experience of Central European States in modernizing their private law, Luboš Tichý, ‘Processes of Modernization of Private Law Compared, and the CFR’s Influence’ (2008) 15 *Juridica International* 36.

⁷⁰ See, for example, Reinhard Zimmermann, ‘Roman Law and the Harmonization of Private Law in Europe’ in Hartkamp and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer 2004) 21-42; Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonization of European Contract Law* (Hart 2006); Mathias Reimann and Daniel Halberstam, ‘Top-Down or Bottom-Up? A Look at the Unification of Private Law in Federal Systems’ in Brownsword and others (eds), *The Foundations of European Private Law* (Hart 2011) 363-77; Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013); See also Legrand’s and Teubner’s articles cited above.

differences between Western States has led to ignoring the particularities of East European jurisdictions which are part of the EU.⁷¹

Certainly, this omission has an explanation. All newcomers have languages that are not widely spoken beyond their boundaries, which makes their law less accessible. Furthermore, the Cold War not only interrupted the dialogue between Eastern and Western scholars, but also resulted in prejudice of the West against the East—East European jurisdictions are often put in the same ‘box,’ hence disregarding the significant differences in their history and cultural heritage as well as their specific needs. Moreover, these jurisdictions are often treated as ‘students’ that have to catch up, hence forgetting that ‘newcomers’ may have something to teach too.

1.3.2 Examining Overlooked Differences

As explained in §1.2, the various jurisdictions have developed considerably different approaches to changed economic circumstances which cannot be fitted in the classical dichotomy of Romanistic, Germanic, and common law traditions. These divergences may impact harmonization negatively because they may lead to discrepancies in interpretation of a common rule. Furthermore, we also underscored that Bulgaria and England appear to stand on the two opposite sides of the spectrum of jurisdictional responses. From a comparative perspective, it seems interesting to explore the magnitude of the differences in practice and to understand why the two jurisdictions developed dissimilar responses to impracticability. The question is also relevant because while there is comparative literature dedicated to impracticability in Western

⁷¹ While there are sporadic references to the Baltic States, Poland, and Hungary, analyses on Bulgarian law are rare. See Örüçü, ‘Law as Transposition’ (n 35) 214-16 and Norbert Reich, ‘Transformation of Contract Law and Civil Justice in the New EU Member Countries. The Example of the Baltic States, Hungary and Poland’ (2005) 23 Penn St. Int’l L. Rev 587.

jurisdictions,⁷² few authors investigate the differences between the approaches of West European jurisdictions and the approaches of East European jurisdictions.⁷³

An initial overview of the English and Bulgarian response reveals both peculiar similarities and differences whose detailed analysis may be helpful in enriching the harmonization debate. Notably, both England and Bulgaria borrowed the will theory from the same jurisdiction (France) in the same time period (19th century).⁷⁴ However, it seems the theory has acquired a different role in the contract laws of the two legal systems. English doctrinal writers traditionally consider English law's commitment to commercial sensibility, efficiency, and freedom of contract as its key strengths.⁷⁵ By contrast, since the 1920s, Bulgarian doctrinal writers have sought ways of limiting freedom of contract and promoting substantive fairness in agreements, as explained in Chapters 2, 4, and 5. This traditional commitment to altruism in contract law, enhanced by Bulgaria's communist experience, has also been embraced by contemporary

⁷² For example, Michael Rapsomanikis, 'Frustration of Contract in International Trade Law and Comparative Law' (1980) 18 *Duq.L.Rev* 551, Werner Lorenz, 'Contract Modification as a Result of Change of Circumstances' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995), Theo Rauh, 'Legal Consequences of Force Majeure under German, Swiss, English and United States' Law' (1996) 25 *Den.J.I.L.P* 151, 'Case 25: Effects of Inflation' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000), Mustapha Mekki and Martine Kloepfer-Pelèse, 'Hardship and Modification (or "Revision") of the Contract' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer 2011) 651.

⁷³ For instance, Girsberger and Zapolskis juxtapose the Lithuanian approach to that of West European jurisdictions, Daniel Girsberger and Paulius Zapolskis, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' (2012) 19 *Jurisprudence* 121; A recent publication of the Common Core Project examines the approach of Slovenia, Lithuania and the Czech Republic. However, the focus of research remains on Western jurisdictions. See Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP 2014) 76-98; Chapter 2 emphasizes that in Bulgaria, there are no detailed comparative studies on economic onerosity either.

⁷⁴ The *Traité des obligations* of 1761 by the French jurist Pothier was translated into English in 1806 and served as inspiration for English judges: Pothier's version of the will theory impacted the analysis of the nature of the agreement, mistake, and assessment of damages in English law, David John Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 220-29; In 1925 Kemp Allen emphasized: 'Pothier has been constantly cited in our Courts, and his authority has been treated with the highest respect by our judges. He cannot be dismissed with a wave of the hand as merely "persuasive,"' Carleton Kemp Allen, 'Precedent and Logic' (1925) 41 *LQR* 329, 330; In Bulgaria, the will theory was indirectly borrowed from France through the 1865 *Codice civile* which inspired the 1892 Bulgarian LOC, as explained in Chapter 2.

⁷⁵ See Hugh Beale, 'The European Civil Code Movement and the European Union's Common Frame of Reference' (2006) 6 *LIM* 4, 9-10.

scholars⁷⁶ and by Bulgarian judges who employ creative means, inspired by Bulgaria's communist law, to enforce substantive fairness in contracts, as discussed in Chapters 4 and 5. In Chapter 5, we also elucidate how the divergence between the values of Bulgarian and English law is an emanation of the different socio-philosophical frameworks underlying the contract laws of the two jurisdictions: whereas English law continues to develop in a liberal individualist setting, Bulgarian law operates in an organicized framework.

Furthermore, as underscored in Chapters 2 and 3, even in the aftermath of WWI, English judges refused to intervene and extend the doctrine of frustration to instances of onerous performance due to the war. By contrast, following the Balkan Wars and WWI, Bulgarian scholars immediately began seeking solutions to the problem of impracticability as well as philosophical justifications of judicial intervention. Some even suggested extending the Bulgarian doctrine of 'impossibility of performance,' which applies to physical and legal impossibility, to cases of impracticability, as explained in Chapter 2. There is indirect evidence that Bulgarian courts had adopted this solution in limited cases and were also inclined towards contract modification.⁷⁷

However, it is interesting that Bulgaria developed a specific doctrine on economic onerosity rather than permanently endorsing the jurisprudential solution of applying 'impossibility of performance' to such cases. As will be argued, the fact that English law not only does not have a specific doctrine on impracticability, but also refuses to extend frustration to such instances seems indicative of fundamental differences between the values of the two legal systems regarding the function of contract and the role of the judge. Furthermore, the economic crisis which affected Bulgaria in 2008 also gave Bulgarian courts the chance to examine and to apply the doctrine of economic onerosity.⁷⁸ It is important, from a comparative perspective, to establish if England

⁷⁶ Recently, a modern Bulgarian authority has argued that further theoretical work should be done to justify the promotion of more fairness in agreements, Angel Kalaidjiev, 'On the Autonomy of Will, Freedom of Contract, and Fairness in Contract' in Atanas Shopov (ed), *Legal Research in Memory of Professor Ivan Apostolov* (Ulpian 2001) 81-82.

⁷⁷ Apostolov draws this conclusion on the basis of extra-judicial speeches, Ivan Apostolov, *The Law of Obligations: General Part* (first published 1947, 3rd edn, BAN 1990) 241-44; Because of the reasons outlined in §1.5, I was unable to find those cases.

⁷⁸ Contrast with Germany which has been cautious to apply its doctrines in modern times even in the crisis following the reunification with Eastern Germany in 1989, Mathias Reimann, 'The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations' (2009) 83 *Tul.L.Rev* 877, 892.

would have reached the same results as Bulgarian courts in the same circumstances. These divergences may have practical implications for cross-border trade in the EU and may hint at issues of discrepancies of interpretation that may arise if common instruments on contract are adopted.

Finally, the integration, or alternatively the refusal to integrate, a principle on impracticability appears symptomatic of the tolerance to fragmentation and foreign influences of a given jurisdiction. In that regard, Bulgaria and England also seem to have an opposing approach. Unlike England which has not changed its political system since the 17th century, Bulgaria has experienced six different political systems only in the past 140 years and has dismantled and rebuilt its legal system from scratch three times in the same time period, as clarified in Chapter 2. This turbulent history, combined with Bulgaria's tendency to 'mix-and-match' principles from foreign jurisdictions and to use comparative law as a primary tool of legal development, may also shed light on why economic onerosity was embraced.

A comparative inquiry into how frustration and economic onerosity were developed may also demonstrate further unexplored substantial differences between European jurisdictions. With few exceptions,⁷⁹ England, France, and Germany have traditionally sought inspiration and innovation within their own tradition with the purpose of enforcing coherence. Moreover, these jurisdictions are exporters of law and their scholars and practitioners have been committed to setting example for others. Bulgarian law, however, is extremely volatile and malleable and has developed strategies to adapt quickly to radical change. It is also incredibly tolerant of incoherence and fond of learning from others. As explained in Chapter 2, it has refused to follow any particular

⁷⁹ See footnote 74; In modern times, English judges have been influenced primarily by other common law jurisdictions, but occasionally make references to French and German law, Andrew Burrows, 'The Influence of Comparative Law on the English Law of Obligations' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart 2015) 15-37; Prior to the enactment of the BGB in 1896, German law looked up to French law, Henri Mazeaud, 'Le Code civil français et son influence en Europe' (1950) 2 *Revue internationale de droit comparé* 757, 759; While in modern times legal transplants in Germany are rare, there is evidence that in drafting the 2001 BGB, inspiration has been sought in the UNIDROIT Principles. Also, when codifying Section 313 on impracticability, the German Parliament considered the approach of England, France, Italy, Greece, the Netherlands, Switzerland, and the USA, André Janssen and Reiner Schultze, 'Legal Cultures and Legal Transplants in Germany' (2011) 2 *ERPL* 225, 232; While France is reluctant to embrace foreign principles in its contract law, it has been influenced by Germany in other fields like employment law.

system as a model and has developed an appreciation for systems relying on a more creative and eclectic approach to lawmaking compared to England, France or Germany.

1.4 Methodology and Methodological Difficulties

For many years, commentators have debated whether comparative law is a separate field of law or simply a research method.⁸⁰ Academics arguing that comparative law is a separate field of law have attempted to identify and develop its proper methodology to promote meaningful comparisons. To this day, however, there does not seem to be consensus on how we should compare.⁸¹ I take the position that comparative law is a separate field of study. However, I do not unequivocally side with any particular comparative method. I believe that to explore and illustrate, but more importantly, to understand the differences and similarities between the English and the Bulgarian response to impracticability, a combination of methods should be used—the functional method, the contextual approach, and the identification of legal transplants. While all of them have their strengths, they also presented some challenges for my research which seem relevant to clarify.

1.4.1 *The Functional Approach*

As early as 1910, Pound underscored that law in the books could be different from law in action, implying that there could be significant discrepancies between legal theory and practice.⁸² Regarding comparative law, this observation may also be valid—there may be significant conceptual differences between two legal systems, but in practice the two jurisdictions can reach the same results. In more modern times, Zweigert and

⁸⁰ On the major debates regarding the discipline's name, scope, and methodology, see Esin Örüçü, 'Developing Comparative Law' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 43-65; See also Zweigert and Kötz (n 32).

⁸¹ Zweigert and Kötz argue that the 'basic methodological principle of comparative law is that of functionality,' Zweigert and Kötz (n 33) 34; Sacco asserts that '[the] aim of comparative law is to acquire knowledge of the different rules and institutions that are compared,' Roberto Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law. Installment I of II' (1991) 39 *AJCL* 1, 6; Örüçü claims that the methodology of comparison depends on the 'strategy of the comparative lawyer,' Örüçü, 'Developing Comparative Law' (n 80) 48.

⁸² Roscoe Pound, 'Law in the Books and Law in Action' (1910) 44 *Am.L.Rev* 12.

Kötz have asserted that ‘the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.’⁸³ Essentially, concepts with different names and underpinnings may in practice be ‘functional equivalents.’ Indeed, while the functional method has been embraced by many scholars, it has also been criticized for focusing too much on the effects of doctrines and ignoring context, culture, and legal theory.⁸⁴

In light of my study, the functional method is indispensable in demonstrating whether the conceptual differences between English and Bulgarian law—notably, England does not have a doctrine that addresses explicitly supervening onerousness while Bulgaria does—lead, in practice, to different results in similar circumstances. The question is twofold:

- 1) to what extent and in what circumstances economic onerosity and frustration may be functional equivalents?
- 2) can English law reach similar results to the Bulgarian doctrine of economic onerosity by employing other means?

Answering these questions will be helpful in understanding if the differences between English and Bulgarian law regarding supervening onerousness are simply on the surface—‘in the books’ rather than ‘in action’ in the words of Pound. However, there are contextual factors that may preclude the provisions of clear cut answers. While the questions call for an examination of case law and a comparison of the judicial approach to similar facts in similar circumstances, cases with identical facts are difficult, if not impossible, to find. Many important cases in English contract law, including cases on frustration, concern carriage by sea. Due to geographical and historical factors, England has traditionally been a leader in the maritime industry, which in turn gave its courts an opportunity to examine diverse maritime disputes. Unlike England, Bulgaria is not a maritime leader and case law involving carriage by sea is extremely limited.⁸⁵ Consequently, when explaining what the approach of Bulgarian courts would be if

⁸³ Zweigert and Kötz (n 33) 34.

⁸⁴ On the functionalist method and its merits, see Ralf Michaels, ‘The Functional Method of Comparative Law’ in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 340-382 and Michele Graziadei, ‘The Functionalist Heritage’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 100-127.

⁸⁵ On how geography impacts law development, see Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* (Clarendon 1990) 75-85.

confronted with the cases English courts have examined, I have to rely primarily on legislation, doctrinal writing, and analogies from case law and will not be able to refer to Bulgarian case law on *identical* facts.

Furthermore, the recent cases in which economic onerosity was demanded before Bulgarian courts also concern subject-matter that is irrelevant to England because of historical reasons. In Chapter 3, I refer to two fundamental cases related to lease agreements as well as a case in which the return of land confiscated during communism disturbed the contractual balance. However, historically frustration has rarely been recognized in agreements for the sale of property or land.⁸⁶ Moreover, England has not experienced communism and the confiscation and subsequent return of land and property on a massive scale is not a problem which English practitioners have confronted. Once again, I will have to rely on analogies from English case law to illustrate the differences between the two jurisdictions—for instance, cases related to compulsory acquisitions by local authorities.

Additionally, as mentioned in §1.1, frustration is applicable, at least in theory, to all types of supervening events while economic onerosity is applicable only to burdensome performance due to supervening events. In Chapters 2 and 3, I explain in more detail that Bulgarian law has a doctrine known as ‘impossibility of performance’ designed to address instances of physical and legal impossibility. Hence, *a priori* frustration and economic onerosity cannot be functional equivalents in all cases. Moreover, economic onerosity terminates or modifies an agreement depending on the request of the aggrieved party while frustration discharges the contract automatically. Consequently, because of the effects prescribed by law, frustration and economic onerosity may also reach different results even if both are applicable to the same facts. For the purpose of clarity,⁸⁷ I have broken down the functional comparison between economic onerosity and frustration into three parts:

⁸⁶ There is evidence that this approach might change. In a Hong Kong case (*Wong Lai Ying v Chinachem Investment Co* (1979) 13 BLR 81), an agreement was found frustrated because of a landslip which prevented the completion of a building within the timeframe stipulated in the permit.

⁸⁷ I chose this approach because case law on economic onerosity is limited since the doctrine was enacted relatively recently. I discuss Bulgarian decisions whenever possible. However, for the interpretation of some of the criteria, I had to rely on legal theory which, as explained in §2.2.2, is a secondary source of Bulgarian law, or analogies to case law on the insurmountable force/chance occurrence whose role I explain in §3.2.

- 1) compare how and when frustration and economic onerosity are invoked;
- 2) compare their criteria and scope of application (for the common law, infer the reasons for rejecting/allowing the application of frustration, as demonstrated by case law);
- 3) compare their effects.

The goal is to identify in what circumstances (if any) frustration and economic onerosity reach similar results. These questions are examined in Chapter 3. I consider the question whether English judges can reach the same results as economic onerosity by employing other means like the rules of construction separately in Chapter 5 which is dedicated to a comparison between the roles of English and Bulgarian judges regarding agreements.

1.4.2 Context and Legal Transplants

As explained above, the functional method may be helpful in elucidating the extent of the differences between the English and the Bulgarian approach to changed economic circumstances. However, it cannot explain the reasons for the likely similarities or dissimilarities in the responses of the two jurisdictions.⁸⁸ Moreover, it cannot clarify whether the English and the Bulgarian approach to supervening onerosity is representative of the values of the two legal systems.

It has been underscored that a comparatist ‘has to take account of the historical circumstances in which the legal institutions and procedures under comparison evolved.’⁸⁹ Likewise, it has been asserted that ‘[often] the best explanation of a legal institution lies in its history rather than in its current operation’⁹⁰ and that ‘[every] legal system has a unique individuality.’⁹¹ Other authors have stressed the importance of the study of ‘legal transplants.’ The concept was put forward in 1974 by Watson who contends that jurisdictions have always borrowed legal rules from one another and that

⁸⁸ Giliker has emphasized that the challenge remaining for comparative law is ‘how to provide an insight which not merely states the law, but permits us to understand the law in question, despite our own subjective preconceptions,’ Paula Giliker, ‘60 Years of Comparative Law Scholarship in the International and Comparative Law Quarterly’ (2012) 61 ICLQ 15, 19.

⁸⁹ Zweigert and Kötz (n 33) 8.

⁹⁰ Grossfeld (n 85) 43-44.

⁹¹ *ibid* 41.

borrowing is ‘the usual way of legal development.’⁹² While Watson has been criticized both for his views⁹³ and for his terminology,⁹⁴ it has been contended that ‘[the] study of legal transfers...shows that law is a complex phenomenon and corrects simplistic views regarding what law is and how it develops.’⁹⁵ In that light, it has also been argued that to understand a transfer, one should consider the role of those who brought it about.⁹⁶

Sacco, by contrast, stresses the role of ‘legal formants’ in legal development. These are the various legal and non-legal factors that could explain the existence of a rule or particular legal practices within a legal system, such as the role of scholarly writing, the role of the judge and precedent, legal borrowing, ideology, etc.⁹⁷ While different systems may have different legal formants, even within the same legal system, the various formants ‘may or may not be in harmony with each other,’⁹⁸ which may explain divergence in results within the same jurisdiction. Some authors have even equated comparative law to a ‘cultural immersion’—‘a valid examination of another legal

⁹² Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974) 7.

⁹³ Notably by Legrand who maintains that transplants are impossible because jurisdictions have different *mentalités*. He claims that the common law and continental law represent ‘two different ways of thinking about the law, about what it is to have knowledge of law and about the role of law in society,’ Legrand, ‘Against a European Civil Code’ (n 25) 45; Once a rule crosses the border, it acquires a new meaning in the host jurisdiction. See Legrand, ‘What “Legal Transplants?”’ (n 26) 55-70; Legrand, ‘The Impossibility of “Legal Transplants?”’ (n 26) 111.

⁹⁴ Scholars contend that the term ‘transplant’ is inadequate. Comparatists have chosen various terms—‘reception,’ ‘fertilization,’ ‘mutual influence,’ ‘legal transfers’—which in their opinion reflect the nature of the borrowing process better. On terminology, see Örüçü, ‘Law as Transposition’ (n 36) 205-11; Some commentators have used value-charged concepts like ‘legal irritants’ to signify the difficulties of interpretation that foreign concepts may lead to once transplanted. See Teubner (n 27).

⁹⁵ Michele Graziadei, ‘Comparative Law as the Study of Transplants and Receptions’ in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 474.

⁹⁶ *ibid.*

⁹⁷ Sacco, ‘Legal Formants. Installment I of II’ (n 81); Roberto Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law. Installment II of II’ (1991) 39 *AJCL* 343; Others have emphasized the importance of context and legal culture in developing the law, Alan Watson, ‘Legal Culture v Legal Tradition’ in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 1-6; See also Lawrence Friedman, ‘The Concept of Legal Culture: A Reply’ in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 33; The use of the term culture, however, has been criticized. See Roger Cotterrell, ‘The Concept of Legal Culture’ in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 13; David Nelken, ‘Defining and Using the Concept of Legal Culture’ in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 109.

⁹⁸ Sacco, ‘Legal Formants. Installment I of II’ (n 81) 30.

culture requires an immersion into the political, historical, economic, and linguistic contexts that molded the legal system.⁹⁹

Indeed, as noted in §1.1, frustration and economic onerosity were developed in different time periods—in the 19th century and in the late 20th century. Moreover, when Bulgaria enacted its doctrine, the economic circumstances were extreme. A careful examination of the contextual factors (formants), which impacted the development of frustration and economic onerosity, may illuminate why England and Bulgaria have different responses to changed economic circumstances. In addition to socioeconomic circumstances,¹⁰⁰ there are other factors, such as the preponderance of philosophical ideas about contract law's function, the distinct roles of scholars and judges, and the attitude to legal borrowing, which may also prove helpful in better understanding what the functional differences illustrate. Such a complex examination of the contextual factors is relevant for the harmonization debate as well because it may hint at some of the unexplored difficulties that could arise if common principles are adopted and suggest ways how they may be overcome.

The study of context, nonetheless, may be problematic when information is not available or there are doubts about the sources' objectivity. As discussed in §1.5, research on Bulgarian law proved tremendously difficult in light of circumstances which Western scholars have not confronted. However, this challenge also demonstrated the power of comparative law. For instance, when comparing different legal systems, a comparatist may ask questions that have not been asked by national lawyers and may find answers that contradict the general opinion within a jurisdiction. Notably, my research disproved the myth propagated by Bulgarian politicians and scholars for 75 years that the communist Law on Obligations and Contracts (LOC), which is still in force today, is an original Bulgarian legal text.¹⁰¹

Moreover, when a comparatist needs to present her own jurisdiction to others and 'culturally immerse' them, or when she culturally immerses herself in another jurisdiction, she may discover misconceptions which are considered as undisputed truth

⁹⁹ Vivian Curran, 'Cultural Immersion, Difference and Categories in US Comparative Law' (1998) *AJCL* 43, 51.

¹⁰⁰ The enactment of economic onerosity cannot be explained only with the socioeconomic circumstances in the 1990s. We will see that Bulgarian judges apply it in significantly milder crises and that generally Bulgarian law is altruistically inclined.

¹⁰¹ See §2.3.2.2.

within the jurisdictions. For example, many Bulgarian authors believe that economic onerosity is an exception to the general spirit of Bulgarian law although a careful examination reveals that Bulgarian law prioritizes interventionist mechanisms in many cases. Also, many English lawyers are convinced that freedom of contract is the ultimate guarantee for legal certainty while the example of Bulgaria shows that the concepts of legal certainty may differ among legal systems and that certainty is achievable even in a system that promotes judicial intervention, as discussed in Chapters 4 and 5.

While I consider the impact of context and the origin of principles throughout this thesis, I have dedicated Chapter 2 to a detailed analysis of the particularities of Bulgarian law which are relevant to this study. Whereas for historical reasons explained in Chapter 2 there is no literature in English providing an account of the idiosyncrasies of Bulgarian law, even Bulgarian scholars are not fully aware of the extent and origin of some particularities.

1.5 Difficulties in the Research Process

Throughout my research, I faced numerous difficulties which merit more serious examination as they are indicative of the differences between Bulgaria and established democracies like England. Because of Bulgaria's turbulent past, which I explore in more detail in Chapter 2, there are many mysteries surrounding the history, development, and practice of Bulgarian law—an issue which may surprise UK researchers who have the comfort of relying on libraries and online databases to find their sources and who may reasonably believe both in the accuracy of parliamentary reports and the relative objectivity and honesty of doctrinal writing.

To clarify, many documents from the 19th and early 20th century, which are fundamental for understanding the philosophy and values of Bulgarian law, are lost and/or forgotten due to censorship during communism. This required substantial archival research on my part in Bulgaria and abroad. For instance, to locate some essential articles by Lyuben Dikov—a scholar who significantly influenced the integration of economic onerosity in Bulgarian law, I had to rely on libraries in Italy, Germany, and France. Furthermore, during communism, the study of the history of

Bulgarian law prior to 1944 was not encouraged. As highlighted in Chapter 2, the first publication on the history of Bulgarian law before 1944 appeared as late as the 1980s. Nonetheless, it provides a historical account from a communist perspective, which is relatively unhelpful, especially with regard to my goal to render a more objective account of Bulgarian law.

For ideological reasons, as explained in Chapter 2, communists had to hide or lie about the origin of communist legislation like the Law on Obligations and Contracts (LOC) which is still in force today. Communist case law is not publicly accessible either. The only way to identify legal practice from this time is to read the few case notes in the textbooks of prominent communist authors or to examine the annual collection of decisions published by the Supreme Court.¹⁰² These books, however, do not contain all decisions. Moreover, the verbatim reports of parliamentary sittings during communism became public only recently.

Information about legislative initiatives and case law after 1989 is also difficult to access. The legislative processes of the 1990s and 2000s are poorly documented. To illustrate, finding the motivation of the Bill that introduced economic onerosity in the LC at the Parliamentary Archives was difficult (it was misplaced) and disappointing. Economic onerosity was part of an amendment introducing more than 340 changes in the LC, but the motivation of the entire Bill was just 5 pages long and did not even mention the principle. Furthermore, modern case law is not publicly available in its entirety and at the same place as each court has an independent website. A researcher usually has to read all available decisions on a court's website to find decisions on a particular topic.¹⁰³ There is a database called *Apis*,¹⁰⁴ which provides paid access to case law for practitioners. However, its collection is not exhaustive.

These difficulties may explain why Bulgarian law is an enigma not only to international, but also to Bulgarian scholars. Throughout the thesis, but particularly in Chapter 2, I will pinpoint facts about Bulgarian law that have not been sufficiently explored. For the purpose of clarity, it should be noted that wherever I mention

¹⁰² Following the democratic changes which restored the private/public law dichotomy, the Supreme Court was renamed Supreme Court of Cassation and a Supreme Administrative Court was established.

¹⁰³ Commentators have already raised concern about the difficulty of finding Bulgarian case law. See Maria Slavova et al, 'The Reform of the Judiciary. Is it Possible Here and Now?' (2011) 3 *Publichni politiki* 122, 128-131.

¹⁰⁴ <http://www.apis.bg/bg/>.

provisions from the *Code civil* to show the historical contrast between France and Bulgaria, I use the code's current numbering, unless I have indicated otherwise.¹⁰⁵

1.6 Brief Overview of the Chapters

Chapter 2 highlights the idiosyncrasies of Bulgarian contract law to situate economic onerosity in context and to provide the reader with historical background which is necessary to understand the doctrine's significance in Bulgarian law. Chapter 3 engages in a comparison between the scope, criteria of application and effects of economic onerosity and frustration to illustrate that the principles do not reach similar results in similar circumstances. Chapters 4 and 5 seek the reasons, which can elucidate why Bulgaria and England have developed diverse responses to impracticability. While Chapter 4 focuses on the distinct nature of contract and the function of subsidiary principles in the contract laws of the two jurisdictions, Chapter 5 examines the particular role which Bulgarian and English judges have assumed regarding agreements. Chapter 6 puts forward lessons for the harmonization project on the basis of the comparison and the Bulgarian experience. Finally, Chapter 7 considers the way forward in comparative research and in policy.

¹⁰⁵ The *ordonnance* mentioned above altered the code's numbering as it introduced new provisions.

Chapter 2

Economic Onerosity in Context: Particularities and Development of Bulgarian Law

2.1 Introduction

While a detailed introduction to Bulgarian law is beyond the scope of this thesis, it is relevant to explain the structure and hierarchy of its sources and the context in which it developed in order to delineate the framework in which the principle of economic onerosity operates and to understand its significance in Bulgarian law. The Chapter draws attention to the idiosyncrasies of Bulgarian law, and Bulgarian contract law in particular, which distinguish it both from English law and other civilian traditions—notably, its fluid structure, the lack of coherence and continuity in the law (including case law and doctrinal writing), the central function of comparative law and legal transplants,¹ and the particular role of jurists in Bulgaria. It also elucidates the origin and influences of Bulgarian civil and commercial law and pays attention to the history of economic onerosity within the Bulgarian legal tradition as well as its likely sources of inspiration with the aim of tracing the Bulgarian contribution to the doctrine's development.²

¹ On the meaning of transplants, see §1.4.2.

² Mitchell contends that understanding how and why legal change takes place is fundamental for the academic study of law. He also emphasizes that it is important to go beyond traditional evidence to adequately understand the process of change and its implications, Paul Mitchell, 'Patterns of Legal Change' (2012) 65 CLP 177-201; One of the purposes of this Chapter is to go beyond the obvious sources of evidence to denounce some of the convenient myths propagated by Bulgarian commentators.

2.2 Understanding Bulgarian Legal Terminology

The two main legal instruments relevant to the application of economic onerosity are the Law on Obligations and Contracts (LOC) and the Law on Commerce (LC). Nonetheless, before presenting these legal instruments' development and influences, it is important to situate them in the general framework of Bulgarian law to explain their function and interaction. This is also an occasion to clarify Bulgarian legal terminology, which is pertinent for my study, and to pinpoint some key differences between Bulgarian civil law and the civil laws of Western jurisdictions, including England.

2.2.1 Structure of Bulgarian Civil Law

Unlike most European jurisdictions, Bulgaria does not have a civil code.³ Its civil law is dispersed in various laws and codes with a limited scope,⁴ case law and scholarly writing.⁵ There are two models of structuring civil law both of which are based on Roman law—the Institutional one borrowed by the *Code civil* and the Pandectist one incarnated in the BGB.⁶ Despite the lack of civil code, Bulgarian civil law has a 'disguised' Pandectist structure. However, while the 'special parts' of its civil law are codified in various laws and codes,⁷ its 'general' part is not.⁸ Bulgarian judges infer the

³ Nordic countries, England, and the Irish Republic do not have civil codes either.

⁴ Articles 3 and 4 of the Law on Statutory Instruments stipulate the difference between a law and a code. A code regulates an entire branch of law while a law regulates particular social relations within a branch. Also, contrast with a civil code which systematizes the core areas of private law.

⁵ Both are secondary sources of law, as explained in §2.2.2.

⁶ The *Code civil* is based on Justinian's Institutes and divides civil law into three parts—of persons, of things, and of actions. The BGB of 1896 was developed by the German Pandectist School and is based on Justinian's Pandects. It divides civil law into a 'general part' specifying the general principles and sources of civil law, the rules of interpretation, etc. and 'special parts'—of property, of obligations, etc.; On the importance of Justinian's Institutes and Pandects, see George Mousourakis, *The Historical and Institutional Context of Roman Law* (Ashgated Publishing 2003).

⁷ For example, Law on Inheritance, LOC, etc.

⁸ A codified general part signifies a modern approach towards codification. The BGB has a general part. Furthermore, Latvia, Estonia, Poland, Hungary, and the Czech Republic all have codified general parts of civil law that were recently reformed; In Bulgaria, a draft project of a civil code, including a general part, was discussed in the 1950s, but it was rejected for being ill-written. While a new draft of a civil code was proposed in the 1990s, scholars deemed it underdeveloped, Christian Takoff and Petko Popov, 'About the Project for a Civil Code as of 1999' [2000] 1 *Turgovsko pravo* 3.

general part from Bulgarian scholarly writing, from the spirit of the various laws and codes, and from case law.⁹ Besides, the ‘special parts’ of civil law have their own ‘general parts.’ Nonetheless, the general parts of special laws like the LOC often neither specify the underlying principles of the documents nor their purpose. Consequently, judges infer these legal instruments’ underlying principles and purposes from their spirit, case law and doctrine.

While this particularity has a historical explanation I discuss in §2.3.1, it allows certain flexibility of interpretation and an opportunity for rapid evolution of the law if needed. It is also a double-edged sword because it may lead to divergences in interpretation, as I illustrate in the subsequent Chapters. Bulgarian doctrine, for example, is not unanimous on what the general principles of Bulgarian civil law are and what they imply.¹⁰ This idiosyncrasy is important for the application of economic onerosity. Article 307 (LC) stipulates that judges intervene in the agreement in the name of fairness and good faith, but neither the LC nor the LOC clarifies how these principles are related—whether they have equal weight, whether they overlap, whether one is a consequence of the other, etc. In Chapter 4, I clarify that doctrinal opinions diverge.

One may speculate that, to some extent, the Bulgarian court plays a similar role to the English court because both may choose to redefine key principles of contract or develop new ones. We explore this theme in further detail in Chapters 4 and 5, where among other examples we discuss instances of how English and Bulgarian judges rely on creativity to combat substantive unfairness. This issue is also relevant for the harmonization debate. For instance, the DCFR has explicitly defined its four underlying principles—freedom, security, justice, and efficiency.¹¹ Considering that the DCFR is supposed to serve as a ‘toolbox’ for national legislators and judges, some jurisdictions might be inclined to rely on these principles when modifying the general

⁹ Maria Pavlova, *Civil Law: General Part* (Sofi-R 2002) 46.

¹⁰ Pavlova, for instance, identifies five fundamental principles: autonomy of the subjects of law, fairness in civil relations, equality of the subjects of law, adequate defense for infringement of rights, and legal certainty, Pavlova (n 9) 46-51; Many Bulgarian laws refer to the principle of good faith, but there is no consensus whether it is a fundamental principle of Bulgarian civil law. It is recognized as an underlying principle of the law of obligations, Angel Kalaidjiev, *The Law of Obligations: General Part* (5th edn, Sibi 2010) 24; During communism, nonetheless, doctrine promoted other general principles—for instance, the primacy of State interests over private interests.

¹¹ *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* 13.

part of their laws on obligations or when interpreting European harmonizing legislation. In §6.5, we analyze how the Bulgarian approach to developing the underlying principles of contract may be helpful in demonstrating the advantages and disadvantages of such a restrictive definition of the principles.

2.2.2 Sources of the Bulgarian Law of Obligations

The Bulgarian law of obligations has diverse sources—they are dispersed and do not have the same weight. As noted above, Bulgarian civil law does not have a codified general part. Moreover, the general parts of the special laws neither explain the underlying principles of the documents nor how they interact with one another. Consequently, the hierarchy of the sources of law, including the sources of the law of obligations, is subject to interpretation. The primary ones are the Constitution¹² and the various laws and codes. Moreover, modern Bulgarian law formally divides private law into civil and commercial law—what is known as ‘dualism of private law.’¹³ While theoretically having such a distinction allows for two separate contractual regimes—one for merchant transactions and one for non-merchant transactions,¹⁴ in practice the two branches are considered subsidiary. The two most pertinent sources of law for our study are the Law on Obligations and Contracts (LOC) and the Law on Commerce (LC), which have a peculiar history we expose in more detail in §2.3. Because of Bulgarian private law’s dualism, rules from the LC like economic onerosity are applicable to civil transactions. Additionally, the rules on contract in the LOC apply to

¹² The current one was enacted in 1991. It contains norms like the autonomy of will which are also relevant to the law of obligations.

¹³ Emil Zlatarev and Veselin Hristoforov, *Commercial Law* (Ciela 2008) 20; Dualism is not universally accepted in continental jurisdictions. It has been embraced in France and Germany. However, Italy and Switzerland do not have autonomous commercial law. See *International Encyclopedia of Comparative Law* (1981) vol VIII, ch 2, para 167-70; Dualism does not exist in England.

¹⁴ Article 1 (LC) provides the definition of ‘merchant.’ Merchants are legal entities or natural persons having particular scopes of activity enumerated in the article; The types of entities involved do not necessarily determine the type of the transaction—there could be a merchant transaction between non-merchants and a non-merchant transaction between merchants. Article 286 (LC) establishes the definition of ‘merchant transaction’; Also note that with the enactment of the Law on Consumer Protection, a third contractual regime was endorsed. Thus depending on the circumstances, a person or entity falling under the scope of merchant as defined in the LC could be considered a consumer.

merchant transactions—in Chapter 3 we explain that some criteria of application of economic onerosity are derived from the LOC.

In addition to the LC and LOC, there are other laws that may be relevant to a contract depending on its scope. For example, the Code of Commercial Maritime Navigation contains rules that are only applicable to contracts concerning carriage by sea. This particularity is important for our functional analysis in Chapter 3. When explaining what the Bulgarian approach would be in a case English judges have confronted, we may refer to rules contained in the special laws and codes.

Both case law and scholarly writing are secondary sources of law. The only court decisions binding for all courts in the future are the decisions on interpretation by the Bulgarian Supreme Court of Cassation (SCC)¹⁵—they are rendered when legal practice is severely divided on the interpretation of certain rules.¹⁶ It should be noted that not all supreme courts of continental systems have the practice of distinguishing between *decisions on interpretation* and regular *decisions on cassation*.¹⁷ In Bulgaria, regular

¹⁵ During communism, there were two types of mandatory guidelines for interpretation rendered by the Supreme Court—decisions on interpretation and decrees of the Plenum. On the main difference between them, see Vitali Tadjer, *Civil Law of People's Republic of Bulgaria: General Part. Section I* (Sofia 1972) 79-85; While the law no longer allows the SCC to render decrees, the ones from communist times may still be relevant.

¹⁶ These special decisions by the general assemblies of SCC's chambers are governed by articles 291-292 of the Code of Civil Procedure and articles 124-131 of the Law on the Judiciary System. These decisions explain how certain principles should be interpreted, but do not apply them to concrete cases. They may be requested by SCC's judicial panels or other State authorities, but not by the parties to a dispute. Regular decisions on cassation are binding only for the parties to the dispute, but have important persuasive value for the lower courts; The decisions on interpretation are rendered rarely. Compare with the *Cour de cassation*, which often resorts to *revirement de jurisprudence* (reversal of case law) although France has not recently experienced radical political change, Maiwenn Tascher, 'The Reversals of Case Law of the Court of Cassation' (Doctoral Thesis, Université de Franche-Comté 2011) <https://tel.archives-ouvertes.fr/file/index/docid/790014/filename/these_A_TASCHER_Maiwenn_2011.pdf>.

¹⁷ Such a distinction does not exist in France or Germany. See the discussion on French and German case law in Jack Beatson and Eltjo Schrage, *Unjustified Enrichment* (Hart 2003) 15-20; Unlike French decisions, which are anonymous, Bulgarian decisions normally include the name of the judicial panel's president. Unlike French judges, Bulgarian judges may dissent similarly to English judges.

court decisions,¹⁸ including SCC's regular decisions and rulings on cassation,¹⁹ have only persuasive value in court. Scholarly writing also has persuasive value in court—courts often rely on doctrine to fill in gaps in the law.²⁰ In §2.3.2, we will see that Bulgarian scholars played a major role in introducing economic onerosity to Bulgarian law and in developing its criteria of application. In Chapter 4, we will also examine a peculiar phenomenon—how contemporary Bulgarian courts have cited communist doctrine to redefine key legal principles.

In that light, it has been asserted that the function and role of legal doctrine depends on the jurisdiction at hand.²¹ Compared to continental scholars, and Bulgarian scholars in particular, English academics have a less palpable influence on adjudication. Various factors may have affected scholars' role in the English tradition:

- The lawmaking role of judges—English judges do not recognize scholarly writing as a source of law unlike Bulgarian judges;²²
- The relatively late development of English legal science—we will see in §2.3 that while Bulgarian law was a 'late bloomer' for historical reasons, Bulgarian

¹⁸ The courts' hierarchy has direct implications for the value of their decisions: a decision by any of the supreme courts (SCC or Supreme Administrative Court) has more persuasive value than a decision by the lower courts; Also, note that Bulgarian courts can render two types of judgments—rulings on admissibility and decisions on the merits. With their decisions, the upper courts either quash (fully or partially) or affirm decisions of the lower courts.

¹⁹ Unlike the supreme courts of common law jurisdictions, which can review both questions of law and fact, the courts of cassation of civil jurisdictions are competent for reviewing only questions of law. On the different roles of these courts, see Sofie Geeroms, 'Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not be Translated...' (2002) 50 AJCL 201-228.

²⁰ On the role of Bulgarian scholarly writing, see Rosen Tashev, *General Theory of Law* (Sofia 2010) 147-150.

²¹ For a comparative and philosophical analysis of the role of doctrine, see Enrico Pattaro (ed), *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law. Treatise of Legal Philosophy and General Jurisprudence: Volume 4* (Springer 2005).

²² For many years, references to the writings of living authors were suppressed in English courts, Mitchell, 'Patterns of Legal Change' (n 2) 197; However, this does not mean that English judges did not read academic research and could not be indirectly influenced by it. Furthermore, the approach seems to have evolved—in some cases I discuss like the *Sea Angel* [2007] 2 Lloyd's Rep 517 modern treatises were cited. Nonetheless, in Bulgaria, scholars have traditionally impacted law development in several ways:

- by providing commentaries on how legislation should be interpreted which in turn are cited by judges;
- by promoting new solutions in their writings, which are then embraced by legislators or judges;
- by helping the SCC to draft its decisions on interpretation;
- by participating in the working committees drafting legislation, etc.

legal science developed prior to English legal science and was and still is instrumental for the development of Bulgarian legislation and court practice;²³

- The less marked links between academia and politics—while there are examples of English academics seeking political engagement,²⁴ in Bulgaria, by tradition since the 19th century as discussed in §2.3, members of Sofia University’s Law Faculty become MPs, ministers, and judges. Hence they have a chance to argue in favor of Bills or to influence interpretation based on their ideas developed as researchers. This Faculty, however, constitutes of a very small community where most junior academics have been students of the senior academics.²⁵ We will see in §2.3.2 how this fact could have played a role not only in the integration of economic onerosity, but also in the drafting of the LOC and LC.

Finally, there are other secondary sources of Bulgarian civil law, which may also be sources of the law of obligations—legal custom, fairness, morality, international agreements, EU legislation, etc. The most interesting for my study is the principle of fairness whose role I discuss in Chapters 4 and 5. In the next section, we will see that following the Liberation from the Ottoman Empire, Bulgarian laws were enacted progressively, which left many gaps. That is why article 10 of the Law on Civil Legal Procedure, which was in force until 1952, explicitly recognized fairness as a separate source of law.²⁶ This peculiarity distinguishes Bulgaria from continental jurisdictions

²³ Between 1700 and 1965 the dominant form of legal education in England was apprenticeship. Hence legal education in English universities did not have the same prestige as legal education in continental universities. Even today some scholars have noted that there is certain hostility by barristers who believe that a university degree in law is not valuable. It has been asserted that the relationship between academic law and the legal profession is problematic, David Sugarman, ‘A Special Relationship? American Influences on English Legal Education, c 1870-1965’ (2011) 18 *IJLE* 7, 14.

²⁴ The UK Parliament often invites scholars to testify for evidence.

²⁵ In the UK, one may observe a different phenomenon—lack of clear separation between the judiciary and legislative authorities. See Mitchell’s discussion about the history behind the Law Reform (Frustrated Contracts) Act 1943, Paul Mitchell, ‘*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Limited* (1942)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006) 247-73.

²⁶ ‘Courts are obliged to decide cases according to the rationale of the laws in force. If the laws are incomplete, unclear or contradictory, courts should decide based on the general spirit of the law. If there is no law, courts base decisions on custom. If there is no custom, they base their decisions on fairness.’

like France and Germany.²⁷ However, to some degree, it approaches it to England,²⁸ although we will see that Bulgaria and England have distinct notions of fairness. While article 10 has been subsequently abrogated, Bulgarian doctrine argues that fairness remains a separate source of law.²⁹

It should be noted that article 5 of the current Code of Civil Procedure³⁰ replaced fairness with morality as a source of law and eliminated the hierarchy between the secondary sources, which was stipulated in article 10 cited above. In this way, legislators recognized morality on par with the general principles of law and legal custom—a particularity with practical implications not only for the application of economic onerosity, but also for the role of Bulgarian courts regarding agreements, which we explore in Chapter 5. While morality plays an important role in English law, we will see that the Bulgarian and English moral reference points diverge.

2.3 The Struggle for Bulgarian Law

In contrast to most Western European jurisdictions³¹ whose laws developed gradually, the Bulgarian legal system does not have a coherent historical path. It had to be rebuilt almost from scratch several times since the late 19th century due to drastic political changes which necessitated rapid legislative initiatives ‘in bulk’ and a brisk adaptation to new socio-economic values, as we discuss below. Three main periods of recent legal development can be identified: the re-establishment and advancement of the Bulgarian State after the Liberation from the Ottoman Empire (1878-1944), communism (1944-

²⁷ Ivan Apostolov, *Evolution of the Continental Theory of Interpretation* (Imprimerie de l'Université 1946) 44-47.

²⁸ It has been contended: ‘...common law judges traditionally have inherent equitable power: they can mold the result in the case to the requirements of facts, bend the rule where necessary to achieve substantial justice, and interpret and reinterpret in order to make law respond to social change,’ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, SUP 2007) 51.

²⁹ Pavlova (n 9) 92-95.

³⁰ ‘Courts examine cases according to the precise meaning of the laws. When the laws are incomplete, unclear or contradictory—according to the spirit of the law. If there is no law, courts base their decision on the general principles of law, custom and morality.’

³¹ With few exceptions like Belgium where Napoléon imposed the *Code civil*, legal development in the West was gradual and uninterrupted by dramatic political changes.

1989), and the transition period to democracy and subsequent entry to the EU in 2007 (post-1989).³²

The relationships between these periods should be examined to understand the particularities of contemporary Bulgarian law. The radical changes of the legal system, notably communism, interrupted the natural evolution of Bulgarian law and resulted in inconsistencies with which Bulgarian law continues to struggle today. Nonetheless, because of these changes, Bulgarian law also developed a capacity to adapt quickly to legal change and acquired a tolerance for fragmentation, which in turn explains the special role of Bulgarian judges and scholars. Moreover, since its birth, Bulgarian law has been conceived by Bulgarian lawyers with backgrounds in diverse foreign laws. Consequently, legal transplants and comparative law are the primary vehicles through which law advances.

However, Bulgarian lawmakers did not settle on any particular legal system as a source of inspiration, which is typical for countries which are traditionally open to foreign influences.³³ Since its conception, Bulgarian law has constituted of a ‘patchwork’ of influences. Subjectively ‘mixing and matching’ principles and concepts from foreign law and modifying them to adapt them to the Bulgarian legal system is a feature of Bulgarian lawmaking. We will see that lawmakers usually borrow principles from the jurisdiction in which they earned their law degree, from jurisdictions they admired or

³² This division is adopted for the sake of clarity. Following the Liberation, Bulgaria faced diverse challenges which affected its State structure and its laws. For a historical account, see Milcho Lalkov, *Bulgaria after the Liberation* (Polis 2001); Despite the provisions of the San Stefano Peace Treaty (1878), which ended the Bulgarian Liberation War, the Congress of Berlin (1878) partitioned Bulgaria into three—Principality of Bulgaria, Eastern Rumelia, and Macedonia. This unjust, from a Bulgarian perspective, partition triggered a national unification movement, which partially succeeded in 1885, when Eastern Rumelia joined the Principality of Bulgaria. For our study’s purposes, references would be made to legislation of the Principality of Bulgaria; The Congress of Berlin was unjust in other ways too: it took away territory from Bulgaria and formally made the Principality of Bulgaria a vassal state to the Ottoman Empire. After a long struggle, Bulgaria became officially an independent kingdom in 1908; Also, in 1934 a *coup d’état* established a temporary military dictatorship. After regaining power, the Bulgarian tsar instituted a ‘dictatorial’ monarchy (1935-1943). These regimes did not impact contract law directly. We will see, nonetheless, that there had been a general predisposition to greater State regulation since the 1920s.

³³ For example, Austria and Italy have been heavily influenced by German and French law. See Michele Graziadei, ‘Legal Culture and Legal Transplants. Italian National Report’ (XVIII Congress of Comparative Law, Washington, July 2010), Herbert Hausmaninger, *The Austrian Legal System* (4th edn, Manz 2011).

from jurisdictions whose language they spoke.³⁴ This idiosyncrasy was preserved during communism, although the origin of the principles codified during that period has not been disclosed. Hence, contemporary Bulgarian law is simultaneously infused with Romanistic and Germanic principles, remnants of communist ideals and original Bulgarian ideas.

The two legal texts relevant to the principle of economic onerosity—the LC, which codifies it, and the LOC, which provides the general rules on contract—illustrate the connections between the three main historical periods and the challenges brought about by communism. The current LOC was enacted in 1950 during communism. After the rise of democracy in 1989, legislators decided to retain it and amend it rather than to draft a new LOC from scratch. The amendments were partially inspired by the 1892 LOC which was in force before the current one and by Bulgarian doctrine prior to communism, as explained below. The current LC, nonetheless, is a modern creation—it was progressively enacted in parts starting in 1991. However, when drafting it, Bulgarian legislators examined the LC which was in force prior to communism, as further discussed below. Moreover, some principles like article 307 on economic onerosity are inspired by the writings of established scholars prior to communism.

This section highlights the most important features of Bulgarian law's development in all three periods with a focus on the LC and LOC. §2.3.1 explains why Bulgarian law has been volatile and incoherent since its birth and how scholars and judges have played an important role in improving it. §2.3.2 reveals why comparative law and legal transplants are the primary tool of legal development and why contemporary Bulgarian law is a patchwork that cannot be fitted into the legal families 'box.' §2.3.3 elucidates how and why economic onerosity was introduced to Bulgarian law.

³⁴ Arguably, they introduced 'chance' as means of legal development; Comparatists have identified diverse factors that lead to borrowing: imposition through violence (when a conqueror imposes its laws on the conquered), prestige (admiration of a certain jurisdiction by another jurisdiction) and chance (historical accidents), Esin Örucü, 'Law as Transposition' (2002) 51 ICLQ 205, 214-18.

2.3.1 Volatility and Incoherence

Bulgaria's dramatic history sheds light on the structure and volatility of Bulgarian law. Legislators from all three periods described above have contributed to the incoherence of Bulgarian law although the concrete reasons for doing so diverge. On the one hand, the particularities of Bulgarian law reform assigned a special role for Bulgarian judges and scholars as authorities to improve the law and fill in gaps. On the other hand, these idiosyncrasies result in challenges for legal practice and research—as explained below, communism interrupted the natural evolution of Bulgarian law and set it on a path of perpetual identity crisis.

2.3.1.1 Post-Liberation Law Reform

As noted in §2.2.1, Bulgaria does not have a civil code. This feature can be explained with the colossal task confronted by the first Bulgarian statesmen. Following the Liberation in 1878, they had to build a country from scratch³⁵—develop a political system, reinstate the monarchy, draft a Constitution and laws, and create an elaborate court system,³⁶ without prior experience. In the span of several decades, they had to catch up on the legal development that independent nations had while Bulgaria was under Ottoman rule. Because of the immensity of the challenge, they were forced to adopt a piecemeal approach and draft the laws which were most urgently needed first—the LOC and the LC being enacted respectively in 1892 and 1897.³⁷ The Bills were passed as soon as the drafts were completed and there is no evidence of coordination between the drafting committees.³⁸

³⁵ See Lalkov (n 32).

³⁶ On the turbulent development of the court system after 1878, see Angel Djambazov, *Court System of Bulgaria 1878-1944* (NIZ 1990).

³⁷ The first Bulgarian constitution was adopted in 1879. Laws regulating the various branches of law were progressively enacted—Law on Acquisition of Uninhabited Land (1880), Laws on the Court System (1880 and 1883), Law on Inheritance (1890), Law on Obligations and Contracts (1892), Law on Commerce (1897), etc. For the most important legal initiatives, see Dimiter Tokushev, *History of the New Bulgarian State and Law 1878-1944* (Sibi 2008).

³⁸ Later, this particularity troubled both legislators and scholars. The Law on Codification (1916) established a permanent committee supposed to group and unify laws pertinent to the same branch of law; Furthermore, in the 1930s Bulgarian scholars argued that the laws in force had no connection with one another, Konstantin Katzarov, 'Coordinating Civil and Commercial Law with Criminal and Procedural Law' (1939) 1 *Advokatski pregled* 24.

Since there were gaps in the law, Bulgarian legislators explicitly gave judges the power to make law by recognizing fairness as a separate source of law, as discussed in §2.2.2.³⁹ While this approach may seem anachronous from a continental perspective,⁴⁰ it was not striking from a Bulgarian standpoint. In the Ottoman Empire, Bulgarians had retained relative autonomy in resolving disputes among themselves. Prior to the Ottoman conquest in 1396, Bulgaria had its own customary law.⁴¹ Under Ottoman rule it was still applicable to Bulgarian family matters, inheritance disputes, and agreements between Bulgarians. These disputes were resolved by the church, the guilds of craftsmen, the mayors, etc. It has been contended that these informal adjudicative authorities did not apply law as professional judges, but as practitioners who based their decisions on conscience and were approached by Bulgarians because they trusted them rather than the corrupt Ottoman courts.⁴² Essentially, the first Bulgarian modern courts were not only symbolic of Bulgaria's independence, but could benefit from the reputation of the prior informal Bulgarian adjudicative authorities.

In addition to judges, Bulgarian scholars also assumed the role of authorities who could fill in gaps in the law. The first Bulgarian university—Sofia University—was founded in 1888 and its Law Faculty opened doors in 1892. In §2.3.2, we underscore that the first Bulgarian legal scholars were all comparatists—they relied on comparative law as a critical tool that could demonstrate the weaknesses of Bulgarian law and justify the integration of new principles like economic onerosity, which was first advocated in the 1920s. This openness to seek inspiration from foreign law has been preserved until today. These scholars also established another Bulgarian tradition—they were strongly

³⁹ This view is held by Apostolov. See Apostolov, *Evolution* (n 27) 45; Others argue that legislators may purposefully leave loopholes in legislation to give judges the opportunity to adjust legal norms to the complex cases that life brings to their attention, Tzeko Torbov, *History and Theory of Law* (BAN 1992) 364. While Torbov's opinion is more relevant to the mature Bulgarian law rather than to its early stages, it shows Bulgarian scholars' conviction that legislation is not self-sufficient.

⁴⁰ One of the main reasons why the *Code civil* was enacted were the excesses of the judges during the *ancien regime*. Ascheri asserts that French codification finally freed citizens 'from the despotic and unaccountable discretion exercised by judges under the old system,' Mario Ascheri, 'Turning Point in the Civil-Law Tradition: From *ius Commune* to Code Napoléon' (1996) 70 *Tul.L.Rev* 1041, 1043; Moreover, unlike Bulgarian judges who received their discretion from legislators, German judges self-declared their discretion by developing jurisprudential solutions, including principles addressing onerous performance. See footnote 38 (Chapter 1).

⁴¹ For a summary of its main principles, see Galabina Petrova and Peter Petrov, *History of the Bulgarian State and Law: Sources 680-1944* (4th edn, Albatros 2010).

⁴² Galabina Petrova, *History of the Bulgarian State and Law (680-1878)* (Sibi 2009) 360-63.

involved in political affairs. Many of them were judges, ministers, or MPs and could promote their ideas about law development and have a direct impact on legislation and adjudication.⁴³ For example, the proposal to enact a principle on economic onerosity in modern times was put forward by an academic from Sofia University who was an MP.⁴⁴

2.3.1.2 Communist Propaganda

Communism⁴⁵ changed profoundly Bulgarian law, and Bulgarian contract law in particular—it altered its values by heavily ideologizing it and it attempted to detach it from its roots. After 1944, all laws of the Kingdom of Bulgaria were abolished within a limited timeframe (1949-1952) and new laws inspired by Marxism-Leninism were enacted. The LOC and the LC were no exception—in 1950 a new LOC was passed. During communism, there was no LC (no dualism of private law as discussed in §2.2.2) because the regime did not allow private initiative. All companies were state-owned and their transactions were regulated by the LOC and other Acts of Parliament.⁴⁶ Communist dictatorship also undertook a ruthless purge at the Law Faculty—many authorities like Dikov and Apostolov who made invaluable contributions to the development of Bulgarian law and the integration of economic onerosity and who I cite

⁴³ For instance, the 1892 LOC was drafted by a committee of three members. Two of them—Stoyanov and Danchov—served as Presidents of the SCC and also pursued careers at Sofia University. Stoyanov was also an MP and Danchov—minister of justice twice. Sgurev, a member of LC’s drafting committee, was a scholar, President of the Bulgarian Parliament, and President of the Bulgarian Bar Council. For the composition of the committees, see Tokushev (n 37) 176 and 203; See also SCC’s website <http://www.vks.bg/vks_p01_05.htm>.

⁴⁴ When discussing amendments to the LC in 1993, Professor Orsov concluded: ‘I would like to declare my desire to include a text regulating economic onerosity in...the LC.’ See Verbatim Report of the Sitting of the Bulgarian Parliament of 2 June 1993; While further discussion on the principle did not take place in Parliament prior to 1996, it seems likely that his proposal influenced the working group on the LC.

⁴⁵ The rise of communism in Bulgaria resulted in brutal expropriation and purges—many politicians from prior governments, businessmen and intellectuals were sentenced to death or concentration camp by the shameful ‘people’s court.’ See Poly Meshkova and Dinyu Sharlanov, *The Bulgarian Guillotine* (Democracy 1994).

⁴⁶ For the types of state-owned entities, see Vitali Tadjer, *Civil Law of People’s Republic of Bulgaria: General Part. Section 2* (Sofia 1973) 73-186.

throughout this thesis were expelled and/or sent to concentration camp⁴⁷ because their work was deemed ‘bourgeois,’ ‘Fascist,’ and against the people.⁴⁸

Communism relied on propaganda and censorship to promote convenient lies and unfortunately Bulgarian law fell victim to the regime as well. To a significant extent, the achievements of scholarship prior to communism were deliberately forgotten. This has made the research on this particular period extremely challenging. The original studies by authors prior to communism are buried in national archives or antique bookshops.⁴⁹ Furthermore, academics specializing in the history of Bulgarian law are relatively few to this day. During communism this type of research was suppressed for ideological reasons. The first systematized studies on the development of Bulgarian law post-1878 appeared in the late 1970s and 1980s⁵⁰ when the communist regime was less strict. However, more comprehensive studies on Bulgarian law’s history prior to 1944 were published after 1989.⁵¹

In addition to attempting to delete the history of Bulgarian law, the communist regime intentionally lied about the origin of its own laws—a particularity which has caused a permanent identity crisis for Bulgarian law. To this day, there is no research on the origin of the LOC, which is still in force, and nothing is known about its authors. Contemporary authorities seem to have fallen prey to the propaganda. Some claim that the LOC is an original Bulgarian normative act created in accordance to the classical solutions of the continental (French-German) tradition.⁵² Others maintain that the 1950 LOC is based on ‘the principles of socialist law and planned economy.’⁵³

⁴⁷ For a personal account of the purges, see Professor Venedikov’s *Memories* (PV 2003).

⁴⁸ Communists accused of ‘Fascism’ those promoting Western influences. In §2.3.2, we explain that Dikov was one of the most prominent academics in the post-Liberation period and that his work is instrumental for economic onerosity’s integration. However, communist writers referred to Dikov as the ‘most distinguished Fascist scholar.’ See Tadjer, *Civil Law. Section 1* (n 15) 48.

⁴⁹ During communism they were saved by people who protected them in their private libraries.

⁵⁰ The first book of this kind is Mihail Andreev’s *History of the Bulgarian Bourgeois State and Law 1878-1917* (Sofi-R 1993). To avoid censorship, however, Andreev had to speak about ‘achievements positive from a bourgeois perspective’ because, from a communist standpoint, they are ‘against the people.’ Despite having infused his book with communist ideology, Andreev makes a contribution in describing law development post-1878 and paying hidden tribute to scholars from those times.

⁵¹ See Tokushev (n 37); Petrova and Petrov (n 41).

⁵² Kalaidjiev (n 10) 26.

⁵³ See Tokushev (n 37) 182.

My archival and comparative research, however, showed that these assertions are only partially true and that the LOC is a complex transplant with a dark secret. In §2.3.2, we explain that it was inspired by the Fascist *Codice civile* of 1942 and, to a limited degree, by the Draft of a Bill on the General Part of Civil Law (1947) of Poland—a scandalous fact that the communist regime could not disclose since Fascism was its rival ideology. It should be noted, however, that similarly to the post-Liberation period, scholars and judges were instrumental for the quick development and implementation of communist law. It is likely that the LOC was drafted by academics—there are hidden nods to prior scholars (notably Dikov), such as a partial principle on economic onerosity codified as article 266, para 2 (LOC) which we mention in §2.3.3. It is also important that in the span of a few years following enactment detailed treatises on the law of obligations were published⁵⁴—these textbooks continue to be cited by courts and scholars today. However, despite its contributions, doctrine during communism did not have the critical spirit of scholarship prior to communism and progressively became more descriptive: it could not criticize the law since it was passed by the Party. The openness towards Western law, characterizing the post-Liberation period, disappeared—in the rare occasions academics mentioned those systems, they criticized them from an ideological perspective.⁵⁵

Bulgarian scholars, nonetheless, were often asked to help the SCC to draft their decisions on interpretation⁵⁶ whose importance we clarified in §2.2.2. These decisions continue to inform interpretation today. For example, Decree of the Plenum 1 of 28 May 1979 on the rules on unjust enrichment still remains the only detailed clarification regarding the role of these principles. We explain why this decree seems relevant to economic onerosity in §3.6.2.

⁵⁴ Ivan Apostolov, *The Law of Obligations: General Part* (Sofia 1947); Lyuben Vassilev, *Civil Law: General Part* (Sofia 1951); Aleksander Kozhuharov, *The Law of Obligations* (Sofia 1954); Lyuben Vassilev, *The Law of Obligations* (Sofia 1954).

⁵⁵ Tadjer’s treatise contains a section dedicated to French, German and British ‘bourgeois’ law. See Tadjer, *Civil Law. Section 1* (n 15) 56-57.

⁵⁶ For instance, in the 1950s and 1960s, the SCC requested the advice of Vassilev cited in footnote 54, ‘Centenary of Lyuben Vassilev’ (2011) 4 *Pravna misul* 88, 92.

2.3.1.3 Dramatic Post-Communist Law Reform

After the fall of communism in 1989, legislators faced yet another titanic task—reforming all branches of law in a limited timeframe. In few years they had to implement a large-scale reform without experience and without having a detailed knowledge of what a market economy was. They also had to create a legal framework allowing citizens to register companies and to trade with one another. Legislators restored the dualism of Bulgarian private law. An LC was progressively enacted in parts—the first part was enacted in 1991. The LC is by far one of the most amended Bulgarian legal texts: until 2013 it was amended 63 times.⁵⁷ Economic onerosity was enacted as part of an amendment introducing more than 340 additions and modifications to the LC. In parallel, the LOC was amended to reflect the needs of a market economy—the two most substantial amendments were enacted in 1993 and 1996, although there have been minor amendments later.

Scholars have characterized contemporary legislation as ‘legislation written on one knee.’⁵⁸ Regrettably, because of this approach, information about the legislative process in the 1990s is scarce and poorly organized. In the spirit of the communist approach of not disclosing information, the composition of the drafting committees is unknown.⁵⁹ The huge amount of amending legislation explains why Bills were passed without a comprehensive discussion by MPs and why scholars have simply been unable to analyze them in detail. As discussed in §2.3.3, this also explains why economic onerosity was codified in Bulgarian law without any major discussion by contemporary academics or parliamentarians although the principle has huge practical implications. The enormous amount of amending legislation also constitutes a challenge for judges and practitioners: it results in lack of continuity and contradictions in case law, which jeopardize legal certainty.

Nonetheless, one should not be too critical of the first post-communist legislators given the colossal task they had. They needed to enact legislation, particularly in commercial law, very quickly, so that Bulgaria could transition from a communist State with a

⁵⁷ See the list of amendments preceding the law’s current version.

⁵⁸ Takoff and Popov, ‘About the Project for a Civil Code as of 1999’ (n 8).

⁵⁹ For instance, the Motivation of the Bill on Amending and Supplementing the Law on Commerce of 1996, which introduced economic onerosity, states that the Bill was drafted by ‘a large working group in which practitioners and scholars participated.’

planned economy to a democracy with a free market the soonest possible. Moreover, contract and commercial law were not viewed as publicly sensitive subjects: instead Parliament spent a long time discussing issues like the return of property and land which had been confiscated after 1944.⁶⁰

Once again, similarly to the previous two periods, scholars and judges played an important role in improving the law and limiting uncertainty of interpretation. However, a peculiar paradox can be identified. Because the LOC was simply amended, communist case law and doctrine on it are still relevant. This is a key reason why Bulgarian contract law is embedded with altruistic and interventionist principles, as explained in this thesis, but also why judges rely on communist writing to develop modern principles.⁶¹ Furthermore, this period is also characterized by a partial rediscovery of academic writing prior to 1944. We will see in §2.3.3.2 that the first articles on economic onerosity published in modern times, notably Staykov's, were instrumental for developing the principle's criteria of application.⁶² Nonetheless, a careful examination shows that Staykov draws heavily on Bulgarian doctrine from the 1920s.

2.3.2 The Role of Comparative Law: Patchworks of Influence

As discussed above, incoherence and malleability are two of Bulgarian law's most important features. Another key characteristic, which further distinguishes it from leading jurisdictions like England, France, and Germany, is its use of comparative law as a primary tool of legal development.

This section examines Bulgarian contract law's main influences and distinct ways of using comparative law—notably, how Bulgarian law relies on a 'mix-and-match' approach and does not follow slavishly any particular jurisdiction.⁶³ This feature has

⁶⁰ See the Verbatim Reports of the 36th, 37th, and 38th Bulgarian Parliament.

⁶¹ In §4.3.2.2, for example, we demonstrate that to define the principle of 'good morals,' the SCC used the writings of Tadjer—a communist authority.

⁶² Ivailo Staykov, 'Economic Onerosity of Performance of Business Transactions' [1997] *Pazar i pravo* 19; Krasen Stoychev, 'Modification of Contractual Obligations due to Change of Circumstances: Historical and Comparative Analysis' [1997] *Pravna misul* 15; Ivailo Staykov, 'The Clausula Rebus Sic Stantibus Institute in Current Bulgarian Commercial Law' [1998] *1 Suvremenno pravo* 71.

⁶³ It is interesting that Giliker explains that contemporary English judges show more interest in the law of other common law jurisdictions than in European jurisdictions with three factors: 1)

been preserved throughout all periods of development discussed in §2.3.1 and has resulted into a layering of contradictory influences. Thus contemporary Bulgarian law is a ‘patchwork’ of Romanistic, Germanic and communist principles ‘sewn’ together with Bulgarian creativity.

2.3.2.1 The First LOC and LC

As noted in §2.3.1.1, the 1878 Liberation is the event which triggered the development of modern Bulgarian law. For historical reasons, which are beyond the scope of this study,⁶⁴ Bulgarians were oppressed. While they lived in the Empire for almost five centuries, they permanently revolted to seek liberation. Their refusal to integrate in the Empire combined with the fact that they did not have their own university in which they could study in Bulgarian encouraged them to earn their education abroad and to develop a profound curiosity for the achievements of other countries.

The first Bulgarians with university degrees had all studied abroad. The first Bulgarian jurists were no exception: they were educated in France, Italy, Germany, Austria-Hungary, Romania, Switzerland and Russia. Following the Liberation, many of them returned to contribute to the re-establishment of the Bulgarian State and development of Bulgarian science, which in practice resulted into the use of comparative legal analysis in lawmaking, legal writing and teaching. Seeking inspiration from foreign law was also necessary because, as noted in §2.3.1.1, Bulgarian customary law had a limited scope—thus it could not serve as the foundation of codified law. Even after the creation of the Law Faculty, Bulgarian lawyers preserved the tradition to study abroad and earned their PhDs in Western Europe.⁶⁵

The legislative process behind the first LOC⁶⁶ enacted in 1892 and the first LC⁶⁷ enacted in 1897 illustrates how important comparative law has been since the early

linguistic accessibility 2) the prestige of the jurisdictions from which inspiration is sought 3) the cultural similarity with a jurisdiction, Paula Giliker, ‘The Influence of EU and European Human Rights Law on English Private Law’ (2015) 64 ICLQ 237, 251-254; We will see below that none of these considerations are relevant for Bulgaria—borrowing is often motivated by the personal preferences of legislators and scholars.

⁶⁴ As a Christian minority in a Muslim empire, they had less rights, paid higher taxes, etc.

⁶⁵ For instance, Lyuben Dikov who I cite throughout the thesis earned his doctorate at the University of Göttingen.

⁶⁶ Applicable until 1951 when the current LOC entered into force.

⁶⁷ See footnote 43.

days of Bulgarian law. Both legal texts were drafted by very small committees of experts who had all studied abroad. The LOC was developed by three experts who had degrees from Russia and Germany.⁶⁸ The LC was drafted by two experts who had degrees from Bratislava (then Austria-Hungary) and Odessa (then Russian Empire).⁶⁹ It is interesting that the authors did not rely on the legal principles they knew best due to their education, but sought inspiration elsewhere. This indirectly evidences that the drafting involved comparative analysis with the purpose of choosing the principles that best suited Bulgaria's needs.

The LOC copied verbatim provisions on contracts and obligations of the *Codice civile* of 1865—it borrowed Titles IV to XXI of Book III with the exception of Titles V and VIII which regulated marriage contracts and long-term leases.⁷⁰ The name of the Law—Law on Obligations and Contracts came from the name of Title IV of the *Codice civile*. Some provisions, however, were copied from *Código civil*, particularly the ones on contracts of insurance.⁷¹ Both the Italian and the Spanish code of that time largely replicated the *Code civil*. The Bulgarian committee justified their choice by indicating that the laws of Italy and France contain everything that theory and practice have deemed most just and rational in resolving personal and property disputes.⁷² It is also interesting that the committee did not choose to replicate the provisions of the *Code civil* directly, but worked with Italian and Spanish versions—it has been suggested that the small changes that Italian and Spanish lawmakers made when replicating the *Code civil* were significant.⁷³

The LC, however, was based on the Hungarian Law of Commerce of 1875 (based on German law) and the Romanian Law of Commerce of 1887 (based on the Italian Commercial Code of 1882).⁷⁴ While it seems obvious that the authors engaged in comparative analysis, it is even more interesting to note that since its conception

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Apostolov, *The Law of Obligations* (n 54) 15.

⁷¹ *ibid.*

⁷² Tokushev (n 37) 177.

⁷³ Apostolov, *The Law of Obligations* (n 54) 16; Apostolov, however, does not provide concrete examples; I have established, for instance, that the *Codice civile* and the *Code civil* contain different definitions of contract. See §4.3.2.2.

⁷⁴ Tokushev (n 37) 203.

Bulgarian commercial law has not blindly followed the developments of any particular jurisdiction.

This approach is even more visible in Bulgarian legal writing from the post-Liberation period.⁷⁵ To illustrate, one of the first tenured professors at the Law Faculty—Mihail Popoviliev—had earned his PhD at the Sorbonne. His thesis⁷⁶ studies an institute related to the inheritance of gifts, but what is striking is that he examines not only Roman law and French law prior to codification, but also the equivalents of this institute in twenty additional jurisdictions. Another example is provided by the work of Yosif Fadenhecht. In his monograph *A Comparative Study on the Law of Obligations*,⁷⁷ he compares the provisions of the 1933 Polish Code of Obligations with the laws of Bulgaria, France, Italy, Germany, Austria, and Switzerland. Furthermore, in his article ‘Unification of Slavic Law of Obligations,’⁷⁸ Fadenhecht argues that the Polish code could be a good basis for unification of the civil law of Slavic countries because it represents an important attempt to ‘synthesize the beginnings of the Romanistic and the Germanic approach, which complement each other despite their differences.’⁷⁹ His advocacy of Polish law’s merits illustrates the openness of Bulgarian scholarship towards foreign innovation. Bulgarian scholars were also active on the international academic scene—they published abroad and suggested solutions for other jurisdictions.⁸⁰

The critical analysis of the principles of other jurisdictions, however, quickly resulted into hostility towards the LOC and the *Code civil* from which it was indirectly inspired, especially in the light of the raging wars (Balkan Wars and WWI). LOC’s firm commitment to sanctity of contracts was deemed problematic and Bulgarian scholars

⁷⁵ Contrast with England where comparative law developed as a discipline from the 1960s onwards, Paul Mitchell, ‘The Impact of Institutions and Professions on Fault Liability in England’ in Paul Mitchell (ed), *The Impact of Institutions and Professions on Legal Development* (CUP 2012) 18.

⁷⁶ See *Du rapport à succession des Libéralités, en droit civil français et européen et au point de vue du droit international privé* (Paris 1897).

⁷⁷ (Sofia 1936).

⁷⁸ (1933) XIV (4) Yuridicheska misul 388.

⁷⁹ *ibid* 391.

⁸⁰ Dikov’s work, which I found in international archives and which I discuss in §5.4, serves as illustration; There is also evidence of intellectual exchange between Bulgaria and Italy. Tzeko Torbov translated many works by the jurist-philosopher del Vecchio who also came to Bulgaria to give lectures. Furthermore, del Vecchio taught Venelin Ganey’s theories (a Bulgarian authority) in his classes in Italy, Neno Nenovski, ‘The Political Philosophy of Giorgio del Vecchio’ [1999] 1 Yuridicheski svyat 226.

started advocating the introduction of a principle on economic onerosity. I discuss the concrete arguments and proposed solutions in §2.3.3.

2.3.2.2 The ‘Fascist’ Shadow of the Communist LOC

As explained in §2.3.1.2, communists abrogated all laws of the Kingdom of Bulgaria and tried to cut all ties with prior doctrinal writing by persecuting scholars and by subjecting publications to censorship. In 1950 a new communist LOC was enacted, but its origin is surrounded by mystery—neither the authors nor its influences are known. In the same section, we also noted that contemporary scholars either argue that it is based on the principles of socialist law and planned economy or that it is an original Bulgarian text based on the classical solutions of the Romano-Germanic tradition. Some have even said that the LOC is timeless and can operate under any political regime with minor corrections.⁸¹

At the beginning of my research, these assertions struck me as unconvincing. Firstly, considering Bulgarian law’s strong propensity to borrow in the post-Liberation period, it seemed unlikely that this tradition would disappear immediately after communism was established. The LOC was drafted and passed shortly after communism’s arrival and there was insufficient time to create original Bulgarian solutions. Secondly, if the LOC contains ‘classical continental solutions,’ it is strange that the wording of its provisions neither resembles provisions of the *Code civil* nor of the BGB. Thirdly, on a pan-communist scale, ideological socialist law was developed much after LOC’s enactment. To clarify, the first Soviet Civil Code was enacted in 1922, but it was primarily based on German, Swiss, and French law. Subsequent Soviet codes were substantially more ideologized, but they were passed after the LOC.⁸² Also, when one compares the 1922 Soviet code with the LOC, there is little resemblance—they have

⁸¹ Kalaidjiev (n 10) 26-27.

⁸² The second Soviet Civil Code was enacted in 1964 and was imposed on all Soviet Republics. This is why Estonia, Latvia, and Lithuania enacted new codes/laws on obligations once the Soviet Union dissolved. On the Soviet codes’ ideology, see Asya Ostroukh, ‘Russian Society and its Civil Codes: A Long Way to Civilian Civil Law’ (2013) 6 J.Civ.L.Studies 373, 388-390; Poland also enacted a new civil code in 1964, but adopted a more ‘Western’ approach, which is why it was only necessary to amend it after communism ended. On the code’s philosophy, see Aleksander Rudzinski, ‘New Communist Civil Codes of Czechoslovakia and Poland: A General Appraisal,’ (1964) 41 ILJ 33.

similar structures, but the content is different and the LOC is noticeably longer. Essentially, while the LOC referred to certain socialist principles like the state economic plan and socialist coexistence, its authors did not follow any available socialist model.

Examining the parliamentary archives, which became available only recently, raises further questions. From the verbatim report of the sitting of 3 November 1950, at which the LOC was enacted, it is visible that the law was voted on unanimously without any discussion. The sitting lasted 5 hours and 23 minutes and only involved a general overview of the law by the Parliament's secretary and ideological speeches by the minister of justice and two MPs. The presentation of the law discloses that it was inspired by the Soviet Civil Code of 1922, Poland's Draft of a Bill on the General Part of Civil Law (1947) and Soviet doctrine.⁸³ The speech of the minister of justice reveals that the law was drafted by the Ministry of Justice in the span of two years in collaboration with academics and the working class represented by factory workers organized by the Party.⁸⁴

The speeches provide ample illustration of communist propaganda: the origin of any positive development was traditionally attributed to the Party and the masses. However, it is unlikely that factory workers without high school education could participate in the drafting of a sophisticated instrument like the LOC, or speak fluent Russian to understand Soviet philosophy and the Soviet Civil Code. Furthermore, as noted above, there is little resemblance between the Soviet code and the LOC. The general part of Polish law could not serve as the basis of the law of obligations either—although this seems to be the document from which Bulgaria borrowed the concept of socialist coexistence,⁸⁵ which still exists in Bulgarian law under a different name ('good morals') and which is a powerful tool against substantive unfairness in contract, as we discuss in Chapters 4 and 5. It was obvious to me that LOC's authors drew inspiration from an undisclosed source.

In 2013 I met with Professor Sarafov from Sofia University to interview him in the hope of learning more about LOC's origin. Sarafov had been struggling with this

⁸³ Stenographical Diary of the Plenary Sitting on 3 November 1950.

⁸⁴ *ibid.*

⁸⁵ On the principles of socialist coexistence in Polish law, see Rafał Mańko, 'The Unification of Private Law in Europe from the Perspective of the Polish Legal Culture' (2007-2008) 11 *Yearbook of Polish European Studies* 109, 117-122.

question for years.⁸⁶ He told me that it was probable that the LOC was written by leading Bulgarian scholars whose names were not revealed because it would have been shameful for the Party to admit that communist law was written by capitalist scholars. He suspects Apostolov, Vassilev, and Kozhuharov as they wrote treatises on the law of obligations shortly prior and after LOC's enactment.⁸⁷ Sarafov emphasized that it was likely that the LOC was inspired by the *Codice civile* of 1942—a fact that could not be disclosed because it would have been discreditable for the Party to admit that the communist LOC is partly based on the law of a Fascist country. Sarafov further stressed that while during communism research on LOC's origin and influences was avoided for these 'shameful' reasons, current research on the topic is missing because it is generally accepted as a statement of fact that the LOC is an original Bulgarian legal text. Moreover, Italian is not a common foreign language for contemporary Bulgarian lawyers and research would be challenging.

Following the interview, I decided to undertake further research because the origin and influences of the LOC is important since the principle of economic onerosity operates in the framework of the Bulgarian law of obligations. Notably, the very article 307 justifies judicial intervention on the grounds of fairness and good faith, both of which are principles of Bulgarian civil law whose meaning is derived from the spirit of the LOC and Bulgarian doctrine, as we explain in Chapter 4. Furthermore, the 1942 *Codice civile* contains explicit provisions regulating economic onerosity.⁸⁸ My research also showed that Apostolov was fluent in Italian (in his younger years he was teaching Italian at the Italian Lyceum in Sofia)—a fact which made a connection between the 1950 LOC and the 1942 *Codice civile* probable because the drafting committee could have had access to the original text. Also, one of the most important authorities on contract in the post-Liberation period had written an article explaining why the *Codice civile* was the greatest achievement of codification.⁸⁹ Moreover, as explained in §2.3.1.1, Bulgarian scholars appreciated attempts at synthesizing the Romanistic and the Germanic tradition as they did not see them in opposition. The original *Codice*

⁸⁶ Interview with Pavel Sarafov, Professor of Law, Law Faculty, Sofia University (Sofia, Bulgaria, 12 November 2013).

⁸⁷ See footnote 54.

⁸⁸ Articles 1644, 1467, 1468.

⁸⁹ Lyuben Dikov, 'The New Italian Civil Code' (1942) 37 *Annuaire de l'Université de Sofia* 57.

civile of 1942 (with the exception of its Fascist influence) is an illustration of this approach.⁹⁰

My analysis shows that the LOC bears a striking resemblance to Book IV and partially Book II of the *Codice civile*. Many articles were copied verbatim—throughout this thesis, I will pinpoint the ones which are relevant for this study. LOC’s drafters, nonetheless, changed the order of provisions to follow the structure of the 1922 Soviet Civil Code. Other provisions borrowed from Italy were slightly modified to suit communist ideology. Notably, in §2.3.3, we explain that a provision on economic onerosity with a limited scope was enacted in the LOC as a result of this ‘Italian connection,’ but the wording was altered to fit socialist ideals. In §5.4.2.2, I will also explain how the Fascist concept of contract was molded into the communist concept of contract. In turn, since legislators amended the LOC only cosmetically, this concept, to some degree, has remained in Bulgarian contract law. It should also be noted that the drafters engaged in creative compilatory work by borrowing some notions and principles from Polish law and from the BGB—I will indicate these transplants where relevant for my study.

2.3.2.3 The Contemporary Collage

As explained in §2.3.2, after the rise of democracy, legislators chose to amend the LOC instead of drafting a new one from scratch. Furthermore, they progressively enacted an LC to restore the dualism of Bulgarian private law. The result is a peculiar collage—to amend the LOC, they sought inspiration in the 1892 LOC.⁹¹ To draft the LC, they sought inspiration in the 1897 LC and in other jurisdictions. The Motivation Letter accompanying the Bill, which introduced the principle of economic onerosity, indicated that ‘in developing the Bill, the codes of Germany, France, Spain, the USA and others were used...the normative solutions from the LC of 1897 were considered as well as the current [LOC] and legal practice...The working group examined the new

⁹⁰ See Graziadei (n 33)

⁹¹ Compare, for instance, the definition of contract—article 2 (1892 LOC) and article 8 (current LOC), which is examined in §4.3.2.2.

law on commerce of Czechoslovakia of 1991 and the commercial laws of Poland and Hungary.’⁹²

Similarly to Bulgarian law, Bulgarian scholarship was in transition. Doctrinal writers began rediscovering and quoting authorities prior to communism but continued citing communist authorities for non-ideological issues. The first years of democracy are characterized by republishing some of the lost articles of scholars prior to communism. Gradually, modern commentators started examining Western literature (mostly French and German) and adopting a more critical approach. Nonetheless, to this date, current Bulgarian doctrine has not reached the level of openness towards foreign jurisdictions Bulgarian scholars had prior to communism.

The reasons for this are multiple. As explained in §2.2.2.1, the first Bulgarian scholars felt at home at several jurisdictions because they spoke multiple languages, studied abroad, and engaged in international dialogue. Many of them had the confidence to suggest solutions even for foreign jurisdictions. During communism, however, few people studied foreign languages other than Russian, which automatically closed the door to exposure to many legal systems. Access to material from non-communist States and traveling abroad were regulated by the Party and generally forbidden. Also, Western countries were regarded as backward because communism was considered the highest stage of human development, so scholars were discouraged to have an interest in their legal systems.

This background is important to understand why there are many questions left unanswered regarding the integration of economic onerosity in Bulgaria. It is unclear why and how the principle was enacted. Furthermore, the doctrine neither received proper analysis by parliamentarians nor by scholars despite the significant judicial discretion it allows. Hence there is a ‘gap’ in Bulgarian doctrine that needs to be filled.

2.3.3 Enter Economic Onerosity

The above sections examined the main particularities of Bulgarian law which are necessary to understand the framework in which economic onerosity operates—

⁹² Motivation of the Bill Amending and Supplementing the LC of 1996, p 2.

notably, Bulgarian law is eclectic, intricate, volatile, and susceptible to diverse, even incompatible influences. This framework, however, provides many of economic onerosity's criteria of application, as discussed in Chapter 3.

This section explains why economic onerosity is a complex transplant whose integration into Bulgarian law was conditioned by comparatists from all three periods. It also highlights contrasts between the historical doctrinal approach to changed economic circumstances between Bulgaria and England where relevant.

2.3.3.1 Hostility towards French Law

As noted in §2.3.2.1, the first LOC was indirectly inspired by the *Code civil*. However, due to the raging wars, the *Code civil* and its underlying liberal individualist values quickly began to lose appeal in Bulgaria. The oldest Bulgarian article advocating the adoption of a principle on impracticability I have identified is Mevorah's 'Vis Major' of 1921.⁹³ Mevorah argued that the LOC at the time and particularly its provision on 'insurmountable force' (force majeure) and 'chance occurrence' (received from Italian law which copied the relevant provision of the *Code civil*⁹⁴) did not properly address instances of extremely onerous performance resulting from the war. Regarding the effect of WWI upon contracts, Mevorah contends:

*There is a huge gap between 1914 and 1921 in which, along with a lot of bones and blood, rest all our units of measure...to accept that the increased difficulty of performance has no importance means to bankrupt many tradesmen and to turn commerce into gambling with the chance impoverishments and enrichments that are typical of such a game.*⁹⁵

Essentially, Mevorah criticizes the effects of the application of force majeure in the context of war. Force majeure in the French tradition (and to this day in Bulgaria) either terminates an agreement if a supervening event permanently renders performance impossible or excuses non-performance during the duration of a supervening event that

⁹³ Nisim Mevorah, 'Vis Major (Legal Archive)' [2002] 5 Turgovsko pravo 559.

⁹⁴ Article 131 (1892 LOC), article 1148 (*Code civil*).

⁹⁵ Mevorah (n 93) 562.

temporarily renders performance impossible. Thus while force majeure excuses non-performance during the duration of the war, once the war is over, the promisor still has to perform. This may result into unjust enrichment of the promisee or/and unjust impoverishment of the promisor—outcomes that may have important socio-economic repercussions.

It should be noted that Mevorah explains that France and Germany have opted for different solutions to this issue—France enacted temporary legislation and Germany developed a jurisprudential solution.⁹⁶ However, he advises that Bulgaria’s approach should also be jurisprudential: he suggests that courts use the term ‘excessive difficulty of performance’ instead of ‘impossibility of performance’ and evaluate the degree of difficulty on a case by case basis.⁹⁷ Thus onerous performance would have the same effects as a permanent force majeure and Bulgarian law shall achieve ‘flexibility and the highest possible justice which is different from dry formulations and Latin texts gone yellow.’⁹⁸

Mevorah’s approach is interesting for several reasons. Firstly, while Bulgaria’s LOC was received indirectly from France, he did not advise Bulgaria to take example from France and to enact temporary legislation to fill a gap that the LOC could not address. Rather, he was inspired by German judges’ proactivity and argued that Bulgarian courts could also be more flexible. Secondly, he argues for greater judicial discretion and a ‘case by case’ approach. Thirdly, he implies that laws become outdated and that the fact that rules have been borrowed from leading authorities (Latin in the sense he uses it may either refer to Roman law or the countries whose languages have Latin roots—in this case France and Italy from which Bulgaria borrowed provisions) does not mean that they lead to just results.

Other contemporaries of Mevorah—notably Dikov, whose work is essential in justifying economic onerosity philosophically, attacked the very concept of liberal individualism underpinning the *Code civil*. In *Morality and Law* of 1934, for example, Dikov explains that the *Code civil* is ‘too old and outdated’ and inadequate to society’s needs. He calls for altruism, more State regulation of contracts, and a dynamic approach to legal certainty:

⁹⁶ See §1.2.1.

⁹⁷ Mevorah (n 93) 564.

⁹⁸ *ibid.*

The liberal individualism of our...private law...proclaims...a formal equality and freedom of labor, which allow the economically stronger party to impose its will on those who are free not to agree only if they are ready to die of hunger...Our law, heavily influenced by 18th century philosophy, is incapable of soothing social tension...We need law which resolves social problems...and guarantees dynamic legal certainty. The State has progressively entered the private sphere and has limited freedom of contract.⁹⁹

As a reaction to liberal individualism's deficiency to resolve Bulgaria's social problems following the wars, Dikov re-examined the theoretical foundation of contract—we discuss his ideas and the implications of his work for the development of Bulgarian law and economic onerosity in §5.4.

It is also essential for our study to highlight the sharp contrast between the Bulgarian and the English doctrinal approach to impracticability in the same historical period. For example, in *Tennants (Lancashire)* Earl Loreburn underlined: 'The argument that a man can be excused from performance of his contract when it becomes "commercially impossible"...seems to me a dangerous contention which ought not to be admitted unless the parties have plainly contracted to that effect.'¹⁰⁰ Similarly, in *Blackburn Bobbin*, a case concerning the interruption of supply of timber from Finland after the outbreak of WWI, McCardie J stressed the 'utmost importance to a commercial nation that vendors should be held to their business contracts.'¹⁰¹ He further declared:

There is here no question of illegality or public policy...There is merely an unforeseen event which has rendered it practically impossible for the vendor to deliver. That event the defendants could easily have provided for in their contracts. If I approved the defendants' contention, I should be holding in substance that a contract which did not contain a war clause was as

⁹⁹ Lyuben Dikov, *Morality and Law* (Imprimerie de la Cour 1934) 15-16.

¹⁰⁰ [1917] AC 495, 510.

¹⁰¹ [1918] 1 KB 540, 552.

*beneficial to the vendor as a contract which contained such a provision.*¹⁰²

Essentially, Bulgarian doctrine promoted a paternal approach towards parties experiencing commercial impossibility and demanded legislators to specifically address issues of onerous performance due to the war by introducing a special explicit legal rule. By contrast, English law encouraged and continues to encourage contracting parties to clearly express their intention about the effects of supervening events on the agreement. McCardie J's words illustrate English courts' firm commitment to freedom of contract, which we explore in further detail in Chapters 3 and 4. English judges refuse to intervene in parties' agreements for fear that they would be making contract for them and imposing an outcome which does not correspond to the parties' wishes.¹⁰³ McCardie J's commentary indicates his unwillingness to recognize that a contract with a war clause and a contract without a war clause are equally beneficial to the promisee to respect freedom of contract.¹⁰⁴

2.3.3.2 Foreign Inspiration

Because many Bulgarian scholars were dissatisfied with the results to which the application of French law led in instances of onerous performance, they sought inspiration and looked for more adequate solutions, from their perspective, in other jurisdictions. Their work has had a tremendous influence on the development of economic onerosity in Bulgarian law. In this subsection, I highlight the contributions of several authors who I deem to have had the greatest impact on the doctrine's development based on my research.

¹⁰² *ibid* 551.

¹⁰³ Ewan McKendrick, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009) 239.

¹⁰⁴ Since the reception of the will theory in England from France in the 19th century, courts have emphasized the importance of executing contracts as written. In *Printing and Numerical Registering*, Sir Jessell MR explained: '...men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced...you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.' (1874-75) LR 19 Eq 462, 465.

In 1922-23, Angelov published an article on onerous performance examining case law from Austria and Germany and doctrine from France and Italy.¹⁰⁵ His article proposed the criteria that should be applied before a contract is terminated due to economic onerosity. It should be noted that shortly after economic onerosity was codified in the LC in 1996, Staykov published the first detailed modern articles on the principle which elaborated its criteria of application since article 307 itself does not provide detailed criteria.¹⁰⁶ While Staykov cites Angelov only in his bibliography but not in footnotes, a careful reading of the articles shows that he draws heavily on Angelov's research. This is important because contemporary commentators and courts consistently cite the criteria from Staykov's articles, as discussed in Chapter 3. Without having received its due recognition, Angelov's article is vital for the development of economic onerosity in Bulgarian law.

Dikov, a leading authority prior to communism, published his monograph *Historical and Comparative Research on Mistake in the Law of Inheritance, Clausula Rebus Sic Stantibus in Private Law and the Essence of Adjudication*.¹⁰⁷ To this day, his section on *rebus sic stantibus* remains the most comprehensive study on changed economic circumstances in Bulgaria. This section was republished in the Legal Archives rubric of the *Turgovsko pravo* journal in its 1994 volume¹⁰⁸ as part of an attempt to introduce the legal community to the achievements of Bulgarian scholarship prior to communism. Perhaps LC's drafters had access to this material and considered it when wording article 307, which was enacted in 1996.

In his monograph, Dikov analyzes German case law and the philosophical justifications in favor of economic onerosity by German scholars.¹⁰⁹ It should be noted that Dikov

¹⁰⁵ The article was published in two parts: Simeon Angelov, 'Economic Onerosity' (1922-1923) 4-5 *Yuridicheska misul* 233 and 'Economic Onerosity' (1922-1923) 5-6 *Yuridicheska misul* 313; Note that Angelov concluded that a principle on economic onerosity was unnecessary as the effects of war were no longer felt.

¹⁰⁶ See Staykov's works cited in footnote 62.

¹⁰⁷ (Sofia 1923).

¹⁰⁸ Issues 1 and 2.

¹⁰⁹ Dikov repeatedly cites Stahl, Krückmann, Leetz, Oertmann, and Larenz. These authors have influenced German courts' approach towards changed circumstances. Following WWI, the theory of equivalence of performance, attributed to Krückmann, was applied by German courts as a criterion of economic impossibility, John Dawson, 'Effects of Inflation on Private Contracts: Germany, 1914-1924' (1934) 33 *Mich.L.Rev* 171, 193; Oertmann's theory of disappearance of the contractual foundation became the basis of the modern German doctrine of changed economic circumstances and was applied by German courts as early as 1922, Peter Hay, 'Frustration and Its Solution in German Law' (1961) 10 345, 361; Larenz's theories have

defended his PhD at the University of Göttingen in 1922.¹¹⁰ Professor Oertmann, whose theory of the disappearance of the contractual foundation was already being applied to cases of onerous performance when Dikov was writing his PhD, was teaching at the University of Göttingen in the same period. Perhaps Dikov knew him personally.

Dikov, however, seemingly turned the integration of economic onerosity into a lifetime project of his, as evidenced by his articles arguing for reconsideration of the notion of contract which I discuss in §5.4. In contrast to Oertmann, Mevorah or Angelov, Dikov advocated that while the permanent recognition of *rebus sic stantibus* was not desirable, judges should be able to modify contracts at difficult times.¹¹¹ To justify State intervention into agreements, he proposed a new concept of contract recognizing the State as a party to contracts—an idea, which is unthinkable from an English perspective.

Apostolov also argued that the only solution to cases of excessively onerous performance could be allowing judges to modify contracts in exceptional circumstances. Unlike Dikov, however, he grounded the justification on the principle of good faith,¹¹² which was the classical approach in jurisdictions that recognized impracticability at the time.¹¹³ We analyze Apostolov's and Dikov's arguments in Chapters 4 and 5 to show that both theories shed light on the role of economic onerosity in Bulgarian law. In §2.3.3.3, we explain that very likely as a tribute to Dikov (I suspect Apostolov as well as other students of Dikov to be the authors of the communist LOC), a partial principle on economic onerosity was enacted as part of the 1950 LOC.

Finally, Fadenhecht's analysis of the Polish Code of Obligations in a comparative perspective mentioned in §2.3.2.1 dedicated two pages to a comparative examination of impracticability.¹¹⁴ As discussed §1.2.2, this code is the first legal text containing an explicit provision on changed economic circumstances. In the same Chapter, we also noted that Fadenhecht favored unification of the law of Slavic countries on the basis of

influenced the recent application of economic impossibility in German law, David Rivkin, 'Lex Mercatoria and Force Majeure' in Emmanuel Gaillard (ed), *Transnational Rules in International Commercial Arbitration* (ILA 1993) 181-83.

¹¹⁰ *Das Institut des Strohmannes (die vorgeschobene Person) im bürgerlichen Rechte* (Doctoral Thesis, Göttingen 1922).

¹¹¹ Lyuben Dikov, 'Clausula Rebus Sic Stantibus in Private Law' in *The Modification of Contracts by the Judge* (first published 1923, Feneya 2010) 98.

¹¹² Ivan Apostolov, *The Law of Obligations* (n 54) 241-43.

¹¹³ See our discussion in §1.2.2.

¹¹⁴ Fadenhecht (n 77) 66-68.

the Polish code. Hence, it may not be accidental that the wording of article 307 (LC) is closest in spirit to the wording of the article on economic onerosity in the current Polish Civil Code¹¹⁵—LC’s drafters could have been aware of Fadenhecht’s work. Also, as noted in §2.3.2.3, contemporary Polish legislation was examined in the process of drafting the amendments to the LC. It should be emphasized, however, that none of the contemporary Bulgarian articles on economic onerosity I have identified mention the likely Polish influence.

2.3.3.3 Enactment and Lack of Comprehensive Discussion

Following the comprehensive discussion on economic onerosity prior to communism, the principle went into oblivion for more than 50 years. It may be shocking from an English perspective that the principle was enacted in 1996 without any motivation in the Bill that contained it¹¹⁶ and without any discussion in Parliament on the substantial power it gives to the judge or the sanctity of contract it violates.¹¹⁷ The concrete reasons for the introduction of the principle have to be deduced. As noted in §1.1, at the time of passing, the economic circumstances in Bulgaria were extreme,¹¹⁸ so it is likely that the enactment of the principle was a measure to limit the possible disastrous effects on business—a goal that was not achieved in the short run because of the criteria of

¹¹⁵ Article 357 of the latest Polish Civil Code stipulates: ‘where unforeseen and extraordinary circumstances occur which would make performance excessively difficult or threaten one of the parties with substantial loss, the court may alter the mode or degree of performance or even terminate the contract where this is in accordance with the principles of social-coexistence.’ See Zdzislaw Brodecki, *Polish Business Law* (Kluwer 2003) 216.

¹¹⁶ While length is not a sign of quality, it should be noted that the motives which the Government submitted to Parliament in support of the said Bill on Amending and Supplementing the Law on Commerce of 1996 introducing 340 changes in the law in the form of modifications or new articles was 5 pages long. Likewise, the report of the *rapporteur* committee (the Committee on Structure and Activity of State Authorities) on the Bill was 2 pages long. The Economic Committee, which also submitted a report, expressed its opinion on one page. Most comments are quite general and none of them touch upon economic onerosity in particular. See Opinion of the Economic Committee of 22 March 1996 and Opinion of the Committee on Structure and Activity of State Authorities of 21 May 1996; The process of private law reform in England is more complex and transparent. The Law Commission is known to consult stakeholders and academics on its proposals and to provide detailed reports regarding the suggestions for reform it makes.

¹¹⁷ At the sitting at which the Bill was discussed, there was a minor debate about the principle’s wording, but nobody contested the power it accords to the judge. See Verbatim Report of Sitting of the Bulgarian Parliament of 4 September 1996.

¹¹⁸ See footnote 1 (Chapter 1).

application of the principle, which I explain in Chapter 3. There was also a general predisposition by the government to favor the principle.¹¹⁹

In §2.3.2.3, I noted that LC's drafters examined the legislation of many jurisdictions, among which Poland, Hungary, and the USA. The legislation of these three jurisdictions contained principles on impracticability at this time.¹²⁰ Perhaps legislators could have been inspired considering Bulgarian jurists had an appreciation for Polish law, as underscored in §2.3.3.2. Moreover, in the same section I clarified that important writings by Dikov on the subject were republished in 1994. Also, as explained in §2.3.1.1, there were MPs who were personally motivated to introduce the principle.

Whatever the reasons for enactment, it is perhaps more astonishing from an English perspective that the introduction of such a powerful doctrine as economic onerosity did not merit substantial critical discussion by scholars. It is precisely the absence of detailed contemporary analysis on how this powerful doctrine fits with the rest of the body of Bulgarian contract law which motivated my research and indicated an opportunity for debate. The first contemporary analyses on the subject appeared only after the doctrine was passed. These studies are more or less introductory to the principle itself and do not attempt to reconcile it with existing Bulgarian contract law. They neither explain the origin nor the influences behind the principle in Bulgarian law.

Stoychev presents a short overview of the development of the doctrine in German law and mentions the existence of 'similar categories' in Italy, the USA and England without going into much detail of how the categories differ from one another or examining interpretation or case law.¹²¹ He also describes other Bulgarian norms that incarnate a similar concept to economic onerosity or give power to one party to modify

¹¹⁹ Article 16-1 of the Law on Agricultural Tenancy enacted in 1996 conveys a similar idea to article 307: 'If circumstances that the parties did not consider at the time of entry into contract modify and induce non-equivalence of their obligations, any of the parties may demand contract modification.'

¹²⁰ Section 2-615 (UCC), Section 241 of the 1959 Hungarian Act no IV, Article 357 of the Polish Civil Code; It should be clarified that the original version of the Polish Civil Code of 1964 did not contain this provision. The principle was re-enacted in 1990. For the reasons and influences, see Dagmara Planutis, 'Le déséquilibre contractuel dû au changement imprévisible des circonstances et ses remèdes Étude de droit comparé: Espagne-Pologne-France' (Master's Thesis, Université Paris II 2013)

<http://idc.u-paris2.fr/sites/default/files/memoire_dagmara_planutis.pdf>.

¹²¹ See Stoychev (n 62) 15.

certain terms of the agreement unilaterally. Stoychev, however, neither explains the contributions of Bulgarian doctrine prior to 1944 nor clarifies why Bulgarian law allows such one-party modifications.

Staykov, by contrast, elaborates the criteria of application of the principle¹²² on the basis of Angelov's and Dikov's work referred to in §2.3.3.2. His writings are important in synthesizing the criteria proposed by these authors because article 307 is rather vaguely worded. The fact that courts have relied on these criteria, as explained in Chapter 3, also demonstrates the influence that Bulgarian doctrine continues to exercise on adjudication. Nonetheless, Staykov neither provides a comprehensive justification nor attempts to reconcile the principle with 'autonomy of will,' which is considered a fundamental principle of Bulgarian law.¹²³ He explains that economic onerosity is an unusual doctrine violating the *pacta sunt servanda* principle (sanctity of contracts) in the name of fairness and good faith. However, while fairness and good faith are underlying principles of Bulgarian contract law and are mentioned in multiple provisions in various laws, they lack definition in the law. Their meaning has to be derived through examining Bulgarian doctrine or through interpreting the spirit of the law, which inevitably opens the door to subjectivism when they have to be applied in concrete cases.¹²⁴ In that regard, Chapter 3 highlights the difficulties of interpretation faced by Bulgarian courts.

Textbooks authors in contract and commercial law also content themselves in describing the principle as 'necessary' in the context of economic crises because the strict application of sanctity of contracts leads to unjust results. They highlight that the principle is 'not new for Bulgarian law' because it already existed in article 266, para 2 (LOC).¹²⁵ However, none of them addresses the question why it existed in the communist LOC to begin with. Article 266, para 2 stipulates: 'If in the course of the

¹²² See Staykov, 'Economic Onerosity' (n 64); Staykov, 'The Clausula Rebus Sic Stantibus Institute' (n 62).

¹²³ He asserts that Roman jurists believed that law was the art of good and just (*ius est boni et aequi*) and clarifies that the enforcement of contracts which would bankrupt one of the parties or which would lead to unjust enrichment is neither just nor good, Staykov 'Economic Onerosity' (n 62); However, he forgets that economic onerosity did not exist in Roman law and this explanation is anachronous and illogical.

¹²⁴ Stoychev alerts to this danger by stating that 'the LC demonstrates huge confidence in the courts' and that the wording of the principle shows the legislator's intention that the principle is interpreted factually. See Stoychev (n 63) 23.

¹²⁵ Ognyan Gerdjikov, *Commercial Transactions* (3rd edn, TIP 2008) 53-57.

performance of the contract the duly determined prices of materials or labor change, the compensation shall be adjusted accordingly, even where it was agreed upon as a total sum.’ Considering LOC’s hidden Italian dimension discussed in §2.3.2.2, I examined the *Codice civile* in more detail. I discovered that the said article is a Bulgarian interpretation of its article 1664.¹²⁶ Indeed, the two main differences between the articles—the Italian article stipulates a threshold of change and requires unforeseeability—stem from the fact that in communism Bulgaria had a planned economy. Legislators did not have to fix the threshold of change of the price of labor/materials because all companies were state-owned and the prices were fixed by the government. We explore the importance of article 266, para 2 in §5.2.2.

Other textbook authors simply contend that economic onerosity was ‘theoretically justified by German doctrine’ without explaining what the justification was, whether this justification is applicable to Bulgarian law or how the principle operates in German law.¹²⁷ The lack of critical analysis of the principle both from a Bulgarian and a comparative standpoint is one of the gaps my research is attempting to fill. Furthermore, as it was emphasized in the previous sections, Bulgarian contract law is heavily influenced by many different systems, both Germanic and Romanistic in spirit, so the direct borrowing of foreign theoretical justifications may not prove helpful for bridging gaps in Bulgarian legal theory. In this light, Chapter 4 explores the theoretical underpinning of the principle in Bulgarian law and examines how it fits with the corpus of the Bulgarian law of obligations.

For almost a decade, Bulgarian commentators abandoned the study of economic onerosity. They became interested in it once again in the context of the economic crisis that hit Bulgaria in 2008.¹²⁸ These articles provide a general overview of the principle as well as comparisons of the wording of similar concepts in other jurisdictions.

¹²⁶ ‘If, by reason of unforeseeable circumstances have occurred increases or decreases in the cost of materials or labor, such as to cause an increase or decrease greater than one-tenth of the total agreed price, any contractor may request a review of the same price. The review may be granted only for the difference that exceeds the tenth...’

¹²⁷ Kalaidjiev (n 10) 323.

¹²⁸ See Silvia Tsoneva, ‘Short Notes on Economic Onerosity’ in Ekaterina Mateeva and others (eds), *Law Development in a Globalizing World* (Feneya 2013) 356, Ekaterina Mateeva, ‘Necessary Changes in the Principle of Economic Onerosity in Article 307 of the LC’ in *Contemporary Law—Problems and Tendencies* (Sibi 2011) 243, Diana Dimitrova, ‘The Application of the Institute of Economic Onerosity in the Conditions of Economic Crisis’ (The Global Crisis and Economic Development, Varna, May 2010), Yassen Nikolov, ‘Economic Onerosity’ [2011] 9 *Turgovsko i konkurentno pravo*, Addendum.

Particularly interesting is Mateeva's article as it raises the issue of the principle's unclear criteria of application in light of comparisons with the wording of provisions in other jurisdictions, PECL, and the DCFR. The only contemporary article on economic onerosity published abroad I found is Silvia Tsoneva's 'Hardship in Bulgarian Law.'¹²⁹ Tsoneva also compares the wording of article 307 with the wordings of provisions of other jurisdictions and clarifies the principle's criteria of application.

2.4 Conclusion

This Chapter presented an overview of the idiosyncrasies of Bulgarian law, which distinguish it from other Western laws, in order to introduce the reader to the framework in which economic onerosity operates and to explain why the study of the principle is a gateway to understanding Bulgarian law's complexity. It also provided historical background on how and why economic onerosity was developed in Bulgarian law. The goal was to expose some of the 'patterns of legal change,' in the words of Paul Mitchell,¹³⁰ in Bulgaria and to fill some gaps that contemporary Bulgarian scholarship has not addressed.

Firstly, I expounded the specific fluid structure of Bulgarian law and the main sources of the Bulgarian law of obligations, which are relevant for my study. Then, I paid attention to the turbulent process of developing Bulgarian law throughout all three main periods of its evolution—post-Liberation, communism, and democracy. This historical inquiry is necessary because contemporary Bulgarian law, including the two legal texts most relevant to the application of economic onerosity—the LOC and the LC, bear the scars of the radical changes that Bulgaria experienced. These documents are complex compilations and contain principles created or borrowed during all three periods. However, even Bulgarian scholars are not fully aware of the origin of all principles because of decades of censorship. This worrisome fact motivated me to undertake comparative and archival research to demonstrate Bulgarian law's porosity.

Because of Bulgarian law's volatility and natural tendency to inconsistency, scholars and judges took the lead in filling gaps in the law. Moreover, since the birth of

¹²⁹ [2011] 1 *Acta Universitatis Danubius. Juridica* 126-138.

¹³⁰ Mitchell, 'Patterns of Legal Change' (n 2) 177-201.

Bulgarian law, for historical reasons, comparative law has been the primary tool of legal development. Nonetheless, unlike leading jurisdictions like Germany, France, and England, which usually seek inspiration in their own heritage, or unlike other Western jurisdictions, which compare their laws primarily with those of leading jurisdictions, Bulgarian law is not faithful to any legal system. It is infused with miscellaneous Romanistic and Germanic principles and remnants of communist ideas all stirred with Bulgarian creativity.

Finally, I presented the development of economic onerosity in Bulgaria to trace the Bulgarian contribution to the principle and to remedy an historical injustice: I wanted to give credit to scholars whose invaluable impact has been ignored. I also presented an overview of the main articles on economic onerosity, which have recently been published, to demonstrate that there are:

- 1) no substantial studies on how economic onerosity fits in Bulgarian law and whether its existence is theoretically justified;
- 2) no detailed examinations of case law showing how the principle is applied in practice;
- 3) no comparative studies on economic onerosity going beyond the mere comparison of the wordings of provisions in other jurisdictions.

These issues motivated me to take a small step in that regard. Chapter 3 presents a functional comparison between economic onerosity and frustration. Chapter 4 analyzes the differences identified in Chapter 3 from the perspective of contract theory. Chapter 5 studies the role of Bulgarian and English judges regarding agreements.

Chapter 3

A Functional Comparison of Economic Onerosity and Frustration

3.1 Introduction

This Chapter engages in a functional comparative analysis of the principles of economic onerosity and frustration to establish in what instances (if any) they reach similar results. As explained in Chapter 2, under the influence of foreign law, Bulgarian scholarship has vigorously debated the necessity of a codified principle on changed economic circumstances since the 1920s. During communism a principle on onerous performance with a very limited scope was included in the LOC, very likely as a nod to Dikov by its drafters. Nevertheless, legislators enacted economic onerosity as article 307 of the LC as late as 1996, amidst the worst economic crisis Bulgaria faced in its history.¹

This article stipulates:

Economic Onerosity

A court may, upon request by one of the parties, modify or terminate the contract entirely or in part, in the event of the occurrence of such circumstances which the parties could not and were not obliged to foresee, and should the preservation of the contract be contrary to fairness and good faith.

¹ See §1.1.

In England, by contrast, there is no equivalent principle. English courts have developed the doctrine of frustration, which emerged from the decision of *Taylor v Caldwell*.² In the said case, the defendants had contracted to hire out the Surrey Gardens and Music Hall for the purpose of giving four grand concerts on four designated dates in 1861. The hirers agreed to pay £100 on the evening of each of these dates. Six days before the first concert, the hall was destroyed by accidental fire. Blackburn J held that the defendants were not liable in damages for the hirers' wasted advertising and expenses because the contract had been discharged on the grounds that 'the parties must from the beginning have known that it could not be fulfilled unless...some specified thing continued to exist.'³

Blackburn J's conclusion that there was an implied condition in the agreement that the property should continue to exist⁴ was in stark contrast to English courts' commitment to the absolute force of contract. The English position towards changed circumstances prior to *Taylor* is elucidated by *Paradine v Jane* (1647) in which a tenant, sued for rent due upon a lease, pleaded that he had been dispossessed from his tenancy by an act of the King's enemies for about two years. The court held: 'When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by contract.'⁵

The test of frustration has evolved since *Taylor*. In modern English law, frustration terminates a contract automatically when circumstances become 'radically different' from the time of entry.⁶ Judges, nonetheless, have been reluctant to apply this doctrine to cases when performance becomes excessively onerous, to enforce freedom of

² (1863) 3 B & S 826; Unlike economic onerosity which is a complex transplant, frustration is the result of English judicial activism. It has been argued, however, that Blackburn J's implied condition bears a striking resemblance to *clausula rebus sic stantibus*, Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta 1990) 580; As explained in §1.2.1, the *clausula* is also considered the forerunner of economic onerosity.

³ *Taylor v Caldwell* (n 2) 833.

⁴ In deriving his conclusion, Blackburn J cites the writings of Pothier (at 834 and 837)—a French philosopher whose interpretation of the will theory had a profound influence on the *Code civil*. In the 19th century, English judges sought inspiration in his work when analyzing the nature of agreement. See footnote 74 (Chapter 1); In Chapter 4, nevertheless, we explain that despite the fact that Bulgaria and England borrowed Pothier's theory, they assigned it a different role.

⁵ EWHC KB J5, 82 ER 897 [3].

⁶ The 'radically different' test was enunciated in *Davis Contractors* [1956] AC 696 and thus reflects the more modern articulation of the principle of frustration.

contract and to prevent parties from using frustration as an escape route of imprudent bargains.⁷ English courts encourage parties to insert force majeure and/or hardship clauses which stipulate the circumstances in which they would be applicable and the consequences they would have on the contract.⁸ We examine the likely reasons for this approach in Chapter 4 and analyze the question whether force majeure/hardship clauses may lead to the same results as the Bulgarian principle of economic onerosity in §5.3.2

In light of the conceptual differences between Bulgarian and English law, which appear at first glance, it should be noted that due to the economic crisis that Bulgaria experienced in 2008, Bulgarian courts have recently had the opportunity to examine cases arguing economic onerosity and have allowed its application. While case law on the principle is scarce, it provides an occasion to study the judicial attitude towards it. It seems interesting, from a comparative perspective, to examine to what extent and in what situations (if any) economic onerosity and frustration are functional equivalents—essentially, in what cases they reach similar results in similar circumstances.

For that purpose, this Chapter compares economic onerosity's and frustration's *scope* and *criteria of application* (§3.3, §3.4, §3.5) as well as their *effects* (§3.6). It also refers to relevant case law in Bulgaria and in England to substantiate the comparison. Before that, nonetheless, certain clarifications regarding the angle of comparison should be made.

3.2 Are Economic Onerosity and Frustration Comparable?

In §1.4, I contended that one of the difficulties of this study stems from the fact that the doctrines it purports to compare were conceived with different purposes in mind, in different time periods, and in different legal traditions. They do not have the same scope of application either. The principle of economic onerosity was specifically designed to

⁷ For instance, in *The Nema* [1982], Lord Roskill contended that 'the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains,' AC 724, 752; In *The Mayor and Burgesses of the London Borough of Tower Hamlets*, Kerr LJ declared: 'Our courts have no power to absolve parties from their contracts when these turn out to be less beneficial than expected...' (CA, 14 December 1983).

⁸ William Swalding, 'The Judicial Construction of Force Majeure Clauses' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's Press 1995) 18.

address issues of onerous performance by legislators. Given Bulgaria's macroeconomic outlook in the early 1990s when article 307 (LC) was drafted, it seems probable that the working group was mostly concerned about the effects of inflation on contracts. Frustration, however, was conceived by English courts more than 130 years earlier, in the 19th century, to counterbalance the view that contracts had to be performed literally. Frustration's criteria of application have evolved since its creation in *Taylor*.⁹ The current test was laid out by Lord Radcliffe in *Davis Contractors*. He stated that a frustrating event may arise when, 'without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract... It was not this that I promised to do.'¹⁰

Case law demonstrates that frustration, unlike economic onerosity, may encompass diverse supervening events: the doctrine may be applicable in instances of, for example, destruction of subject-matter, unavailability of the subject-matter or something essential for the performance, illegality, etc.¹¹ Bulgarian law addresses these issues through its doctrine of 'impossibility of performance.' It distinguishes between two types of impossibility—'the insurmountable force' (*vis major* or *force majeure*) and 'the chance occurrence' (*casus fortuitous*). However, it should be noted that there is no consensus about the difference between the terms¹² and courts often use them interchangeably.¹³

⁹ As explained above, Blackburn J found an implied condition that the property should continue to exist and refused to award damages for non-performance to the plaintiffs.

¹⁰ (n 6) 729.

¹¹ See, for instance, *Appleby v Myers* (1867) LR 2 CP 651, *The Nema* [1982] AC 724, *Fibrosa Spolka Ackcyjna* [1943] AC 32.

¹² Apostolov claims that a chance occurrence is a natural event (earthquake, flood, epidemic) while the insurmountable force amounts to the action of a person (legislation, strike, theft), Ivan Apostolov, *The Law of Obligations: General Part* (first published 1947, 3rd edn, BAN 1990) 233; Kalaidjiev, however, contends that there are no serious dogmatic arguments to support this distinction, Angel Kalaidjiev, *The Law of Obligations: General Part* (5th edn, Sibi 2010) 320.

¹³ In Decision 579/2003 on civ.c.1329/2003, the SCC declared: 'The appellate court correctly approved the conclusion of the regional court...that the destruction of...salt was due to a chance occurrence...the heavy rainfall and the subsequent flood were correctly qualified as events leading to an objective impossibility to perform. To qualify an occurrence as an insurmountable force, it is not only necessary that it takes place, but also that it was not due to the promisor's fault'; Moreover, sometimes Bulgarian courts use the French term 'force majeure' although it is not used in Bulgarian legislation. See BAC's Decision 20/2009 on com.c.6/2008.

While the qualification of the supervening event as ‘insurmountable force’ or ‘chance occurrence’ is still debated, it has no practical implications because both events have the same effect—non-performance is excused. This distinction seems to have only historical value because these terms were part of the 1892 LOC, which, as highlighted in Chapter 2, was based on the *Codice civile* of 1865 that in turn was inspired by the *Code civil*. Both *vis major* and *casus fortuitous* are concepts inherited from Roman law. The current LOC contains the terms ‘chance occurrence’¹⁴ and ‘impossibility of performance.’¹⁵ Article 81-1 on ‘impossibility’ bears a striking resemblance to article 1218 of the current *Codice civile*¹⁶ and article 89 on its effects seems to fuse its articles 1463 and 1464.¹⁷ This serves as further evidence for my claims in §2.3.2.2 that LOC’s drafters borrowed secretly from Italy.

It is also interesting that the ‘insurmountable force,’ which was not part of the 1950 LOC, made a sudden reappearance in article 306 (LC),¹⁸ which was enacted together with article 307 on economic onerosity in 1996. This reappearance created a conceptual discrepancy—while the remedy for permanent impossibility is rescission by operation of law,¹⁹ the remedy for the ‘insurmountable force’ in article 306 is unilateral

¹⁴ **Art. 196, para. 1 (LOC):** ‘The seller shall have the rights set forth in the previous article even when the movable property has perished or has been damaged, if this has happened because of its defects or because of a *chance occurrence*.’

¹⁵ **Art. 81, para. 1 (LOC):** ‘A promisor shall not be liable if the *impossibility to perform* an obligation is due to a reason for which he cannot be found to be at fault’;

Article 89 (LOC): ‘In case of a bilateral agreement, if the obligation of one of the parties is extinguished due to *impossibility of performance*, the contract shall be rescinded by operation of law. Where the said *impossibility* is only partial, the other party may claim a respective reduction of its obligation or rescission of the contract in the court, if it does not have sufficient interest in seeking partial performance.’

¹⁶ **Art. 1218 (Codice):** ‘The promisor who does not perform exactly his due obligation owes compensation for damages if he does not prove that his default or delay is due to an *impossibility of performance* which cannot be attributed to him.’

¹⁷ **Art. 1463 (Codice):**

‘Total Impossibility

In contracts with corresponding performance, the party released from its obligations due to *impossibility of performance* (1256) cannot ask for counter-performance and must return what it has already received, according to the rules concerning the recovery of overpayments...’

Art. 1464 (Codice):

‘Partial Impossibility

When the performance of a part has become only partially impossible (1258), the other party entitled to a corresponding reduction of the benefit due from that, and may also withdraw from the contract if it has a partial interest in performance (1181).’

¹⁸ **Art. 306(1), LC:** ‘A promisor in a commercial transaction shall not be liable for failure to perform due to an *insurmountable force*. Where the promisor was already in default, he may not invoke the *insurmountable force*.’

¹⁹ See footnote 15.

termination.²⁰ Because of Bulgarian private law's dualism discussed in Chapter 2, depending on whether the transaction is merchant or non-merchant, the remedy is different—termination has only effects for the future while rescission requires that parties be put in the position they were before entry.²¹

These clarifications are important for several reasons. Firstly, the regime of excused non-performance illustrates the patchwork approach of Bulgarian legislators discussed in §2.3.2. Secondly, some criteria of application of economic onerosity are derived by analogy to impossibility, but the regime of impossibility is incoherent. Thirdly, frustration, at first glance, may be a likely partial functional equivalent of several Bulgarian doctrines. Although I explained my motivation to focus on a comparison of the English and Bulgarian approach to impracticability in §1.2.1 and §1.2.2 and discussed some of the difficulties I have encountered in functionally comparing frustration and economic onerosity in §1.4.1, it seems relevant to further clarify some of my arguments.

3.2.1 The Choice of Angle of Comparison

While the various Western legal systems diverge on the remedies for physical impossibility and illegality, there is consensus that such instances excuse non-performance. Nonetheless, as explained in §1.2, Western jurisdictions do not address supervening onerosity in similar ways and the jurisdictional responses do not fall into the classical Romanistic, Germanic and common law categories. Moreover, the subprime crisis of 2007 and 2008 affected many European jurisdictions either directly or indirectly, including the UK²² and Bulgaria. As Bulgaria accumulated case law on economic onerosity, it is interesting to compare its approach to the approach of a

²⁰ **Art. 306(5), LC:** 'If the duration of the *insurmountable force* lasts so long that the promisee loses its interest in the performance, he is entitled to terminate the contract. The promisor has the same right.'

²¹ Note the difference between rescission and rescission by law. The former is always related to a breach by one of the parties. The latter neither involves breach nor default: it is granted by law.

²² Shiv Chowla, Lucia Quaglietti and Łukasz Rachel, 'How Have World Shocks Affected the UK Economy?' [2014] Q2 Bank of England Quarterly Bulletin 167 <<http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/2014/qb14q206.pdf>>.

jurisdiction, which, at first glance, has a pronouncedly different attitude to impracticability.

Such stark contrasts may affect not only trade in the EU, but may also have implications for the harmonization project. In that light, the approach to onerous performance seems indicative of substantial differences between the contractual values of jurisdictions. In §2.3.3.1, we discussed that even in the aftermath of WWI, which severely affected entire Europe, Bulgarian and English doctrine significantly diverged on whether courts should intervene and remedy the consequences of war upon the contract. The Bulgarian choice to subsequently create an explicit doctrine geared towards supervening onerousness rather than to reconstruct and redefine the existing doctrines on impossibility of performance is also revealing of Bulgarian legislators' special attention towards this question of law.

It is also worth mentioning that similarly to English courts, Bulgarian courts also respect parties' freedom to include force majeure/hardship clauses in their agreements and to determine the consequence of supervening events upon the contract themselves.²³ One of the main differences with English law, nevertheless, is that Bulgarian law is concerned with the protection of parties that were not farsighted enough to foresee and/or provide for the consequences of some supervening events that make a contract contradictory to fairness and good faith.²⁴ While the practical implications of this requirement are discussed below, it should be underlined at this stage that because of the existence of the principles of 'insurmountable force' and 'chance occurrence' in Bulgarian legislation, the inclusion of force majeure clauses in contracts is uncommon in Bulgaria: parties generally feel protected by legislation.²⁵

²³ Kalaidjiev (n 12) 326.

²⁴ Contrast this approach with McCardie J's concerns in *Blackburn Bobbin* [1918] 1 KB 540, 551 that a contract with a war clause and a contract without a war clause cannot have the same consequences for the vendor (See §2.3.3.1); The instances in which parties may opt to contract out of a principle seem revelatory of the values of a given contract law and of its conception of the contractual relationship, as discussed in Chapter 4.

²⁵ Kessedjian argues that French companies also do not have the habit of including hardship clauses based on questionnaires she sent to French companies. The reasons, however, diverge. Some in-house lawyers from her survey said that 'they wanted risk allocation to be clearly provided and not left to future changes.' Others asserted that it was more difficult to 'obtain insurance coverage for their long-term contracts when they included a hardship clause,' Catherine Kessedjian, 'Competing Approaches to Force Majeure and Hardship' (2005) 25 IRLE 415, 421.

Recently, some Bulgarian parties have begun to include such clauses under the influence of foreign practice. Usually, when entering international agreements, Bulgarian companies do not have leverage to impose Bulgarian law as governing their contract and have to agree on an applicable law they do not know well. Hence some companies have transferred their habit of including force majeure clauses in international contracts to their domestic contracts. However, it is questionable whether in the long run this practice would flourish as Bulgaria's biggest trade partners remain Germany, France, and Italy²⁶ whose contract laws provide rules on the consequences of supervening events and offer a sufficient degree of protection for parties which are not farsighted enough.

3.2.2 The Goals of this Chapter

This Chapter's next sections will analyze whether despite the differences in attitudes towards impracticability that can be identified in the doctrinal discourse of the two jurisdictions, Bulgarian and English law reach similar results in similar circumstances. Essentially, I attempt to establish in what cases, if any, economic onerosity and frustration are functional equivalents by comparing their *scope, criteria of application*²⁷ and *effects*.

It should be clarified that some criteria of application of economic onerosity can be derived directly from article 307 while others have been developed by Bulgarian doctrine and courts on the basis of legal theory (mostly Staykov's, Angelov's, and Dikov's work discussed in §2.3.3.2) or other provisions in the LOC and the LC. By solely examining article 307, one can make several observations:

- 1) The article requires one of the parties to request modification/termination before the court. This means that the application of the doctrine is not automatic. This requirement is emphasized because legislators used the auxiliary verb 'may' to underline that the judge cannot interfere by himself, but should be petitioned by one of the parties;

²⁶ For statistics on Bulgarian exports, see the site of Bulgaria's National Statistical Institute <<http://www.nsi.bg/otrasal.php?otr=60&a1=992&a2=993&a3=998&a4=1000#cont>>.

²⁷ For the common law I seek to identify the reasons which judges give to reject/permit the application of frustration.

- 2) The supervening event was unforeseen and the parties were not obliged to foresee it;
- 3) The preservation of the contract after the supervening event should be contrary to fairness and good faith.

The meaning and implications of unforeseeability, fairness, and good faith have been clarified by Bulgarian doctrine and case law, as I explain below. Moreover, there are several additional criteria which I also analyze: the requirement that the aggrieved party should not be at default regarding the contract before the supervening event arises, lack of fault in producing the supervening event, the fundamental nature of the supervening event, performance should still be possible and incomplete, etc. It has been argued that all of these requirements are cumulative—even if only one criterion is not satisfied, economic onerosity cannot be applied.²⁸

In contrast to economic onerosity, frustration, as noted in §3.1, was not specifically created to address onerous performance. Its modern test was developed by Lord Radcliffe in *Davis Contractors*. He underlined that a frustrating event may arise when ‘without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract...It was not this that I promised to do.’²⁹ In the same decision, he maintained that mere hardship or inconvenience could not invoke the principle: ‘It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.’³⁰ Whereas Lord Radcliffe’s test puts an emphasis on the radical change of the contractual obligation, there are other important criteria which English courts examine: the frustrating event cannot be self-induced and it should be unforeseen and unforeseeable.

²⁸ Ivailo Staykov ‘Economic Onerosity of Performance of Business Transactions’ [1997] 5 Pazar i pravo 19; Ivailo Staykov, ‘The Clausula Rebus Sic Stantibus Institute in Current Bulgarian Commercial Law’ [1998] 1 Suvremenno pravo 71; Ekaterina Mateeva, ‘Necessary Changes in the Principle of Economic Onerosity in Article 307 of the LC’ in *Contemporary Law—Problems and Tendencies* (Sibi 2011) 234.

²⁹ (n 6) 729.

³⁰ *ibid.*

For clarity, I have broken down the functional comparison into several parts. Firstly, I examine how and when frustration and economic onerosity are invoked. Secondly, I analyze if Bulgarian and English law approach lack of fault and unforeseeability similarly. Thirdly, it is indispensable to compare the ‘radically different’ test to the Bulgarian understanding of the agreement becoming ‘contrary to fairness and good faith.’ Finally, I compare the doctrines’ effects.

The Chapter also refers to the Bulgarian doctrine of ‘impossibility’ when it is relevant to illustrate key differences between the Bulgarian and the English approach. This is also necessary because some criteria of application of economic onerosity were developed by analogy to those of ‘impossibility.’

3.3 Invocation of the Doctrines

Economic onerosity and frustration are invoked in different ways. As already asserted, article 307 obliges the aggrieved party to file a claim in court. This claim should provide proof that all criteria of application are fulfilled and it should state whether the aggrieved party asks for termination or for modification. It is crucial to underline that the judge cannot intervene unless a claim has been submitted. For example, in Decision 115/2008,³¹ the SCC declared: ‘the principle of economic onerosity is not applied automatically, but should be demanded by the parties.’

Under English law, parties also plead frustration in court. There have been instances when claimants asked for the recovery of extra costs in *quantum meruit* on the grounds of frustration—notably, in the leading case *Davis Contractors*.³² Economic onerosity, however, should be claimed at the time it arises and not after performance is completed. We will see in §3.6 that the court decision on economic onerosity has effects for the future: thus it is essential that performance be incomplete and possible to invoke the doctrine. For example, in Decision 531/2007,³³ the SCC affirmed a decision of the lower courts not to honor a demand for contract modification on the ground of economic onerosity because performance had already been completed. Under Bulgarian law, the *Davis Contractors*’ claim, if grounded on economic onerosity, would

³¹ SCC’s Decision 115/2008 on com.c.774/2007.

³² (n 6).

³³ SCC’s Decision 531/2007 on com.c.284/2007.

be inadmissible. However, in §5.2.2 we will see that Davis Contractors may find relief even if performance is completed by application of article 266, para 2 (LOC), which allows price modification in a contract if there are changes in the price of labor/material following entry.

Under English law, it is also possible to use frustration as a defense in a claim for damages for breach.³⁴ In that regard, frustration is similar to the Bulgarian doctrine of ‘impossibility’ which parties rely on to excuse non-performance when they face court proceedings for breach. Unlike frustration or the Bulgarian doctrine of ‘impossibility,’ economic onerosity cannot be used as a defense in a claim for breach because the court requires that economic onerosity be requested in a separate claim. This is illustrated by several recent court decisions³⁵ stating that economic onerosity should be argued in a separate claim and that it cannot be used as a defense against a claim for breach.

It should be underlined, however, that a claim for economic onerosity precludes the proceedings for breach until a decision on the claim for economic onerosity is rendered. As the claims are separate (for economic onerosity and for breach), different judges examine them. If economic onerosity is found, the claim for specific performance, damages, etc. becomes ungrounded. If economic onerosity is not established, the proceedings for breach can resume. For instance, in a Ruling of 19 December 2006,³⁶ the SAC declared that the decision in the dispute on article 307 would affect the decision in the dispute on specific performance. The court refused to examine the claim for specific performance before the decision on the claim of economic onerosity was rendered.

These important procedural particularities regarding the invocation of frustration and economic onerosity result in differences between their scopes. Although legislators did not explicitly stipulate it and perhaps did not intend it, the invocation of economic onerosity for short-term contracts is futile because the filing of a claim does not in itself suspend performance in a contract. The contract may be terminated or modified only after the court decision has been rendered, but the modification or termination will take effect from the date the decision enters into force and not from the moment economic

³⁴ For instance, *The Eugenia* [1964] 2 QB 226.

³⁵ SCC’s Decision 829/2006 on c.2121/2003, SAC’s Decision 90/2010 on com.c.738/2009 and SAC’s Decision 92/2015 on com.c.4244/2014.

³⁶ SAC’s Ruling of 19 December 2006 on civ.c.2325/2006.

onerosity actually arose—a particularity of the principle which scholars have criticized.³⁷ Consequently, the application of the doctrine to short-term contracts seems excluded since the timeframe in which judges should render a decision is not specified in the law. In §3.5.2.2, we discuss a case, which took five years to resolve as the SCC reversed a decision by the lower courts.

The fact that economic onerosity produces effects from the date of the decision and that judges are not bound by any timeframe to render a decision can be regarded not only as a weakness of the article's wording, but also as contrary to the Bulgarian principle of good faith, which calls for optimal coordination of the interests of all subjects of law. We discuss the implications of this principle in §4.3.2.3. It should also be underlined that the type of the agreement (long/short term) cannot make the invocation of frustration pointless in itself. As discussed in §3.6.1, frustration's effects are automatic—the contract would be considered terminated at the time frustration arose and not from the date of the court decision onwards. Furthermore, had there been frustration, the promisor would be unable to perform, so giving effect to frustration from the date of the court decision and demanding damages for non-performance for the period between the occurrence of frustration and the date of the judgment would be ungrounded.

3.4 Deceptive Similarities

At first glance, economic onerosity and frustration bear two important similarities—both of them require that the supervening event be neither self-induced (1) nor foreseen/foreseeable by the parties (2). We will see, however, that these criteria have different practical implications in the two jurisdictions.

³⁷ Silvia Tsoneva, 'Short Notes on Economic Onerosity' in Ekaterina Mateeva and others (eds), *Law Development in a Globalizing World* (Feneya 2013) 357-58.

3.4.1 No Fault Requirement

English case law demonstrates that the essence of frustration is that it should not be due to the act or election of the party seeking to rely on it.³⁸ Therefore, if the impossibility of performance is caused by one party or arises out of a choice that party has made,³⁹ there is a breach rather than frustration. This principle was formulated in *Taylor*—the decision from which the doctrine of frustration emerged. Blackburn J stated that the doctrine applied where performance was impossible ‘without the default’ of the contractor.⁴⁰ In the aforementioned case whose facts we explained in §3.1, the contract would not have been frustrated had the defendants themselves set fire on the music hall. Similarly, Bulgarian law considers that the supervening event should not be induced by the party relying on it. This requirement stems from article 81-1 (LOC): ‘A promisor shall not be liable if the impossibility to perform an obligation is due to a reason for which he cannot be found to be at fault.’ While this rule explicitly refers to ‘impossibility of performance,’ doctrine concurs that it applies by analogy to economic onerosity.⁴¹

In this section, I explain that:

- 1) Fault is defined differently in English and Bulgarian law;
- 2) English and Bulgarian law impose a different burden of proof regarding fault;
- 3) English and Bulgarian law explore different causal chains.

3.4.1.1 Defining Fault

In England, most cases in which self-induced frustration has been found involve a deliberate act by the party seeking discharge. The boundaries of self-induced frustration, however, seem difficult to delineate. Judges and scholars have engaged in a discussion over the term ‘fault’ used in the original formulation of the principle in

³⁸ *Davis Contractors* (n 6) 729; *Paal Wilson v Partenreeder Hannah Blumenthal* [1983] 1 AC 854, 909; *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep 1, 10.

³⁹ For example, *The Super Servant Two* (n 38), as discussed in §3.4.1.3.2

⁴⁰ (n 2) 834.

⁴¹ Staykov, ‘Economic Onerosity’ (n 28) 19; Kalaidjiev (n 12) 324.

Taylor. In the decision itself, Blackburn J said ‘without default of the contractor’⁴² and subsequently ‘without fault of either party.’⁴³ Whereas in this context it is unlikely that a distinction between ‘fault’ and ‘default’ was intended, Treitel asserts that these words have different meanings.⁴⁴ He maintains that while ‘fault’ normally refers to conduct amounting either to the deliberate commission of a wrong or to want of care or diligence, default refers to the breach of a legal duty.⁴⁵ Therefore, it is possible for a party to a contract to be at default although he is not at fault. Moreover, it should be stressed that although most English cases of self-induced frustration involve one party that did not manage to prevent an event, there are some cases which involve deliberate omissions rather than positive acts. For example, in *Mertens v Home Freehold Co*⁴⁶ the builder of a house deliberately worked slowly and omitted to obtain a license which was required.⁴⁷

The distinction between fault and negligence has also raised debate in England. In *Joseph Constantine*,⁴⁸ Viscount Simon LC contended that in a commercial context fault should be treated as equivalent to negligence,⁴⁹ but Lord Wright reminded that in previous case law fault was assimilated to positive acts against the faith of a contract.⁵⁰ In the said case, there was an explosion of a ship’s auxiliary boiler which prevented her from rendering the services she was supposed to under a charterparty. The court established frustration although the cause of explosion was not clarified and there were doubts that the defendants’ servants’ negligence might have caused the supervening event. It has been argued, nonetheless, that the question whether the presence of negligence should necessarily exclude frustration has not been conclusively resolved.⁵¹

Before examining how Bulgarian courts would approach the same facts, it should be underscored that, from a comparative standpoint, the discussion on the meaning of fault and its relevance to frustration reveals significant conceptual differences between

⁴² (n 2) 834.

⁴³ *ibid* 840.

⁴⁴ Guenter Treitel, *Frustration and Force Majeure* (2nd edn, Sweet & Maxwell 2004) 524.

⁴⁵ *ibid* 524-25.

⁴⁶ [1921] 2 KB 526.

⁴⁷ For a discussion, see Treitel (n 44) 533-35.

⁴⁸ [1942] AC 154.

⁴⁹ *ibid* 166.

⁵⁰ *ibid* 195.

⁵¹ Ewan McKendrick, ‘Force Majeure and Frustration—Their Relationship and Comparative Assessment’ in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd’s Press 1995) 50.

England and Bulgaria. Under Bulgarian law, fault is a generic term referring to the relationship between the doer and his unlawful conduct, including its effects.⁵² While Bulgarian legislation does not provide a definition of fault, Bulgarian legislators have created different categories of fault whose meaning has been clarified by doctrine.⁵³ The LOC refers to ‘deliberate actions,’⁵⁴ ‘negligence,’⁵⁵ ‘gross negligence,’⁵⁶ etc., which have been transplanted from Roman law through the *Codice civile*.⁵⁷ It is generally recognized that the difference between ‘deliberate actions’ and ‘negligence’ stems from the doer’s intention. When fault is intentional (deliberate action), the person at fault intentionally creates or promotes an unlawful result. When there is negligence, the person or entity unintentionally causes or contributes to an unlawful result.⁵⁸

In both instances, the unlawful result could either constitute in breaching the law or in breaching a legal duty. Hence, from a Bulgarian perspective, default as explained by Treitel, the omission to obtain a license in *Mertens*, the ‘deliberate actions against the faith of a contract’ and ‘negligence’ as referred to in *Joseph Constantine* would be considered as different types of fault. In all of these cases, the ‘no fault’ requirement will not be satisfied and the application test of economic onerosity (or ‘impossibility of performance’) will fail.

3.4.1.2 Burden of Proof

Bulgarian and English law have reverse burdens of proof regarding fault in contractual relations. Under Bulgarian civil law, fault is always presumed.⁵⁹ To disprove fault and to benefit from the protection of the law, the party claiming economic onerosity (or ‘impossibility’) should prove that:

⁵² Trayan Konov, *Grounds for Civil Liability* (2nd edn, Reguli 2002) 124.

⁵³ On the role of fault in Bulgarian law, see Trayan Konov, *Selected Works* (Ciela 2010) 152-82.

⁵⁴ Article 94.

⁵⁵ Article 247.

⁵⁶ Article 94.

⁵⁷ On fault in Roman law, see George Mousourakis, *Fundamentals of Roman Private Law* (Springer 2012) 198-200.

⁵⁸ Scholarship is divided about the meaning of ‘gross negligence.’ Some authors believe ‘deliberate actions’ and ‘gross negligence’ are synonyms while others contend that ‘gross negligence’ is a degree of ‘negligence,’ Konov, *Selected Works* (n 53) 152-82.

⁵⁹ Art. 45, para 2 (LOC): ‘In all cases of tort, fault is presumed until proven otherwise.’ By contrast, in Bulgarian criminal law there is a presumption of innocence.

- 1) It did not cause the supervening event by its actions/omissions. While the court may characterize the type of fault, the result of any of the types (negligence, deliberate actions, etc.) is the same, as discussed in §3.4.1.1—non-performance is not excused.
- 2) It was not delaying performance prior to the supervening event. This stems from the requirement for performance in good faith discussed in §4.3.2.3. In practice, as performance would be tremendously difficult or impossible, he will need to pay damages for non-performance. To illustrate, if a builder had already delayed construction before a natural catastrophe or substantial inflation, his non-performance after the supervening event will not be excused. This approach should be contrasted with frustration which has automatic effects irrespective of the promisor's behavior prior to the supervening event (See §3.6.1).
- 3) In case of 'insurmountable force,' the promisor should also show that it properly informed the promisee in writing of the event's occurrence. Otherwise, it owes damages for breach of information duties. This requirement stems from article 306(3), LC⁶⁰ and is a transplant of CISG's article 79(4). It, however, does not apply to economic onerosity. For example, recently, the Veliko Turnovo Appellate Court concluded that the partial non-performance was due to a supervening event—severe drought which impeded the harvest of the quantity of grain stipulated in the contract of sale.⁶¹ Thus the non-performance was excused and the liquidated damages clause in the contract could not be applied. However, because the defendant did not properly inform the promisee, it owed damages—it had to return the difference between the advance payment, which constituted more than 99% of the total sum in the contract, and the total price of the

⁶⁰ 'A promisor who cannot perform due to *insurmountable force* must notify the other party in writing within a reasonable time about the nature of the *insurmountable force*, and its potential consequences for the contract. In case of failure to notify, compensation shall be due for the damages resulting from such failure.'

⁶¹ Decision 368/2008 on com.c.661/2008.

delivered grain, but with an interest rate.⁶² English law does not have such information duties in case of frustration.⁶³ While the promisor would have to return a just sum if frustration is established, as explained in §3.6.2, it would not pay interest on that sum.

In England, by contrast, the burden of proof is often in the reverse to Bulgarian law—the party suing for breach should prove that frustration was self-induced. In *Joseph Constantine*, as noted above, the court established frustration although the defendants did not prove they were not at fault and the cause of the explosion was not clarified. Viscount Maugham contended:

I can see no firm ground for the proposition that the party relying on frustration...must establish affirmatively that "the cause was not brought into operation by his default"...Such a proposition seems to me to be equivalent to laying down that the determination of the contract by frustration is not the automatic result of the event, but is dependent on the option of the parties...⁶⁴

Under Bulgarian law, determining the reason for the explosion and the defendants' lack of fault in causing it would have been essential for establishing 'impossibility of performance.' Furthermore, to use Viscount Maugham's words, the application of both 'impossibility' and economic onerosity somewhat depends on the promisor's conduct—to ensure it can benefit from the protection of the law, it needs to demonstrate both that it has performed in good faith prior to the supervening event and that it did not cause the event.

⁶² Had the contract been for the sale of grain only rather than for the production and sale of grain from a specific place, non-performance would not have been excused as grain is a generic good; Also, compare with Section 7 of the Sale of Goods Act 1979 which discharges contracts if specific goods perish without the fault of the seller or buyer.

⁶³ Diverse factors may explain this divergence:

- Unlike Bulgarian law, the common law has not embraced the principle of good faith and the consequential duties of good merchant, as discussed in §4.3.2.3;
- Unlike frustration, temporary force majeure only suspends performance while the supervening event lasts. As the promisor still needs to perform after the event ends, it is more logical to inform the promisee of its likely consequences on the performance;
- The UK is not a CISG signatory.

⁶⁴ (n 48) 172.

We should also emphasize that compared to English law, Bulgarian law has a different approach towards evidence and fact finding. In addition to witnesses who parties can invite to court to testify, the Bulgarian Code of Civil Procedure allows judges to appoint expert witnesses either because they deem necessary to do so or because a party to the dispute requested such assessment.⁶⁵ The courts select expert witnesses from a list that has been preapproved by the Ministry of Justice. Essentially, the expert witnesses under Bulgarian law play a role much more similar to assessors under English law.⁶⁶ In contrast to English courts which encourage the use of party-appointed expert witnesses, it is common practice for Bulgarian courts to appoint expert witnesses themselves.

If *Joseph Constantine* had to be decided under contemporary Bulgarian law, the court would probably appoint expert witnesses to establish the cause of the explosion. The defendants would submit evidence disproving fault as well. For instance, in a Bulgarian case in which a car left for repair at an auto center completely burned down, the defendant had to prove that the fire in the vehicle was not the result of bad repair, but of a ‘chance occurrence.’ This was difficult as little had remained of the car. While the defendant relied on witnesses working in his center, the court also appointed assessors.⁶⁷ Their conclusion that there was insufficient evidence to ascertain that the short circuit, which caused the fire, was not the result of bad repair (bad performance which is a form of non-performance) played a crucial role in establishing a ‘chance occurrence.’

3.4.1.3 Causation

As explained above, in Bulgaria, the party relying on economic onerosity or ‘impossibility’ should disprove any fault in causing the supervening event. In England, however, the party arguing frustration was self-induced faces the challenge of proving its claims. Furthermore, to benefit from the protection of economic onerosity or

⁶⁵ Article 195. On expert witnesses in Bulgaria, see Vesselin Vouchkov, ‘On Assessors and Evidence in Civil Proceedings’ (2009) 3 *Bulgarski zakonnik* <<http://zakonnik.bg/document/view/qanda/140775/242842>>.

⁶⁶ See CPR, r 35.12; The Bulgarian approach to evidence reflects the spirit of the continental tradition which favors court-appointed experts to party-appointed experts. See Remme Verkerk, ‘Comparative Aspects of Expert Evidence in Civil Litigation’ (2009) 13 *IJEP* 167-97.

⁶⁷ See SCC’s Ruling 55 of 29 January 2014 on com.c.1466/2013.

‘impossibility’ in Bulgaria, the relying party should prove it was not in breach of the agreement prior to the supervening event. In England, there is no equivalent requirement as frustration is automatic. It is likely, however, that the defaulting party would pay damages for breaches prior to frustration.

Despite the different burden of proof and the different scope of fault, it seems essential to compare the Bulgarian and English approach towards establishing the causation between a party’s actions/omissions and the impossibility/onerosity to perform as they may reveal key differences between the values of the two jurisdictions.

3.4.1.3.1 *The Bulgarian Approach*

Under Bulgarian law, parties are required to provide the care of a good husband⁶⁸ for non-merchant⁶⁹ transactions while for merchant transactions they are required to exercise the care of a good merchant,⁷⁰ which is the highest degree of care in Bulgarian law. These standards are intimately related to the principle of good faith⁷¹ whose role we discuss in §4.3.2.3. It should be underscored at this stage, however, that a party performing in good faith would exercise one of these types of care depending on whether it is a merchant or a non-merchant. The explicit definition of two standards of care in Bulgarian law encourages judges to have higher expectations of merchants because they are professionals.⁷² Failure to provide the relevant due care amounts to fault.

Bulgarian scholarship has emphasized that due care is an abstract notion which is established regarding the usual behavior of persons and entities in similar circumstances.⁷³ Courts have to take decisions based on the concrete facts of the case

⁶⁸ Art. 63 (LOC); This term incarnates the Roman notion of *bonus paterfamilias* (care of a father) and was transplanted in Bulgarian law from the 1865 *Codice civile*.

⁶⁹ Art. 1 (LC) enumerates the types of natural persons and legal entities that qualify as merchants and are expected to exercise the care of a good merchant. Entities and persons beyond this scope must exercise the care of a good husband.

⁷⁰ Art. 302 (LC): ‘A promisor in a transaction which is commercial with respect to him shall exercise the care of a good merchant.’

⁷¹ Not exercising these types of care amounts to performance in ‘bad faith.’

⁷² This symbolic requirement has little practical significance because by default judges are expected to consider the surrounding circumstances; While English law also applies higher standards of care to professionals (for instance, the reasonable professional), it does not have a specific standard for merchants.

⁷³ See Konov, *Selected Works* (n 53) 152-82.

and their view of what a usual behavior could be in the given circumstances. While, at first glance, this approach seems similar to the English standard of reasonable care,⁷⁴ there are substantial differences between the legal reasoning of the courts.

In case of economic onerosity, article 307 compels the promisor to prove that the parties ‘could not and were not obliged to foresee’ the supervening event. Bulgarian doctrine argues that the requirement for unforeseeability itself is a natural consequence of the standards of care because a good merchant/husband should foresee many types of events on the basis of their skills and experience.⁷⁵ Essentially, not foreseeing the event amounts to fault.

Bulgarian doctrine argues that the second condition—‘obliged to foresee’—refers to the relevant objective standard of care (care of a good merchant or husband) defined in the law rather than to the type of care defined in the parties’ agreement.⁷⁶ We will analyze the implications of foreseeability from a comparative perspective in §3.4.2. However, it is crucial to emphasize at this stage that the Bulgarian approach should be contrasted with English law which prioritizes the parties’ will as expressed in the agreement. While English judges have relied on implied conditions in the past (the very decision of *Taylor* was based on an implied condition), in many cases frustration was excluded on the grounds of contractual provisions evidencing risk distribution or on the grounds that the event was foreseeable and parties should have made a provision in the agreement.

To exclude non-intentional fault in causing economic onerosity,⁷⁷ a Bulgarian court should establish why the promisor did not foresee the event:

- 1) because the promisee did not provide due care in foreseeing the event (fault)
- OR
- 2) because it was impossible to foresee the event (no fault)?

⁷⁴ On the difference between the English reasonable person and the Bulgarian standard of good faith, see §4.3.2.3 and §5.3.1.2.

⁷⁵ Ivailo Staykov, ‘Economic Onerosity’ (n 28) 19; Ivailo Staykov, ‘The Clausula Rebus Sic Stantibus Institute’ (n 28) 71; Yassen Nikolov, ‘Economic Onerosity’ [2011] 9 *Turgovsko i konkurentno pravo*, Addendum.

⁷⁶ *ibid.*

⁷⁷ The party arguing onerosity claims it was not at fault, so intentional fault would be rare.

By contrast, in case of ‘insurmountable force,’ article 306(2), LC⁷⁸ requires the promisor to prove that the event was unforeseeable OR unavoidable. While doctrine does not agree whether unforeseeability and unavoidability are cumulative criteria or not,⁷⁹ courts contend these criteria are alternative because article 306(2) uses the conjunction ‘or.’⁸⁰ This means that the promisor should prove either that it could not foresee the supervening event despite exercising good care OR that it could not prevent the event despite exercising good care.⁸¹ It should also be noted that doctrine has severely criticized court decisions in which the criterion for unavoidability has been extended to cases of economic onerosity.⁸² In practice, this implies that in establishing fault in a claim for economic onerosity, courts will be looking for (1) unforeseeability and (2) no delay prior to supervening event, as discussed §3.4.1.2.

3.4.1.3.2 *The English Approach*

The above clarifications are essential because in England, as noted above, courts look for acts or elections by a party that caused the event. Hence, in contrast to Bulgarian courts, they are significantly more concerned about the unavoidability of the event. We will analyze two examples to clarify how the examination of dissimilar causal links leads to different results in practice.

Example 1: *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*

In *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*,⁸³ Wijsmuller could not fulfill its obligation to transport Lauritzen’s drilling rig by sea because its ship, the Super Servant Two, sank. The contract explicitly mentioned that Wijsmuller had to

⁷⁸ ‘An *insurmountable force* shall be an unforeseen or unavoidable event of an extraordinary nature which has occurred after the conclusion of the contract.’

⁷⁹ Aleksander Georgiev, ‘The Insurmountable Force as Grounds for the Exclusion of Liability due to Non-Performance in a Commercial Transaction’ [2001] 3 *Bulgarski zakonnik* 90, 92; Polya Goleva, ‘The Insurmountable Force and Its Application in Court and Arbitration Practice’ [2004] 4 *Pazar i pravo* 18, 22; Ognyan Gerdjikov, *Commercial Transactions* (3rd edn, TIP 2008) 52.

⁸⁰ SCC’s Decision 6/2013 on com.c.1028/2011.

⁸¹ In French law the requirements for unforeseeability and unavoidability are not alternative, Barry Nichol, ‘Force Majeure in French Law’ in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd’s Press 1995) 24.

⁸² See Mateeva (n 28) 242.

⁸³ [1990] 1 Lloyd’s Rep 1.

transport the rig either by Super Servant Two or by Super Servant One. Nonetheless, the latter was allocated to another contract. The court emphasized that the real question is ‘whether the frustrating event relied upon is truly an outside event or extraneous change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about.’⁸⁴

It was held that had the contract explicitly mentioned transportation by Super Servant Two only (and not an alternative between the two ships) and had there been no negligence in causing the loss of the ship, the contract would have been frustrated.⁸⁵ Nonetheless, the contract was *not* put to an end automatically when the Super Servant Two sank. It ended when Wijismuller elected not to use the Super Servant One to perform its obligations.⁸⁶ In other words, Wijismuller’s election interrupted the causal link between the supervening event (the sinking of the ship) and its inability to perform. It is interesting that Wijismuller’s counsel tried to prove a direct causal link between the sinking of Super Servant Two and the impossibility to perform by referring to Professor Treitel’s textbook as well as prior unreported case law.⁸⁷ Notably, Treitel argues that if a party, which enters several contracts, cannot perform all of them due to an unforeseen supervening event, he can use the means available to him to perform some of them and claim the others have been frustrated provided he acts ‘reasonably’ in making his choice.⁸⁸ Nonetheless, the court relied on *Maritime National Fish*⁸⁹ to reject this argument and to conclude that the reasons why Wijismuller made their election were immaterial⁹⁰—a harsh outcome, which has been criticized.⁹¹

Moreover, it should be noted that the court did not establish the reasons why the Super Servant Two sank. It actually concluded that the contract would not be frustrated no matter whether the ship sank due to Wijismuller’s negligence or not.⁹² If it sank without

⁸⁴ *ibid* 10.

⁸⁵ *ibid* 9.

⁸⁶ *ibid*.

⁸⁷ *ibid*.

⁸⁸ *ibid* 13.

⁸⁹ [1935] AC 524.

⁹⁰ [1990] 1 Lloyd’s Rep 1, 14.

⁹¹ For instance, it has been asserted that the effect of the decision is to ‘place a supplier whose source partially fails in a very difficult position.’ *Chitty on Contracts* (31st edn, 2012) vol I, para 23-064.

⁹² [1990] 1 Lloyd’s Rep 1, 10 and 11.

negligence, the contract would not be frustrated because of Wijismuller's election not to use the Super Servant Two, as noted above. By contrast, if the ship sank due to negligence, as alleged by Lauritzen,⁹³ the contract would not be frustrated as a party cannot rely on a self-induced event.

It is very likely that the case would be resolved differently under Bulgarian law notably because the court would examine a different causal chain and would attempt to determine the precise reasons why the ship sank. As explained above, Bulgarian law assumes that the non-performing party is at fault, so that party needs to prove that non-performance was excused—for instance, it was due to an impossible event which was unforeseeable OR unavoidable. Wijismuller has to present proof that it acted as a good merchant and that the ship did not sink as a result of its actions or omissions. For instance: 1) proof that Wijismuller could not have foreseen the sinking (the weather forecasts were good, historically the weather in that season was favorable); 2) proof that Wijismuller did not contribute to the sinking (they followed security procedures, hired qualified personnel, etc.). Wijismuller may ask the court to appoint assessors too.

The court would examine the proof and characterize the facts to conclude whether the evidence disproves the assumption of fault. While this approach can be derived from the LC, it is indispensable to underline that because the contract involves transportation by sea, the Code of Commercial Maritime Navigation is also applicable. Article 169-1 explicitly states: 'A contract of carriage is terminated automatically if before sailing off...and without the fault of any party, the ship perishes or is declared unfit for use.' Thus the key question for Bulgarian courts would be why the ship sank and, consequently, if Wijismuller caused the sinking in any way.

Moreover, the English approach of treating the 'power to elect' as a factor which interrupts the causal link between the supervening event and the impossibility to perform cannot be theoretically justified under Bulgarian law. To reallocate Super Servant One, Wijismuller would have to delay performance in another contract. Thus he would not perform that second contract in good faith and the other party may request specific performance, damages or both. It is unthinkable that a Bulgarian court concludes that to perform in one contract, a party needs to perform in bad faith in another contract. We will analyze this aspect in more detail in Chapter 4. It should also

⁹³ *ibid* 11.

be noted that the agreement between Wijsmuller and Lauritzen included a force majeure clause—we discuss how it will be construed differently in English and Bulgarian law in §5.3.2.2.

Example 2: The Eugenia

In *Ocean Tramp Tankers Corporation v V/O Soyfracht (The Eugenia)*,⁹⁴ the defendants had chartered the Eugenia to make a trip via Odessa to India. While their agreement contained a clause stipulating that dangerous waters should be avoided, they headed for the Suez Canal thinking they could make it on time. However, the canal closed due to military action and the charterers could not reach India. They claimed frustration. Lord Denning concluded that the Eugenia could have sailed around the Cape of Good Hope because ‘[the] fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about frustration. It must be more than merely more onerous or more expensive.’⁹⁵

It is also interesting to note that he examined the questions of fault and foreseeability separately. He asserted: ‘One thing that is obvious is that the charterers cannot rely on the fact that the Eugenia was trapped in the canal; for that was their own fault.’⁹⁶ Regarding foreseeability, he contented: ‘The only thing that is essential is that the parties should have made no provision for [the event] in their contract. The only relevance of it being "unforeseen" is this: If the parties did not foresee anything of the kind happening, you can readily infer they have made no provision for it...’⁹⁷

Denning’s view on foreseeability has been criticized by English scholarship. Treitel, for instance, argues that an important criterion in determining foreseeability’s relevance is whether there is an indication that a party has assumed the risk of the event’s occurrence. The degree of foreseeability should be high and the consequences of the event on the contract should also be foreseeable.⁹⁸ Frustration could be prevented only by an express provision that one of the parties should bear the loss. McKendrick, by contrast, contends that while the result in *The Eugenia* is correct, the reasoning is

⁹⁴ [1964] 2 QB 226.

⁹⁵ *ibid* 239.

⁹⁶ *ibid* 237.

⁹⁷ *ibid* 239.

⁹⁸ Treitel (n 44) 514-16.

suspect as there is authority, namely *Walton Harvey*,⁹⁹ which we discuss in §3.4.2.1, to support the claim that a contract is not frustrated when the event which has occurred is foreseeable.¹⁰⁰

From a Bulgarian perspective, the lack of explicit provision in the charterers' agreement would be of little relevance, as we explain in §3.4.2.2. The crucial question for Bulgarian courts would be whether the parties were obliged to foresee the closure in light of their duty to provide the care of a good merchant. If the answer is positive, that in itself would already constitute fault even if the ship is not trapped, but in free waters. This approach should be contrasted with Denning's view that had the ship not entered the canal, there would have been room for frustration to apply.¹⁰¹

It should be noted that there appear to be grounds to argue both force majeure ('insurmountable force') and economic onerosity under Bulgarian law. As discussed above, in case of 'insurmountable force,' Bulgarian courts usually consider unforeseeability and unavailability to be *alternative* conditions of application. The charterers could argue 'impossibility' either on the grounds of an unforeseen extraordinary event OR on the grounds of an unavoidable extraordinary event. However, as noted in §3.4.1.2, to preclude fault for breach of information duties, the charterers should properly inform in writing the vessel's owners regarding the supervening event. We should remind the reader, nonetheless, that 'impossibility' only excuses non-performance during the duration of the supervening event (closure of the canal)—the defendants would have to perform after the canal opens but would not owe damages.

It seems likely that a Bulgarian court would establish that the closure was not foreseeable, especially if it had to decide at the time Lord Denning did, because this was the first modern closure of the Suez Canal. In cases involving claims for 'impossibility,' Bulgarian courts tend to examine the historical record of similar events taking place.¹⁰² Besides, it seems unlikely that a Bulgarian court would conclude that the buildup of French and British forces near Cyprus as a sign that the closure of the

⁹⁹ [1931] 1 Ch 274.

¹⁰⁰ Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 711.

¹⁰¹ *The Eugenia* (n 94) 239.

¹⁰² For instance, in Award of 30 April 2003 on DAC 141/2002 statistics on the regular monthly rainfall in the area were examined to conclude that the rain which prevented the plants from growing was unforeseeable.

canal was foreseeable like Lord Denning held.¹⁰³ For example, in a Bulgarian arbitral decision,¹⁰⁴ the Yugoslavian embargo (1992-1996) was considered as an objective ‘impossibility’ excusing non-performance during its duration although the contract was entered into in 1991 when Yugoslavia was breaking up and the United Nations had issued a series of resolutions against it. Furthermore, the charterers in *The Eugenia* could not prevent the closure of the canal either, so they could argue unavailability. Finally, the Code of Maritime Commercial Navigation also allows parties to rescind an agreement after commencement of the voyage ‘if any circumstances occur that prevent the continuation of the carriage for a long or unforeseeable period.’¹⁰⁵

Because of the particularities of invocation of economic onerosity discussed in §3.3, relying on economic onerosity for termination/modification of the agreement seems difficult. The charterers would need to file a claim for economic onerosity at the time the canal closes. Consequently, because of the nature of the agreement and because of the weakness of Bulgarian law to give effect to economic onerosity from the entry into force of a decision, but at the same time not to bind judges with a timeframe to decide, it would be more logical to pursue a claim if the agreement were for periodic carriage by sea.

If the contract does not involve periodic carriage, there might be two possible outcomes:

- 1) By the time Bulgarian judges examine the case, the canal may reopen and performance will no longer be extremely onerous. The promisors, however, would be in delay and would owe damages.
- 2) If the canal is still closed by the time the case is examined, there may be grounds that performance has become contrary to fairness and good faith, as we argue in §3.5. However, the aggrieved party will be in delay and thus the ‘no fault’ requirement would be violated.

Had the parties made an agreement for periodic carriage, the court could have terminated the agreement or modified it to factor in the additional expenses that would be incurred because of sailing around the Cape of Good Hope for the future.

¹⁰³ *The Eugenia* (n 94) 233.

¹⁰⁴ Award on IAC 45/98 of 28 April 2000.

¹⁰⁵ Article 167; I could not find case law on this article.

Nonetheless, the charterers would have to continue performing until a decision is rendered (sail around the Cape of Good Hope for the first trips) and bear the losses due to economic onerosity prior to the court decision.

3.4.2 Unforeseeability

As explained in §3.2.2, one of the conditions of application of economic onerosity is that the parties could not and were not obliged to foresee the supervening event. Similarly, English law requires that the frustrating event be unforeseen and unforeseeable. Examining case law and academic writing shows that English judges express concern for both the risk distribution in the agreement and the objective degree of foreseeability based on the circumstances of the case. By contrast, Bulgarian judges traditionally seem to focus more on the obligation to foresee resulting from the law (objective duty of care as required by the standards of good merchant/husband) rather than the distribution of risk in the agreement itself. Moreover, Bulgarian law may use unforeseeability as a cover for the political motivation behind certain decisions.

3.4.2.1 The English Approach

When examining cases arguing frustration, English courts analyze primarily if the risk is expressly allocated in the contract—if, for instance, the price is fixed, or if there are express provisions distributing risk and loss in case of supervening events, including but not limited to force majeure/hardship clauses. In such instances, English judges consider that there is no strong reason to interfere with the allocation the parties intended. For example, in *English Hop Growers*, Scrutton LJ underscored:

*I have always myself regarded it as in the public interest that parties who, being in an equal position of bargaining, make contracts, should be compelled to perform them, and not to escape from their liabilities by saying that they had agreed to something which was unreasonable.*¹⁰⁶

¹⁰⁶ [1928] 2 KB 174, 181.

Moreover, in *Joseph Constantine*, Viscount Simon LC declared: ‘There can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance, notwithstanding that the supervening event may occur.’¹⁰⁷ Generally, express risk allocation may exclude the application of frustration because parties would have agreed on the consequences of the supervening event.

There is also authority, notably *Walton Harvey*,¹⁰⁸ which demonstrates that a contract is not frustrated when a supervening event is deemed foreseeable based on the context. In the said case, an advertising agency had entered into an agreement with the lessees of a hotel to display an advertising sign for seven years. The hotel was compulsorily acquired by the local authority and subsequently demolished. Thus the agency sued the hotel’s lessees for breach. While they argued frustration, the court held that the supervening event had been foreseen by Walker & Homfrays since they were aware of local authority’s plans at the time of entry and the compulsory powers of the local authority could ‘reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made.’¹⁰⁹ Walker & Homfrays could have also ‘guarded against’ the supervening event in their agreement.¹¹⁰

It is also conceivable that upon construction of the agreement or, of a force majeure clause in particular, it is found that frustration is not excluded.¹¹¹ For instance, in *The Sea Angel*, it was asserted that:

Even events which are not merely foreseen but made the subject of express contractual provision may lead to frustration: as occurs when an event such as a strike...lasts for so long as to go beyond the risk assumed under the contract and to render performance radically different from that contracted for. However, as Treitel shows through his analysis of the cases, and as Chitty summarizes, the less that an event, in its type and its impact, is foreseeable, the more

¹⁰⁷ (n 48) 163.

¹⁰⁸ (n 99).

¹⁰⁹ *ibid* 285 and 286.

¹¹⁰ *ibid* 286.

¹¹¹ We analyze the key issue of construction and whether English courts reach the same results as economic onerosity through interpretation in §5.3.

*likely it is to be a factor which, depending on other factors in the case, may lead on to frustration.*¹¹²

Essentially, English judges examine the risk allocation in the agreement and analyze whether the parties foresaw the degree of change or could have foreseen it based on the circumstances. Rarely, however, foreseeability is the only factor that motivates their decision. By contrast, below we examine instances in which Bulgarian judges have rejected claims for onerosity solely on the grounds of foreseeability. Perhaps one can explain this approach with the fact that unforeseeability is the most malleable criterion of application of the doctrine and may be used as a cover for the political motivation of certain decisions, as discussed in §3.4.2.3.

3.4.2.2 The Bulgarian Approach

As highlighted in §3.4.1.3.1, unlike English judges, Bulgarian judges determine foreseeability primarily from the perspective of the requirements for due care (good merchant and good husband) defined in the law. Article 307 compels the promisor to prove that the parties to the agreement ‘could not and were not obliged to foresee’ the supervening event. Recent case law, however, provides more clarity regarding how this provision should be understood. The SAC has underlined that unforeseeability is established on the basis of two cumulative propositions: the ‘objective impossibility of both parties or of one of them to foresee the changed circumstances and the absence of an obligation to foresee proceeding from a legal norm, the contract or the principle of good faith.’¹¹³ Nonetheless, my research did not identify a decision in which the requirement for unforeseeability was not fulfilled because of a breach of duty to foresee resulting from the contract itself. All decisions in which the application of economic onerosity was excluded or recognized I was able to find ground their conclusions on the objective duty to foresee.

¹¹² [2007] 2 Lloyd's Rep 517 [127].

¹¹³ SAC's Decision 365/2013 on com.c.2115/2012; In this case, the appellants had filed a claim for supplementing the agreement under article 300 (LC), which we discuss in §5.2.1. The SAC concluded that filing a claim for supplementing was incorrect and that the aggrieved party had to file for economic onerosity instead. The SAC saw the two claims in opposition. While for economic onerosity the right to modify stems from the above conditions, the right for supplementing ‘stems from an express provision made at the entry to contract to [supplement the agreement] upon the arising of circumstances which were discussed in advance.’

In §3.4.2.2, I discuss a claim for economic onerosity regarding a privatization agreement in which economic onerosity was not recognized because of an objective duty to foresee the event by researching the surrounding circumstances. In §3.5, we will also see decisions applying economic onerosity in which the duty to foresee was construed as the duty resulting from the law rather than the agreement although in one of the cases there was an explicit termination clause. Moreover, in a recent case,¹¹⁴ a party claimed economic onerosity because it was put in a difficult financial situation since parties in other contracts it entered failed to perform. The SAC excluded the application of the principle on the sole grounds that parties were obliged to foresee the event: it emphasized that ‘non-performance of contracts which may affect other legal relationships of the merchant constitutes normal merchant risk and the said risk could be counted among the circumstances that a party was obliged to foresee when entering the contract.’¹¹⁵ It seems likely that English courts may not consider these facts not because they are foreseeable, but because they were simply irrelevant and do not constitute a radical change of circumstances.

A second key difference between English and Bulgarian law is that the operation of economic onerosity and ‘impossibility’ cannot be excluded by an express provision in the agreement. To clarify, since article 307 gives parties the right to a claim in court, parties cannot insert clauses to circumvent it¹¹⁶ and avoid judicial intervention.¹¹⁷ This means that while they can specify the precise effects that a supervening event constituting economic onerosity would have upon their agreement, they cannot insert provisions declaring that the contract cannot be modified/terminated in the event of economic onerosity. Besides, courts cannot make an assumption that parties did not want to modify/terminate the contract in case of a supervening event based on the content of the contract because they would deprive them of their right to a claim.

This particularity of Bulgarian law can be best understood from the perspective of the values of Bulgarian law—in §5.2.2, for instance, we will see that even in instances

¹¹⁴ SAC’s Decision 1589/2009 on com.c.1008/2009.

¹¹⁵ This fact also violates the requirement that the event should lead to an imbalance in the particular contract at hand (lack of equivalence of obligations in the same contract), which we discuss in §3.5.

¹¹⁶ Article 26, para 1 (LOC) states: ‘Contracts contravening or circumventing the law, as well as contracts infringing good morals, including contracts on inheritance that does not exist as yet, shall be null and void.’

¹¹⁷ Anton Karlov, ‘The Advantages of a Clause on Negative Material Change’ [2010] 2 *Turgovsko i konkurentno pravo* 19, 23.

where there is no economic onerosity and there are no provisions in the contract, the price can be modified under certain conditions by relying on other rules. However, it has been suggested that parties can insert material adverse change clauses that provide for/against contract modification/termination in case of milder changes that do not fall within economic onerosity's scope.¹¹⁸ Considering how sensitive Bulgarian judges are to imbalances in the agreement due to supervening events, as we explain in §3.5, it seems that it may be difficult to draw the line between economic onerosity and a material adverse change.¹¹⁹ Hence such a clause may be voided.

Regarding force majeure clauses, Gaydarov contends that recent Bulgarian arbitration practice to give effect only to the force majeure circumstances that parties have listed in the force majeure clause is 'unacceptable.'¹²⁰ He argues that even the detailed enumeration of force majeure circumstances in the contract cannot prevent the application of article 306 (LC) which regulates the 'insurmountable force.'¹²¹ He further maintains that the fact that even legislators did not permit themselves to specify the instances in which article 306 applies, but instead provided criteria for evaluation, evidences that excluding article 306 is not allowed.¹²² My research, for instance, did not identify a decision in which the court excluded the application of 'impossibility' on the grounds that the parties had assumed the risk of force majeure/chance occurrence in their agreement.

3.4.2.3 Unforeseeability as a Cover

It is interesting to remark that in Bulgaria there are instances when courts rejected the application of economic onerosity on the sole grounds that the event should have been foreseen. In the cases I found, the duty to foresee was derived from the objective

¹¹⁸ *ibid.*

¹¹⁹ This fundamental difference between Bulgarian and English law illustrates the important divergence of values promoted by the contract laws of the two jurisdictions, as discussed in §4.3.

¹²⁰ Pavel Gaydarov, *Boundaries of Contractual and Delictual Liability* (Ciela 2011) 117-18; For example, in Award on DAC 16/95 of 1 August 1995, it was concluded that only the circumstances enumerated in the force majeure clause could be characterized as force majeure.

¹²¹ The position of Bulgarian commentators lies in stark contrast to the approach of English law—in §5.3.2.2, we demonstrate that it is possible to exclude the operation of frustration by inserting a force majeure clause.

¹²² Gaydarov (n 120).

standards of care rather than the agreement itself. Arguably, however, this approach to unforeseeability can be used to cover the political motives of certain decisions.

The most striking case is a decision,¹²³ in which the SCC concluded that the restitution of land, part of the estate on which a privatized hotel with sports facilities was constructed, was not unforeseeable because the claimant had enough time to research the surrounding legal circumstances when entering the privatization contract. The court declared that economic onerosity was not applicable because the event was foreseeable. To clarify, in the early stages after the fall of communism, two separate but important processes were taking place in Bulgaria. The first one was the restitution of land and immovable property to the heirs of owners whose land and/or property had been confiscated by the communist government after 1944.¹²⁴ The other process was the privatization of state-owned companies or property by local or foreign investors since all companies were state-owned during communism. In the above-mentioned case, the privatizer realized that part of the land under the hotel it bought from the State (privatized) was restituted to the heirs of the original owners shortly after the privatization deal was closed.

SCC's approach may be contrasted with the legal reasoning in *Walton Harvey*,¹²⁵ which we mentioned in §3.4.2.1. In *Walton Harvey*, the court held that the supervening event had been foreseen by Walker & Homfrays since at the time of entry they were aware of the local authority's plans to acquire compulsorily property and to demolish it and that they should have made a provision in the agreement. In the Bulgarian case, nonetheless, the plaintiff was unaware of the claims for restitution in that area, but the court declared the event was foreseeable because the plaintiff should have done prior research.

Nonetheless, it seems that *Walton Harvey* might have had a different outcome under English law if the defendants had been unaware of the local authority's plans at the

¹²³ SCC's Decision 673/2007 on c.324/2007.

¹²⁴ The return of land and property to their rightful owners was a legislative priority in the first decade following communism. Bulgaria enacted various laws enabling heirs of deprived owners to reacquire the property of their relatives either in real boundaries or in equivalent shares (the same area but in a different place). On the specificity of Bulgarian property law, see Mario Bobatinov and Krasimir Vlahov, *Property Law: Practical Problems* (Sibi 2007); After the fall of communism, the right to private property was recognized in Bulgaria's constitution. See Pavel Sarafov, 'The Right to Private Property as a Sacred Constitutional Right' [1996] 6 *Suvremenno pravo* 15-25.

¹²⁵ (n 99).

time of entry because all conditions of application of frustration could have been fulfilled—unforeseeable event, lack of fault/negligence in causing the acquisition, and radically different circumstances as the hotel was no longer there. Unless the plans of the local authority were public in some way, there was no way to know except by chance. The Bulgarian case, by contrast, is unusual because it is grounded on the assumption that the privatizer should have expected that it is possible to lose part of its property because of the process of return of confiscated land/property, which was taking place, and thus it should have done more research. This is equivalent to a Bulgarian court saying to Walker & Homfrays that the demolition of their hotel was foreseeable because in other parts of the country local authorities were acquiring and demolishing property compulsorily and that they should have done more research on the process—an argument which on its own may be insufficient for an English court to exclude frustration.¹²⁶

Moreover, it should be noted that the privatization agreement was entered into between the investor and the local municipality (a State authority). The return of land and property was also carried out by State authorities—permanent commissions appointed by region. Essentially, a State authority closed the transaction with the privatizer at the time the claim for restitution of land was already submitted by the heirs. Although it did not know, the municipality was selling property on part of which it was going to lose its right to sell. Consequently, the privatizer either had to suffer further expenses (attempt to buy the land from the heirs) or lose part of the property. In the latter scenario, the heirs could destroy the part of the building which was on their land, so that they could use it in a different way, or forbid the privatizer access to the part of the building, which was on their land, and use it themselves.

The decision seems to disguise political motives as generally the process of restitution of land was poorly handled—declaring economic onerosity for this agreement could have resulted into claims in other privatization cases. This conclusion is reinforced by the SCC's declaration that 'there was no proof that the restitution of land led to a change of the economic outlook which in turn imbalanced the contract.' Essentially, they added a supplementary requirement for application which neither results from article 307 nor

¹²⁶ Treitel underscores that the justice of *Walton Harvey* was 'reinforced by the fact that the defendants had received compensation for their compulsory acquisition of their hotel,' Treitel (n 44) 509.

from scholarly writing—a change of circumstance causing a change in the economic outlook of the country which in its turn causes a contractual imbalance. We will see in §3.5 that economic onerosity requires a much simpler causal chain—a fundamental change in circumstances of any nature causing a contractual imbalance. Furthermore, the restitution resulted into the unjust enrichment of the municipality because it received payment for the entire building, but had the right to sell only part of it.

It would be extremely difficult to put ourselves in the shoes of English judges faced with the circumstances of this case for an array of historical and political factors. England never faced communism and the related property issues (confiscation and subsequent return 60 years later). Also, English land law is very specific. Nonetheless, it may still be useful to compare how, from a theoretical perspective, English judges may reason. Depending on how the contract is written and what percentage of the building was on land which turned out to be the property of the heirs, it may be deemed that the restitution radically changed the obligation of the contract—the privatizer clearly wanted to buy and develop a hotel and not to pay the municipality for something it would never own. The key issue then would be to decide which event radically changed the obligation—the decision on the heirs' restitution OR the heirs' filing a claim for the restitution of the land (because most claims succeeded if the heirs had all necessary documents).

The decision on restitution had come out after the entry into the privatization agreement, so it was a supervening event. In such instance, if the court deemed the change of the obligation to be radical, frustration could be established on the grounds of supervening illegality. Alternatively, if we consider the filing of the claim for restitution to be the external event that radically changed the obligation in the privatization agreement, considering the claim was filed before the privatization agreement was finalized and neither party knew of it, the said situation could constitute mistake under English law and void the privatization agreement. In the leading case on common mistake *Bell v Lever Brothers*, it was underscored that 'a mistake will not affect assent unless it is the mistake of both parties and is to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.'¹²⁷ In the Bulgarian case both parties thought that the hotel and

¹²⁷ [1932] AC 161, 218.

the land under it belonged to the municipality. However, the restitution of land made the subject-matter different for under Bulgarian law ‘land acquires property’: the heirs became the owners of part of the hotel.

Finally, it is worth mentioning that under English law there may be grounds to consider that the municipality breached their contract. In the *Great Peace Shipping*, Lord Phillips enunciated five conditions that should be fulfilled before a common mistake avoids a contract:¹²⁸ 1) a common assumption regarding the existence of a state of affairs; 2) no warranty by either party that the state of affairs exists; 3) the non-existence of the state of affairs must not be attributable to the fault of either party; 4) the non-existence of the state of affairs must render performance of the contract impossible; 5) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

In clarifying the second and the third condition, Lord Phillips referred to¹²⁹ *McRae v CDC*¹³⁰—a case in which the Commonwealth Disposals Commission (CDC) invited tenders for the purchase of an oil tanker lying on the Jourmaund Reef. The successful bidder incurred significant expenses as they embarked on the salvage mission only to discover there was neither a Jourmaund Reef nor a tanker. While the CDC argued this was a case of common mistake, the High Court of Australia, on true construction of the contract, established a promise by the CDC that there was a tanker.¹³¹ The court also held that a party could not rely on common mistake if it entertained the belief without reasonable grounds and it induced this belief in the mind of the other party.¹³² Essentially, in *McRae*, the court found a way to hold the CDC liable for its own lack of research. While we do not have access to the tender documents and the contract between the Bulgarian municipality and the investor, there is a distinct possibility that, on construction of the agreement,¹³³ a common law judge could identify a promise that the hotel is owned by the municipality in its entirety and that it induced this belief in

¹²⁸ [2003] QB 679 [76].

¹²⁹ *ibid* [77].

¹³⁰ (1951) 84 CLR 377.

¹³¹ *ibid* 410.

¹³² *ibid* 408.

¹³³ On the different approaches of Bulgarian and English law to contractual interpretation, see §5.3.

the investor's mind.¹³⁴ This also seems likely in light of the well-known commercial sensibility of the common law, which we discuss in Chapter 4. By contrast, we saw that the Bulgarian courts imposed the burden of research on the investor.

3.5 Key Differences

The key difference between the criteria of application of frustration and economic onerosity, nonetheless, stems from the requirements for the change of the contractual obligation due to the supervening event. As underlined in §3.2.2, the modern test for frustration was established in *Davis Contractors*—to apply frustration, the circumstances should have become ‘radically different’ since entry. Lord Radcliffe highlighted: ‘It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.’¹³⁵ Bulgarian law, by contrast, demands that the supervening event render the contract ‘contrary to fairness and good faith.’ We will see that these dissimilar requirements illustrate major differences between the values of English and Bulgarian law and lead to substantially different outcomes in practice.

3.5.1 *Contractual Imbalance v ‘Radically Different’ Obligation*

Both Bulgarian and English law require that there be a change in the contractual obligation as a result of the supervening event. Nonetheless, they establish the change using different criteria. Lord Radcliffe’s test puts an emphasis on the alteration of the promise—the parties promised one thing, but have to perform something completely different because of the radical change of circumstances. As clarified in Chapter 4, this approach can be understood from the perspective of English contract theory—notably, contract as a promise and an instrument for risk allocation. By contrast, Bulgarian law

¹³⁴ Conditions 1, 4, and 5 of Lord Phillips’ test seem fulfilled as the assumption that the hotel belongs to the municipality is common, performance of part of the contract is impossible, and acquiring the entire hotel is certainly what induced the investor to bid.

¹³⁵ (n 6) 729.

is primarily concerned with the agreement becoming contrary to fairness and good faith due to the change of circumstances.

It is thus important to examine what Bulgarian law understands by ‘contrary to fairness and good faith.’ As explained in §2.2, both fairness and good faith are fundamental principles Bulgarian contract law. While we discuss their origin and role in Chapter 4, at this stage, we will briefly explain their relevance to economic onerosity to underline the difference between the Bulgarian and the English application test. Bulgarian doctrine generally agrees that a contract is unfair when an agreement is vitiated or when the equivalence of obligations has been violated—the value of what the promisor gives to the promisee is substantially different from what the promisee gives to the promisor.¹³⁶ The equivalence, however, is evaluated factually, on a case by case basis by the court,¹³⁷ which, as explained below, results in contradictory case law.

Good faith, by contrast, is a ‘criterion of evaluation of honesty and respectability’ which implies that ‘society is interested in the preservation of the economic existence of the disadvantaged party.’¹³⁸ Some authors examine the two principles together and argue that economic onerosity arises when ‘due to an unforeseen and unforeseeable event, there is such an obvious disproportion between the values of the reciprocal obligations that what was previously agreed becomes incompatible with the requirements of preservation of the honest and respectable balance of the parties’ interests...’¹³⁹

We should also clarify that both doctrine prior to 1944 and contemporary scholarship concur that to apply economic onerosity, the contractual imbalance should be the result of a significant and objective change in the socio-economic circumstances in the country after the rise of the obligation.¹⁴⁰ This condition has also been embraced by

¹³⁶ Staykov, ‘The Clausula Rebus Sic Stantibus Institute’ (n 28) 71; Kalaidjiev (n 12) 325; Tsoneva (n 39) 349.

¹³⁷ Kalaidjiev (n 12) 325.

¹³⁸ Tsoneva (n 39) 356.

¹³⁹ Mateeva (n 28) 243.

¹⁴⁰ Apostolov (n 12) 241; Staykov, ‘Economic Onerosity’ (n 28) 19; Staykov, ‘The Clausula Rebus Sic Stantibus Institute’ (n 28) 71; Gerdjikov (n 81) 55; Diana Dimitrova, ‘The Application of the Institute of Economic Onerosity in the Conditions of Economic Crisis’ (The Global Crisis and Economic Development, Varna, May 2010).

Bulgarian courts. One of the clearest explanations regarding the criteria of application may be found in a recent decision by the SCC¹⁴¹:

The principle of economic onerosity is not applied automatically, but must be demanded by the parties. A precondition for the rise of this right is the violation of the principles of fairness and good faith by the contract. This violation could be established when the equivalence of obligations is imbalanced due to a fundamental change in the economic context in which parties would not have entered the agreement.

Similarly, the SAC has stressed:

*The principle of article 307 of the LC is applied when there is a change in objective reality (mostly the economic outlook) after entry into contract which substantially violates the equivalence of obligations which in turn makes the preservation of the contract as written contrary to... fairness and good faith. It applies to circumstances which the parties could not foresee and were not obliged to foresee at entry.*¹⁴²

These decisions show that the existence of an objective and significant change of economic circumstances is insufficient to establish economic onerosity. There must be a causal link between that change and the contractual imbalance subject to the dispute. One can further observe that whereas SCC's decision explicitly refers to a change in the economic context, SAC's decision refers to any change of 'objective reality,' which seems to have a larger scope and to include changes, which are not purely economic.¹⁴³ Doctrine contends that the change could be of 'economic, political or other nature'¹⁴⁴

¹⁴¹ SCC's Decision 115/2008 on com.c.774/2007.

¹⁴² SAC's Decision 1589/2009 on com.c.1008/2009.

¹⁴³ This observation made me conclude that events like the closure of the Suez Canal may qualify as a change in the objective reality and make economic onerosity theoretically applicable to cases like *The Eugenia*, as discussed in §3.4.1.3.2.

¹⁴⁴ Phillip Ralchev, 'Non-Performance in Commercial Transactions' [1998] 8 *Bulgarski schetovoditel* 18, 20.

and that wars or natural disasters can also qualify as economic onerosity if they cause a contractual imbalance.¹⁴⁵

Unlike English law, Bulgarian law is primarily concerned with the substantive fairness in the contract—whether because of the change of circumstances, the promisor will be unjustly impoverished and/or the promisee will be unjustly enriched. This approach should be contrasted with the English attitude towards contractual onerosity as evidenced by case law. For example, in *Davis Contractors*, Lord Radcliffe explicitly emphasized: ‘It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play.’¹⁴⁶ In *The Eugenia*, Lord Denning maintained:

*The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done. And it is for the courts to do it as a matter of law.*¹⁴⁷

Furthermore, in *The Sea Angel*, Rix LJ explained:

*Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as ‘the contemplation of the parties’, the application of the doctrine can often be a difficult one. In such circumstances, the test of ‘radically different’ is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerosity is not sufficient.*¹⁴⁸

Similarly to English law, Bulgarian law does not allow the application of economic onerosity in cases of mere onerosity—for such cases, practitioners encourage parties

¹⁴⁵ Mario Bobatinov, *Private Law Considerations in Commercial Transactions* (Feneya 2007) 115.

¹⁴⁶ (n 6) 729.

¹⁴⁷ (n 94) 239.

¹⁴⁸ (n 112) [111].

to include material adverse change clauses, as explained in §3.4.2.2. However, there is a fundamental difference between the Bulgarian and the English concept of justice, as we will see in Chapter 4. From a Bulgarian standpoint, the injustice consists in the fact that the promisor gives substantially more than what it receives from the promisee due to the supervening event. English judges, nonetheless, find injustice when a party has to bear a risk it has not undertaken in the contract—they do not look into the unjust enrichment/impoverishment of the parties to identify whether frustration has occurred.

3.5.2 Illustration by Case Law

Examining case law reveals that the different approaches towards establishing the change of the obligation in Bulgaria and England lead to divergences in practice. It also demonstrates the difficulties which Bulgarian courts face in drawing the line between what is just and unjust when they have to apply economic onerosity. Two Bulgarian cases illustrate some of the challenges which judges confront when establishing contractual imbalances factually and provide ample material for comparative analysis.

3.5.2.1 Decision 50/2010

The Varna Appellate Court (VAC) examined a case concerning the lease for a store selling luxury goods in a shopping center. In its Decision 50/2010,¹⁴⁹ it declared that the parties not only did not foresee that the number of clients would decrease several months after the mall's opening, but also could not and were not obliged to foresee this fact at entry. It appears, however, that a leading factor motivating the decision was the contractual imbalance resulting from an objective change of economic circumstances. The court established that the revenue of the store was 'several times less' than the rent and that the cause of low revenue was an economic crisis: 'The effects of the world economic crisis were felt...at the end of 2008...The analysis of the facts shows that at the end of 2008 when the claim was registered, the claimant had objective difficulties in performing his contractual obligations...'¹⁵⁰ It should be noted that the parties had

¹⁴⁹ VAC's Decision 50/2010 on com.c.10/2010.

¹⁵⁰ *ibid.*

entered into negotiations and the lessor had proposed to decrease the rent by 20%. The court, nonetheless, concluded that ‘the lessor’s proposal...was inadequate to the loss suffered by the lessee.’ The court deemed that all necessary conditions for application of economic onerosity were present and terminated the agreement as requested by the plaintiff.

It seems likely that English law would reach a different result if confronted with the same case. English judges would examine whether the supervening event (the economic crisis) had radically altered the contractual obligation and whether the parties intended to preserve the contract in such circumstances. The lease agreement was entered into during the first half of 2007. Official statistics show that the yearly inflation rate in Bulgaria was estimated at 12.5% in 2007 and 7.8% in 2008. By contrast, in 2006 it was 6.5%.¹⁵¹ Objectively, there was a macroeconomic change which could be proven in court. The judgment does not make references to the clauses in the agreement, so it is difficult to analyze whether the lessee had assumed the risk of inflation. For the purposes of our comparison, we will assume he either had not or he had assumed standard inflation targeted by the central bank. In both circumstances, it seems unlikely that English judges would conclude that the inflation change of 6% (between 2006 and 2007) radically altered the promisor’s obligations—to pay rent in this case—or that it does not constitute standard merchant risk.

English judges traditionally support the principle of nominalism for domestic contracts.¹⁵² For instance, in *Treseder-Griffin*, Lord Denning emphasized:

In external transactions it is...quite common for parties to protect themselves against a depreciation in the rate of exchange by means of a gold clause. But in England we have always looked upon a pound as a pound, whatever its international value. We have dealt in pounds for more than a thousand years—long before there were gold coins or paper notes. In all our dealings we have disregarded alike the

¹⁵¹ Press release by Bulgaria’s National Statistical Institute

<http://www.nsi.bg/sites/default/files/files/pressreleases/Inflation_god2011.pdf>.

¹⁵² According to this principle, where a debt is expressed in pounds, the debtor is bound to pay the nominal amount irrespective of the currency’s depreciation or appreciation due to inflation/deflation. On the origin of this principle in the common law, see David Fox, ‘The Case of Mixt Monies: Confirming Nominalism in the Common Law of Monetary Obligations’ (2011) 70 CLJ 144-174.

*debasement of the currency by kings and rulers or the depreciation of it by the march of time or events.*¹⁵³

Similarly, in *Wates Ltd v GLC*, it was concluded that there was no frustration although the contract had become ‘more expensive and onerous... because inflation rose faster, even much faster, than was expected.’¹⁵⁴

An exception is *Staffordshire Area Health Authority*¹⁵⁵ in which Lord Denning used the rules on construction, as discussed in §5.3.2.1, to terminate an agreement in which the cost of supplying water was approximately twenty times higher than the price agreed on in the contract. However, the inflation to which Denning refers is in the span of 16%-24% per year.¹⁵⁶ Denning was also examining a contract entered into more than fifty years before the case was brought to court while the Bulgarian lease was concluded two years before the case was brought to court.

Considering that Bulgarian legislators were motivated to enact article 307 because of exorbitant inflation,¹⁵⁷ it might appear that the VAC interpreted the principle rather generously. Nonetheless, it is crucial to stress that the VAC examined a different causal link from the one English judges would if this case were argued on the grounds of frustration. The VAC was not concerned about the inflation’s altering the obligation to pay rent itself—it was worried about the inflation’s altering the purchasing power of the potential customers of the store, thus making the revenue become lower than the rent and causing a contractual imbalance. This, of course, does not mean that under other circumstances, for instance the facts of the *Staffordshire* case, Bulgarian courts will not examine a different causal link—notably, inflation making the costs of supplying water higher than the price in the agreement, thus making the agreement contrary to fairness and good faith.

¹⁵³ [1956] 2 QB 127, 144.

¹⁵⁴ (1983) 25 BLR 1.

¹⁵⁵ [1978] 1 WLR 1387.

¹⁵⁶ Luca Benati, ‘Long Run Evidence on Money Growth and Inflation’ (Bank of England Quarterly Bulletin, Autumn 2005)

<<http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/qb050302.pdf>>.

¹⁵⁷ See footnote 1 (Chapter 1).

3.5.2.2 Decision 192/2010

A second court decision by the VAC and its subsequent cassation by the SCC illustrates the subjectivity of judgment that may arise in the application of economic onerosity and provides further material for comparative analysis. In 2010, the VAC was confronted with another case with similar facts to the one in Decision 50/2010 discussed above. The case concerned the 10-year lease of a store selling jeans and shoes which faced low revenues and closed down.¹⁵⁸ The judicial panel reached a different result because the contract itself contained a termination clause stipulating that

- 1) the lessee does not have the right to terminate the contract unilaterally during the first 36 months unless it pays the rent for all 36 months;
- 2) the lessee may terminate the agreement after 36 months, but only with a 6-month advance notice.

This clause shows that the parties themselves included specific mechanisms for contract termination: the lessee may terminate the agreement after the 36th month, without paying damages, if it notifies the lessor during the 30th month. Furthermore, the lessee tried to renegotiate the contract and the lessor proposed to decrease the monthly rent by 20%. The court, however, examined extrinsic evidence to establish that while the lessee did not accept the proposed 20% decrease in this contract, it accepted a 12% decrease of rent in another contract it renegotiated.

Similarly to Decision 50/2010, the judges admitted the existence of a global financial crisis, but held that there was no proven substantial imbalance of the reciprocal obligations due to it. The court said that ‘economic onerosity may be recognized only if as a result of the changed economic circumstances, there is an objective and substantial decrease in the rent of real property of a similar type to such an extent that what the lessee owes is disproportionate to what it receives from the lessor.’¹⁵⁹ It concluded that lack of economic profitability cannot be equated to economic onerosity.

Essentially, the VAC reached different results in similar circumstances because it applied dissimilar criteria about the evaluation of the imbalance in the reciprocal obligations in the contract. While Decision 50/2010 relied on the comparison between the revenue of the store and the rent, Decision 192/2010 relied on the real estate market

¹⁵⁸ VAC’s Decision 192/2010 on com.c.446/2010.

¹⁵⁹ *ibid.*

as a criterion. It is thus not surprising that the plaintiffs in the second decision demanded cassation by claiming that Decision 192/2010 contradicted Decision 50/2010. In Ruling 614/2012, the SCC affirmed that the demand for cassation was justified because of a potential contradiction between the two decisions.¹⁶⁰ In Decision 240/2013, the SCC quashed Decision 192/2010 by stating it was ‘incorrect.’¹⁶¹

The SCC termed the criteria used by the appellate court to establish whether a contractual imbalance was present ‘a reference to legally irrelevant facts.’ It affirmed the approach of Decision 50/2010 by declaring that the correct method would be to examine the revenue in the concrete store after the change of circumstances and to compare it both with the revenue prior to the supervening event and with the rent. The SCC stated that only this approach may give an objective answer to the question whether there is a lack of equivalence of reciprocal obligations. It concluded that in the said case there was a contractual imbalance as ‘a direct and immediate consequence of the global economic crisis in which consumption was limited to goods of first necessity’ and that the decrease of sales of shoes and jeans was unforeseeable and could not be attributed as fault to any of the parties. The SCC declared that the request for termination had to be honored and terminated the agreement.

The cassation by the SCC is interesting for several reasons. Firstly, it clearly demonstrates that Decision 50/2010 of the VAC is not accidental, but compliant with the principle in article 307. To the best of my knowledge, it is the first decision of the SCC which reverses a decision of the lower courts not to apply economic onerosity. Thus it shows that the doctrine has huge practical implications and is not just a theoretical possibility. Secondly, it seems crucial that the SCC did not consider the termination clause mentioned above (it was not even mentioned in the decision) as a factor in its decision. Thirdly, while all criteria of application of economic onerosity are cumulative, the decision implies that the contractual imbalance is one of the most important, yet the most difficult to apply uniformly. Although the SCC has given clear instructions how to evaluate contractual imbalances in leases, lower courts may diverge on the methodology of evaluation in other types of agreements.

This in turn may discourage parties to rely on economic onerosity. In Decision 192/2010, the plaintiff filed the claim in 2008, but managed to terminate the agreement

¹⁶⁰ SCC’s Ruling 614/2012 on com.c.259/2011.

¹⁶¹ SCC’s Decision 240/2013 on com.c.259/2011.

in 2013. The possibility of a worst scenario in which a claimant has to appeal both at the appellate court and at the SCC may limit the application of the doctrine in certain agreements, contrary to what legislators said in article 307. For instance, if we take the example of *The Eugenia*, which we discussed in §3.4.1.3.2, the defendants could file a claim for economic onerosity at the time the canal closed and argue that sailing around the Cape of Good Hope would alter the contractual balance. If the parties have to wait for years before a decision is rendered, this will create difficulties for the promisee for which the delivery of the goods *The Eugenia* transports may be time-sensitive and may lead to the promisee's breaching other agreements. Thus indirectly the filing of a claim by the promisor may cause the promisee's acting in bad faith in its other agreements, which contradicts the principle of good faith.

In that light, if English courts were confronted with the case in Decision 192/2010, it seems that they would reach a decision different from SCC's. The agreement's substantive fairness which might be altered by the supervening event would not be of concern. They would examine the agreement to conclude if the risk of inflation was assumed and if the change in circumstances radically altered what parties agreed upon in their contract. Similarly to the case in Decision 50/2010, the agreement was entered into in 2007 and the claim was filed in 2008. As we saw above, there was a 6% increase of inflation between 2007 and 2008, which seems insufficient to apply frustration. Moreover, as the lease agreements contained detailed clauses allowing early termination against damages, it seems likely that English judges would conclude that early termination would simply be costlier for the promisee who himself had agreed to these terms and was trying to escape from an imprudent bargain by relying on frustration—an approach which contradicts English law's values. It has been suggested that a lease may be frustrated in case of destruction of the property by fire, earthquake or coastal erosion.¹⁶²

3.6 Comparing the Effects

This section highlights the main differences between the effects of frustration and economic onerosity. While the effects of frustration are automatic, the effects of

¹⁶² *National Carriers v Panalpina* [1980] AC 675, 690-91.

economic onerosity largely depend on the aggrieved party's discretion and on the timing of the claim and its subsequent examination by the court. The section also discusses the key issue of loss distribution following supervening events.

3.6.1 Discretion of Aggrieved Party v Automatic Effects

In English law, a frustrated contract is brought to end automatically irrespective of the wishes of the parties or the judge. Both parties are released from any further performance, but their legal rights and obligations accrued before the frustrating event remain. In *Hirji Mulji*, for example, Lord Sumner emphasized that frustration occurs 'irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances.'¹⁶³ Likewise, in *National Carriers v Panalpina*,¹⁶⁴ Lord Roskill reiterated:

*Frustration if it occurs operates automatically. Its operation does not depend on the action or inaction of the parties. It is to be invoked or not to be invoked by reference only to the particular contract before the court and the facts of the particular case said to justify the invocation of the doctrine.*¹⁶⁵

This specificity of the doctrine may explain why courts are cautious to apply it—scholars have referred to its consequences as 'draconian.'¹⁶⁶ Furthermore, the contract is terminated at the moment frustration arises. In *Davis Contractors*, for instance, Lord Morton emphasized: 'I think, impossible to hold that a contract has been frustrated unless it can be said: "As and from such and such a date, at" latest, the contract ceased to bind the parties.'¹⁶⁷

By contrast, economic onerosity does not produce automatic effects. As explained in §3.3, it gives the aggrieved party a right to file a claim in court in order to benefit from

¹⁶³ [1926] AC 497, 510.

¹⁶⁴ [1980] AC 675.

¹⁶⁵ *ibid* 712.

¹⁶⁶ McKendrick, *Contract Law* (n 100) 707.

¹⁶⁷ (n 6) 717.

the protection of article 307.¹⁶⁸ Furthermore, article 307 explicitly states that a court may ‘upon request by one of the parties, modify or terminate the contract entirely or in part.’ This means that the party may request:

- 1) modification of the agreement OR
- 2) termination of the entire agreement OR
- 3) termination of certain clauses in the agreement.

Essentially, economic onerosity’s effects depend primarily on the party which filed the claim for economic onerosity. Moreover, they do not take place at the moment economic onerosity occurs. The article’s drafting also implies that if the conditions of application of economic onerosity are met, the judge has to honor the request of the aggrieved party—for instance, if the claimant demands termination, the judge cannot decide that it is better to modify the contract.¹⁶⁹ In the lease cases we examined in §3.5.2, in which the courts established economic onerosity and terminated the contracts, the lessees had explicitly requested termination of the entire agreements. By contrast, in the claim related to privatization discussed in §3.4.2.2, the plaintiff had requested modification of certain clauses, which, however, were not cited in the decision. As there is no case law in which the claim for economic onerosity succeeded and the aggrieved party demanded modification, it is unclear whether the judge is bound by the suggested modification or may adjust the proposed modification, if he finds it contrary to fairness and good faith. As the purpose of article 307 is to re-establish the contractual balance, it is logical that the judge should be able to do so to prevent abuse of justice.¹⁷⁰

At first glance, it may seem that if a party demands termination of the entire agreement, economic onerosity may have effects similar to those of frustration. However, even in such a hypothetical situation, this supposition is untrue. Frustration terminates the contract automatically at the moment it arises. Although the frustrating event may be

¹⁶⁸ Contrast with the ‘insurmountable force’ discussed in §3.2, which allows unilateral termination out of court.

¹⁶⁹ Bulgarian law often leaves the choice of remedy to the aggrieved party. For example, in case of unexcused non-performance, the promisee may request specific performance and damages OR damages for non-performance OR performance by a third party at the promisor’s expense. See articles 79 and 80 (LOC).

¹⁷⁰ In Italy, the judge may intervene in the modification process if the offer is inequitable, Elena Zaccaria, ‘The Effects of Changed Circumstances in International Commercial Trade’ (2005) 9 ITBLR 135, 148.

established by the court at a later stage during the court proceedings, the contract will be considered terminated from the moment the supervening event has taken place.

By contrast, Bulgarian courts seem to be divided about the moment when economic onerosity produces effects. Some courts declare that economic onerosity has effects from the date the judgment enters into force. In a recent award,¹⁷¹ it was concluded that economic onerosity does not have automatic effects—it produces effects for the future, but it cannot affect legal consequences which have already occurred. Similarly, in a Ruling of the SAC,¹⁷² it was indicated that by virtue of the provisions in which the legislator talks about termination, it can be concluded that the legislator gives effects to termination in the future rather than retroactively. Nonetheless, in the decision¹⁷³ with which the SCC quashed Decision 192/2010 of the VAC we saw in §3.5.2.2, effect was given from the day the claim of economic onerosity was submitted.

This contradictory approach to the moment economic onerosity produces effects can have huge practical implications because courts are not subjected to any restrictions regarding the timeframe in which they have to render a decision. With regard to the same lease case, we saw that the filing of the initial claim and the final decision by the SCC were five years apart. Between the time a party files a claim and the time a final decision is rendered, the contractual imbalance may have caused the promisor's insolvency. These practical results cast doubt about the quality of the article's wording.¹⁷⁴ While we make our inferences on the basis of parties' demanding termination, the same considerations would be valid if parties demanded modification—changes entering into force years after the claim is submitted may be futile if the aggrieved party has become insolvent due to the contractual imbalance.

3.6.2 Loss Distribution

The moment at which frustration and economic onerosity produce legal effects is crucial regarding the key issue of loss distribution. England and Bulgaria not only tend

¹⁷¹ Award on IAC 196/2007 of 3 July 2008.

¹⁷² SAC's Ruling 647/2013 on civ.c.826/2013.

¹⁷³ SCC's Decision 240/2013 on com.c.259/2011.

¹⁷⁴ The Bulgarian approach differs significantly from DCFR's article III.–1:110(2)(b) and CESL's article 89(2)(b): both state that the contract is terminated on date and terms determined by the court.

to diverge on the determination of that moment, as explained above, but also have different rules for loss distribution. These rules developed in dissimilar historical contexts and illustrate divergent legal values. §3.6.2.1 presents the main differences between the English and Bulgarian approach to loss distribution as they appear in legislation and §3.6.2.2 demonstrates some of the difficulties that arise when the rules are applied in practice.

3.6.2.1 The Rules in the ‘Books’

Before examining the rules pertaining to loss distribution following supervening events, we should pay attention to a significant difference between Bulgarian and English law: unlike England,¹⁷⁵ Bulgaria recognized unjust enrichment as a source of obligations independent of contract and tort as early as 1950. The 1950 LOC contains general rules on unjust enrichment.¹⁷⁶ It should also be emphasized that while the 1892 LOC did not contain general provisions on unjust enrichment,¹⁷⁷ Bulgarian courts developed jurisprudential solutions¹⁷⁸ to address such instances relying on their powers

¹⁷⁵ The HL recognized unjust enrichment as the basis for a claim in restitution in 1991 with the decision *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; In 1998, it put forward a 4-stage elaborate test to identify unjust enrichment with its decision *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227. Prior to 1991, the cases were resolved pragmatically by extending the established forms of remedies. For a comparative historical overview of the development of unjust enrichment in England, see Paula Giliker, *Pre-contractual Liability in English and French Law* (Kluwer 2002) 65-103; On the division of the law of obligations from an English perspective and the separation of the law of restitution from the law of contract, see Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart 1998) 1-15.

¹⁷⁶ Articles 55 to 59 (LOC); There are also other principles in the LOC that are not part of the section on unjust enrichment, which essentially prevent unjust enrichment, such as article 28, para 2 (LOC) permitting rectification of calculation errors in agreements.

¹⁷⁷ As explained in §2.3.2.1, the first LOC was indirectly inspired by the *Code civil*. It recognized the category of quasi-contracts (LOC's articles 45-55 were verbatim copies of articles 1371-1381 of the *Code civil*) and permitted recovery on these grounds.

¹⁷⁸ Courts and commentators derived a principle on unjust enrichment from the general principles of Bulgarian law, particularly the principle of justice discussed in Chapter 4. See Chudomir Goleminov, *Unjust Enrichment* (3rd edn, Feneya 2011) 27-28; Similarly, French courts also relied on their equitable powers to justify recovery, notably in the well-known *affaire Boudier* (1893). This approach was criticized in subsequent decisions and doctrinal commentaries. See Jack Beatson and Eltjo Schrage, *Unjustified Enrichment* (Hart 2003) 35-42, Giliker (n 175) 77-81 and 97-102; Nonetheless, the *ordonnance* implementing a major law reform in France we mentioned in §1.2.1 introduced a section on unjust enrichment in the *Code civil*.

to make law in the absence of legislation.¹⁷⁹ The enactment of the rules of unjust enrichment seemed like the next natural step—doctrine and courts favored the principle,¹⁸⁰ unjust enrichment was in line with the communist ideology which Bulgaria had embraced,¹⁸¹ etc.

The law of unjust enrichment in England, however, had a rather turbulent development. Scholars had to justify its existence by publishing detailed treatises in its defense.¹⁸² Furthermore, it faced severe opposition by the judiciary—in *Orakpo v Manson Investments*, Lord Diplock famously said: ‘there is no general doctrine of unjust enrichment recognized in English law.’¹⁸³ Courts had to use creativity to address instances which would be currently resolved by the principles of unjust enrichment.¹⁸⁴ In this context, it should be emphasized that England enacted special legislation—the Law Reform (Frustrated Contracts) Act 1943—to tackle the key issue of loss distribution following frustration.

3.6.2.1.1 *The English Approach*

The traditional position of the common law is that loss lies wherever it falls. Nonetheless, following contradictory case law, which raised concern about the adequacy of this remedial response, notably *Chandler v Webster*¹⁸⁵ and *Fibrosa Spolka*

¹⁷⁹ On the sources of Bulgarian law, see §2.2.2.

¹⁸⁰ One should not underestimate the role of comparative law, which we discussed in §2.3.2, either. The first BGB contained an elaborate section on unjustified enrichment (Section 812-822). The 1942 *Codice civile* also contains a general rule on unjust enrichment (articles 2041-2042). See Brice Dickson, ‘Unjust Enrichment Claims: A Comparative Overview’ (1995) 54 CLJ 100-124.

¹⁸¹ Marxism-Leninism promoted equality and condemned unfair wealth redistribution.

¹⁸² *Goff and Jones: The Law of Restitution* (Sweet & Maxwell 1966) and Peter Birks’ *An Introduction to the Law of Restitution* (Clarendon 1985) played a key role in developing the law of unjust enrichment.

¹⁸³ [1978] AC 95, 104.

¹⁸⁴ For instance, find an implied contract—an approach, which has now been discredited, *Beaton and Schrage* (n 178) 32.

¹⁸⁵ [1904] 1 KB 493; This is one of the famous ‘coronation cases’ which followed the postponed coronation procession of Edward VII. The plaintiff had agreed to pay the defendant £141.15 to observe the procession from his premises. Before the procession was cancelled and the contract became frustrated, he had paid £100. The court not only rejected the plaintiff’s claim to recover the £100 he had already paid, but also held that the plaintiff owed the defendant the remaining £41.15. The court explained that the effect of frustration was to release parties from their future obligations, but could not affect obligations accrued prior to frustration.

Akcyjna,¹⁸⁶ Parliament enacted the Law Reform (Frustrated Contracts) Act 1943.¹⁸⁷ McKendrick emphasizes that the basic strategy of the legislation is to ‘identify the benefit which has been obtained by the defendant at the expense of the plaintiff’ and to ‘allow the plaintiff to recover as much as it appears to the court to be just.’¹⁸⁸ It should be clarified that the Act does not apply to all types of contracts.¹⁸⁹ Furthermore, unlike other common law jurisdictions, England did not endorse the principle of loss apportionment.¹⁹⁰

Of particular interest for our comparative study are S1(2) and S1(3). S1(2) provides for the recovery of money paid to the other contracting party prior to frustration and relieves a party from the obligation to pay money which was payable prior to the frustrating event, but remained unpaid. However, the court may allow the other party to retain the whole or part of any expenses incurred in relation to the contract before frustration occurred. S1(3) provides for the recovery of non-money benefits. McKendrick argues that both rules can be accommodated within a restitutionary framework:

- 1) Under S1(2), the plaintiff should demonstrate that the defendant was ‘enriched by the receipt of money,’ ‘the enrichment must be at the expense of the plaintiff,’ and the unjust factor is partial failure of consideration.¹⁹¹
- 2) By contrast, under S1(3), the plaintiff must ‘show that the defendant was enriched’ by a valuable benefit, ‘enrichment must be at the expense of the

¹⁸⁶ [1943] AC 32; The HL held that the appellants were entitled to recover their prepayment on the grounds of total failure of consideration. Commentators criticized the decision since the party who had to return pre-payment could have incurred expenses, *Anson’s Law of Contract* (29th edn, OUP 2010) 557.

¹⁸⁷ Mitchell elucidates that there is archival evidence showing that the decision in *Fibrosa* did not trigger the reform, but was part of the political process aimed at adapting existing law to commercial expectations. Members of the judicial panel were also involved in the drafting and enactment of the 1943 Act. See Paul Mitchell, ‘*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Limited* (1942)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006) 247-73.

¹⁸⁸ Ewan McKendrick, ‘Frustration, Restitution, and Loss Appointment’ in Andrew Burrows (ed), *Essays on Restitution* (OUP 1991) 155.

¹⁸⁹ Section 2(5); It does not apply to charterparties, contracts of insurance, in cases when Section 7 of the Sale of Goods Act 1979 applies or to contracts for the sale of specific goods which are frustrated because the goods have perished.

¹⁹⁰ McKendrick, ‘Frustration’ (n 188) 154.

¹⁹¹ *ibid.*

plaintiff,’ and the unjust factor is again the partial failure of consideration.¹⁹²

However, according to *Goff and Jones*, ‘whilst the 1943 Act governs a situation where the law of unjust enrichment would otherwise apply, it should not be seen as being a part of the law of unjust enrichment.’¹⁹³ At this point in time, not only the law of unjust enrichment was still at its ‘formative stage,’ but also one cannot infer such intention on behalf of the legislators based on the terms of the 1943 Act.¹⁹⁴ *Goff and Jones* identify key differences between claims in unjust enrichment and claims under the 1943 Act. For instance, unlike a claim in unjust enrichment, a claim under S1(2) does not require an examination of ‘the basis on which the prepayment was made.’¹⁹⁵ Furthermore, in a claim under S1(2), the payer may recover even if the basis of the payment has only partially failed.¹⁹⁶ We explain below that although Bulgarian law enacted general principles of unjust enrichment prior to economic onerosity’s codification, it harbors similar conceptual nuances and incoherencies because of its generous interpretation of *causa* and its ‘patchwork’ approach to law development.¹⁹⁷

3.6.2.1.2 *The Bulgarian Approach*

The approach of Bulgarian law to loss distribution differs both from the approach of the common law and of the 1943 Act. Unlike the common law which allowed loss to lie where it fell, Bulgarian law inherited several rules for risk distribution in case of supervening impossibility from Roman law.¹⁹⁸ The *casum sentit debitor* rule stating

¹⁹² *ibid* 159-60.

¹⁹³ *Goff and Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2015) [15-10].

¹⁹⁴ *Ibid*.

¹⁹⁵ *Goff and Jones* (n 193) [15-15].

¹⁹⁶ *ibid* [15-14]; Recent case law reaffirms the position that failure of consideration must be total for a claim in unjust enrichment to succeed. See *Stoczniak Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574, *Giedo van der Garde BV* [2010] EWHC 2373 (QB); Nonetheless, some commentators have argued in favor of partial failure of consideration as grounds for recovery. See Peter Birks, ‘Failure of Consideration’ in Francis Rose (ed), *Consensus Ad Idem: Essays on the Law of Contract in Honor of Guenter Treitel* (Sweet & Maxwell 1996) 179.

¹⁹⁷ In §4.3.2.2 and §5.2.3, we discuss instances when Bulgarian courts relied on creativity to redefine key notions of Bulgarian law like *causa* or ignore legislation to enforce the underlying principles of Bulgarian law.

¹⁹⁸ The *casum sentit debitor* stating that the risk is borne by the promisor of the obligation that became impossible, the *res perit domino* rule stating that the risk is borne by the owner of specific goods (the promisee), and the *genus non perit* rule stating that for non-specific goods

that the risk is borne by the promisor of the obligation that became impossible is applicable by analogy to cases of economic onerosity. Essentially, if the aggrieved party demands modification, the changes take effect for the future after the court renders a decision. This means that any losses/additional expenses resulting from the burdensome performance prior to the modification are borne by the promisor. Alternatively, if the aggrieved party demands termination, any loss suffered by the promisor resulting from the supervening event prior to the date of termination lies on him.

Furthermore, as explained above, the 1950 LOC contains general rules on unjust enrichment. Articles 55 to 58 specify all instances in which enrichment is unjust and recoverable. Article 59, however, allows aggrieved parties to file claims for restitution in instances which are not specified by the law,¹⁹⁹ thus providing flexibility to aggrieved parties to seek redress in instances legislators have not thought of. This approach evidences Bulgaria's bigger commitment to social justice in the law of obligations, compared to English law.²⁰⁰

Particularly relevant for our study is article 55-1 (LOC): 'Any person who has received something without cause or for an unfulfilled or lapsed cause must return it.' While we explain the difference between the Bulgarian notion of cause and the English notion of consideration in §4.3.2, it should be emphasized that Bulgarian doctrine does not hold a uniform view on what cause means in this context. Whereas some authors argue that the cause legislators refer to is the cause as an element of 'causal contracts,' others believe that in this context the cause has a larger scope and is synonymous to the legal relationship between the one that gives and the one that receives something.²⁰¹ This relationship could result from contract, tort, an act of government creating a relationship between parties where none existed before, etc. Moreover, while the 1943

the risk is borne by the promisor. See Aleksander Kozuharov, *The Law of Obligations: General Part* (first published 1958, Petko Petkov ed, Jurispres 2002) 281-87.

¹⁹⁹ Article 59 states: 'Apart from the above cases, whoever has enriched himself without cause at the expense of another shall owe the return of that by which he enriched himself, up to the amount by which the other impoverished himself.'

²⁰⁰ See our discussion in §4.3.2.

²⁰¹ Similarly, in English law, consideration has different implications in the law of contract and the law of restitution—in the former it is concerned with the promises in the agreement while in the latter with their performance. See Graham Virgo, 'Failure of Consideration: Myth and Meaning in the English Law of Restitution' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 202) 103.

Act puts an emphasis on the valuable benefit conferred to the defendant at the expense of the claimant, Bulgarian law is primarily concerned with the absence of cause for the transfer. Article 55-1 neither makes reference to enrichment nor to impoverishment.²⁰² Furthermore, unlike S1(2) and S1(3) of the aforementioned Act, it does not subject the restitution to judicial discretion.

Article 55-1 has important practical implications regarding loss distribution following supervening events. In case the aggrieved party demands termination, anything²⁰³ received by the promisor or the promisee following the date of termination of the agreement, as determined by the court, is recoverable on the basis of this article because it was conferred without a cause—the agreement no longer existed.²⁰⁴ By contrast, the question of loss distribution prior to the date of termination has no clear answer because the mere application of *casum sentit debitor* may lead to unjust results from a Bulgarian perspective—solely relying on this principle may have the same consequences as *Chandler*.

On the one hand, courts have not had the chance to examine this issue—as noted in §3.1, case law on economic onerosity is limited. On the other, peculiarly, doctrine has not paid much attention to it either.²⁰⁵ Tormanov, the only scholar who I found to have discussed this question, contends that if one party has already performed, it is logical that termination has retroactive effects, so that the said party can recover what the other party received without counter-performing.²⁰⁶ He supports his claim with the argument

²⁰² Doctrine and courts concur that no causal link is required between the claimant's impoverishment and the defendant's enrichment. See Goleminov (n 178) 108-116 and Decree of the Plenum 1 of 28 May 1979 on the rules on unjust enrichment.

²⁰³ Note that unlike the 1943 Act, the Bulgarian rules do not distinguish between money and non-money benefits.

²⁰⁴ For certain agreements like leases physical return of the benefit is impossible—the lessee cannot return his occupying the property to the lessor if he occupied it following termination, so he owes the lessor rent.

²⁰⁵ It is striking that while in Bulgaria unjust enrichment was recognized as a separate source of obligations in 1950, it has not received sufficient scholarly attention. One of the few comprehensive contemporary works dedicated to the subject is Goleminov's monograph *Unjust Enrichment* (n 178). Traditionally, textbooks on the law of obligations contain a chapter on unjust enrichment, but this approach leads to a superficial representation of a rather complex area of law; As explained at the beginning of §3.6.2, English doctrine played a fundamental role in developing the law of restitution. The main reason for this substantial divergence between the two jurisdictions is that during communism contracts were primarily entered into by state-owned companies, which resolved their disputes out of court—consequently, no case law was generated and the subject was not of interest to commentators.

²⁰⁶ Zahari Tormanov, *Termination of the Contract* (Sibi 2013) 285-86.

that since termination is justified by the principles of fairness and good faith, their application cannot lead to unjust results.²⁰⁷

Tormanov's argument seems rational from a Bulgarian perspective. As I explain in Chapter 4, the key difference between English and Bulgarian law is that the latter enforces equivalence of performance—what the promisor receives from the promisee should be *equivalent* to what it gives. However, his idea of 'termination with retroactive effects' seems to blur the line between termination and rescission even further. As discussed in §3.2, under Bulgarian law, termination ends the contractual relationship for the future while rescission ends it retroactively—it puts the parties back in the position they were before entry into contract. Bulgarian law is already fragmented—in addition to rescission for breach and rescission by law, it distinguishes between retroactive and non-retroactive rescission. For instance, article 89 (LOC) recognizes rescission by law as a remedy for permanent impossibility.²⁰⁸ Article 88-1, however, states: 'Rescission is retroactive except for contracts requiring continuous or periodic performance.' Conceptually, non-retroactive rescission is termination.

It seems to me that Tormanov's argument can be reinforced by relying on the rules of unjust enrichment. Decree of the Plenum 1 of 28 May 1979 pertinent to the articles on unjust enrichment in the LOC specifies the instances in which something given without a cause should be returned. One of the cases the SCC examines, which may be applicable to economic onerosity, is 'performance rendered with regard of an expected future cause, which, however, could not be fulfilled.' The SCC explicitly provides the example of 'bilateral contracts, in which the obligation of one party is extinguished due to impossibility of performance.' When the SCC rendered this decision, article 307 did not exist. However, it seems logical for this decision to be applicable to economic onerosity by analogy because, in principle, the cause of each party is the counter-performance of the other party—an aspect which distinguishes Bulgarian law from English law discussed in §4.3.2.

Our claim can find further support by analogy to article 267 (LOC)²⁰⁹ applicable to manufacturing contracts which states that in case of 'partial impossibility of performance,' the promisee should still pay for the part which is performed if it is useful

²⁰⁷ *ibid.*

²⁰⁸ See footnote 15.

²⁰⁹ The article seems to be a verbatim copy of article 2228 (*Codice civile*).

to him, in case he has not done so prior to the supervening event. This rule in fact synthesizes the *casum sentit debitor* principle discussed above and the rules on unjust enrichment. If the promisor has started performing, but has not produced anything useful, or if he has produced something but has incurred more expenses due to the supervening event, the loss from the production in the first case and the increased expenses in the latter would lie on him. However, if he has already produced something useful for the promisee, the promisee needs to pay him what they agreed.

3.6.2.2 The Rules in ‘Action’

In the previous subsection, we underlined the conceptual differences between English and Bulgarian law regarding loss distribution following supervening events. At first glance, English law is much clearer as the rules are systematized in the Law Reform (Frustrated Contracts) Act 1943. Bulgarian law, by contrast, faithful to its ‘patchwork approach,’ which results in gaps, seems harder to navigate. While it is interesting to explore how these rules are applied in practice, we recognize that this part of the comparison is conceptually difficult and artificial because, as demonstrated in the previous sections, frustration and economic onerosity are not applicable to the same factual situations. However, considering the rules on loss distribution of economic onerosity and ‘impossibility’ are similar, it may be helpful to discuss how these rules operate in practice to the extent that they illustrate the two legal systems’ values.

English judges have already faced difficulties in applying S1(2) to the recovery of payment prior to the supervening event. In *Gamerco*,²¹⁰ the plaintiff had entered into an agreement with Guns and Roses to promote their concert on a stadium in Madrid. The promoter had paid the band \$412,500 when it turned out that the stadium was unsafe. Garland J concluded the contract was frustrated but worried about his discretion to allow a party to retain the whole or part of expenses incurred prior to frustration. He considered three possible methods: total retention of the expenses by the payee, equal division of loss, and a broader discretion of the court to do what it deems just in the circumstances.²¹¹ He favored the third option, allowing Gamerco to recover the whole prepayment, to ‘do justice in a situation which the parties neither contemplated nor

²¹⁰ [1995] 1 WRL 1226.

²¹¹ *ibid* 1226-1237.

provided for, and to mitigate the possible harshness of allowing all loss to lie where it has fallen.’²¹²

Under Bulgarian law, the promoter should be able to recover the money it paid to the band because there was no counter-performance (no cause)—a concert did not take place. Because the contract is terminated, the band does not have to perform or pay damages for non-performance, but they should return the money they received for what they did not do. All expenses suffered by the promoter in relation to the advertising, however, should remain for him—*casum sentit debitor*.

Moreover, as mentioned above, the 1943 Act explicitly distinguishes between money and non-money benefits while Bulgarian law examines all benefits together. Regarding the restitution of non-money benefits pursuant to S1(3), English doctrine argues that establishing the benefit in respect of which restitution should be made is particularly challenging in case services have been provided to the defendant.²¹³ This issue was illustrated by *BP Exploration Co (Libya) Ltd v Hunt (No. 2)* in which Lawton J concluded that since just sum was not defined in the statute, ‘what is just is what the trial judge thinks is just.’²¹⁴ While this conclusion was criticized,²¹⁵ the HL also held that ‘[the] question what is a just sum is essentially one for the judge.’²¹⁶

Unlike English law, Bulgarian law gives stricter guidelines regarding what a just sum is and how the benefit should be valued. Article 57 (LOC) states:

If the restitution of a particular thing is owed, the recipient owes the fruits from the moment the invitation²¹⁷ was made. If the thing subject to restitution perishes after the invitation or if the recipient alienates or consumes it after finding out that he is holding it without a cause, he owes its actual value or the price he received for it, whichever is higher. However, if the

²¹² *ibid* 1235.

²¹³ *Goff and Jones* (n 193) [15-32].

²¹⁴ [1981] 1 WLR 232, 238.

²¹⁵ McKendrick argues that such a statement on behalf of the appellate courts constitutes an abdication of their task of providing the lower courts with a measure of guidance in the difficult issues of principle and interpretation to which S1(3) gives rise, McKendrick, ‘Frustration’ (n 188) 165.

²¹⁶ [1983] 2 AC 352, 363.

²¹⁷ By invitation, Bulgarian law understands a letter (usually notarized) requesting restitution from the person from whom the thing was taken to the person who took it.

thing has perished or has been alienated or consumed by the recipient prior to the invitation, he owes only what he has profited, excluding fruits.

Doctrine argues that by analogy this article applies to activities different from transfer of things, such as services.²¹⁸ While we have not identified case law applying this rule to economic onerosity, it is conceivable that courts use it by analogy.

Furthermore, from a comparative perspective, it is interesting that the Bulgarian provision requires that the defendant pay the actual value or the price he received, whichever is higher. One may argue that this methodology of valuation protects the claimant against the depreciation due to inflation of the benefit he was deprived of—an approach which contrasts with the English principle of nominalism.²¹⁹

3.7 Conclusion

This Chapter engaged in a functional comparative analysis between economic onerosity and frustration to demonstrate that they are not functional equivalents. I recognized that Bulgarian law disposes of various doctrines pertinent to impossibility of performance, so *a priori* frustration may only be a suspected ‘partial equivalent’ of economic onerosity. Then, I pinpointed the two main reasons for the angle of comparison I have chosen: 1) while all European jurisdictions address physical/legal impossibility, not all tackle the question of supervening onerosity, which seems indicative of divergences in values; 2) Bulgaria has recently accumulated case law on economic onerosity which provides opportunities for comparative analysis.

After a careful examination of legislation, case law, and scholarly writing, I showed that the doctrines’ scopes, criteria of application and effects significantly differ. Frustration and economic onerosity are invoked in distinct ways. The two criteria of application, which the doctrines share—no fault in producing the supervening event and unforeseeability—are *faux amis*. Bulgarian and English law define fault in different ways, impose a different burden of proof in contractual disputes and explore different causal links. Moreover, they evaluate unforeseeability differently—English judges

²¹⁸ Kalaidjiev (n 12) 374.

²¹⁹ See footnote 152.

prioritize the risk distribution in the agreement while Bulgarian judges analyze foreseeability predominantly from the standpoint of the objective duties of care. Additionally, Bulgarian parties cannot exclude the application of economic onerosity because article 307 gives a right to a claim in court.

Furthermore, I illuminated what I deem to be the key difference between frustration and economic onerosity—while economic onerosity applies when the supervening event renders the contract contrary to fairness and good faith, frustration applies when circumstances become radically different from the time of entry. From a Bulgarian perspective, fairness implies equivalence of performance (what the promisor gives should be comparable to what he receives) and good faith calls for an examination of the effects on third parties. Consequently, whereas English judges are primarily concerned about the effect of the event on the promise (is this what I promised to do?), Bulgarian judges worry about the contractual imbalance it produces (is it fair to perform regarding the initial contractual balance and society's interests?).

Finally, I demonstrated that while frustration results in automatic termination at the time it arises, the effects of economic onerosity (termination/modification) largely depend on the promisor's will. Moreover, Bulgarian law is uncertain about the moment that economic onerosity produces legal effects—when the aggrieved party files a claim or when the court renders a decision. Besides, Bulgarian and English law entertain different rules on the quintessential issue of loss distribution following supervening events.

It thus seems relevant to analyze the factors that may explain the substantial differences between English and Bulgarian law this Chapter identified. Chapter 4 compares the English and the Bulgarian conception of contract and justice in contract law. Chapter 5 compares the role of English and Bulgarian judges regarding agreements. It also examines whether English judges may achieve the same results as economic onerosity by employing other means.

Chapter 4

The Conceptions of Contract and Justice in Bulgarian and English Contract Law

4.1 Introduction

Chapter 3 demonstrated that economic onerosity and frustration are not functional equivalents by examining their scope, criteria of application, and effects on the basis of case law, legislation, and doctrine. It also identified significant conceptual dissimilarities between English and Bulgarian law. Notably, not only they approach fault and foreseeability differently, but also show concern for diverse types of change in the contractual obligation resulting from supervening events. Furthermore, while frustration produces automatic effects, economic onerosity gives the promisor the right to a claim in which it should specify the type of remedy it demands. Moreover, the two legal systems have adopted different rules on loss distribution following supervening events.

It thus seems relevant to analyze if these differences can be better understood from a doctrinal perspective. Examining whether economic onerosity and frustration are consistent with the prevailing ‘conceptions of contract’¹ as they appear in case law, legislation, and scholarly writing² in the two jurisdictions may identify if the

¹ By ‘conception of contract’ I understand the juridical basis and nature of contractual obligations.

² As explained in §2.2.2, Bulgarian and English scholars play different roles regarding law advancement. Common law scholars often aim at developing theories that can make existing law coherent and give normative guidance for law development. For instance, Stevens asserts:

differences are accidental or symptomatic of deeper divergences of values³ between English and Bulgarian law. This inquiry is important since it clarifies the role of freedom of contract and subsidiary principles like fairness and good faith in the two jurisdictions. It may also uncover potential difficulties in drafting, implementing, and interpreting common rules on contract, including a common principle on changed economic circumstances.

§4.2 explores the formal justifications of economic onerosity and frustration put forward by Bulgarian legislators and English judges to demonstrate that both principles are rationalized with the enforcement of just outcomes. However, since economic onerosity and frustration do not play the same role in their respective jurisdiction and do not reach the same results, it seems important to analyze where the difference stems from:

- 1) the fact that courts seek just outcomes regarding dissimilar conceptions of contract OR
- 2) the fact that the two jurisdictions have dissimilar notions of what justice⁴ in contract law entails (§4.3).

‘The first task of the academic lawyer is to explain the law so that it makes coherent sense and to account for it in the best possible light,’ Robert Stevens, ‘Damages and the Right to Performance: A Golden Victory or Not?’ in Jason Neyers and others (eds), *Exploring Contract Law* (Hart 2009) 198. In Bulgaria, the main goal of doctrine is to explain what existing legislation *means* and/or criticize the rules in force and propose new ones if they are inadequate. *A priori*, Bulgarian scholars do not aim at achieving coherence.

³ Many scholars agree that contractual principles incarnate the values of a given legal system and that different jurisdictions may prioritize different values at different times. The Study Group on Social Justice in European Private Law contends that ‘any system of contract law expresses a set of values, which strives to be coherent, and which is regarded as fundamental to the political morality of each country,’ ‘Social Justice in European Contract Law: A Manifesto’ (2004) 10 ELJ 653, 656; Likewise, Chen-Wishart asserts that ‘[contract] law is an evolving integration of ideals which is informed by, and which in turn informs, social views about contract’s role in society,’ Mindy Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 18.

⁴ I focus my analysis on examining what courts understand by just/fair solutions in the realm of contract and how, if at all, they mold existing principles to promote the values of their jurisdiction. I believe this approach sheds light on why Bulgarian courts have become sensitive to even minor imbalances in agreements and why English courts refuse to extend frustration to onerous performance; It should also be underscored that theorists have extensively debated the meaning of justice in private law and its relationship with fairness. In the common law world, one of the most influential theses is Weinrib’s claim that private law’s purpose is to restore the notional equality with which parties entered the transaction. See Ernest Weinrib, *The Idea of Private Law* (HUP 1995); His theory has been criticized—for instance, for failing to explain unjust enrichment, Prince Saprai, ‘Weinrib on Unjust Enrichment’ (2011) 24 CJLJ 183; Beyond Weinrib, there are other claims about private law and its notions of justice—economic efficiency, social justice, etc.; In Bulgaria, there is no coherent theoretical understanding of

4.2 Doctrines with Elusive Grounds

It is interesting that at first glance both economic onerosity and frustration seem like exceptions to the spirit of the contract law in their jurisdiction. Article 307, which codifies economic onerosity, states that the judge intervenes in the name of ‘fairness and good faith.’ Contemporary Bulgarian doctrine asserts that the principle is an exception or a contradiction to the *pacta sunt servanda* (sanctity of contract) principle, which is fundamental for Bulgarian law.⁵ It is striking, however, that no author has attempted to reconcile the contradiction from a Bulgarian theoretical perspective or to ‘dig deeper’ and establish if, from the standpoint of Bulgarian law, this is indeed a contradiction, as discussed in §2.3.3.3. In the same section, we also underscored that the motivation of the Bill, which enacted economic onerosity, does not provide clarity on the reasons behind the principle’s permanent enactment.

By contrast, frustration’s legal basis has been the subject of debate among common law scholars and judges. While theorists contend that the lack of clear juridical basis of the doctrine may be problematic,⁶ judges have not agreed on a single justification. In *Taylor v Caldwell*, Blackburn J relied on the implied condition theory.⁷ In *Tamplin Steamship*,⁸ judges based their decision on the disappearance of the foundation of the contract—an idea embraced by German courts following Oertmann’s theory, as explained in §1.2.1 and §2.3.3. In *Hirji Mulji*, Lord Sumner explained that frustration is ‘a device by which the rules as to absolute contracts are reconciled with a special

what justice implies either. Torbov underscores that justice is best understood when one studies the legislator’s intention, which is identified when one scrutinizes the legal text at hand, Tzeko Torbov, *History and Theory of Law* (BAN 1992) 365; Others maintain that justice can be interpreted as society’s expectations regarding what law should be, Ivan Apostolov, *The Law of Obligations: General Part* (first published 1947, 3rd edn, BAN 1990) 33-34.

⁵ Ivailo Staykov, ‘The Clausula Rebus Sic Stantibus Institute in Current Bulgarian Commercial Law’ [1998] 1 *Suvremenno pravo* 71; Ognyan Gerdjikov, *Commercial Transactions* (3rd edn, TIP 2008) 55; Diana Dimitrova, ‘The Application of the Institute of Economic Onerosity in the Conditions of Economic Crisis’ (The Global Crisis and Economic Development, Varna, May 2010); Yassen Nikolov, ‘Economic Onerosity’ [2011] 9 *Turgovsko i konkurentno pravo*, Addendum.

⁶ Leon Trakman, ‘Frustrated Contracts and Legal Fictions’ (1983) 46 *MLR* 39; John Stannard, ‘Frustrating Delay’ (1983) 46 *MLR* 738; Andrew Phang, ‘Frustration in English Law—a Reappraisal’ (1992) 21 *Anglo-Am.L.R.* 278.

⁷ (1863) 3 *B & S* 826, 833.

⁸ [1916-17] *All ER Rep* 104, 109.

exception which justice demands.’⁹ In *Joseph Constantine*, Lord Wright maintained that frustration was meant to achieve ‘a just and reasonable result.’¹⁰

In *Davis Contractors*, the case that introduced the modern test for frustration, Lord Radcliffe highlighted: ‘It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.’¹¹ In *British Movietonews*, Lord Denning emphasized: ‘In these frustration cases...the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation.’¹² In *The Eugenia*, he also stressed the importance of justice: ‘The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound.’¹³

In *National Carriers*, Lord Wilberforce emphasized: ‘It is not necessary to attempt selection of any [of these theories] as the true basis [of frustration]: my own view would be that they shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration.’¹⁴ He also contended: ‘I think that the movement of the law of contract is away from a rigid theory of autonomy towards the discovery—or I do not hesitate to say imposition—by the courts of just solutions, which can be ascribed to reasonable men in the position of the parties.’¹⁵

Despite the diverse justifications of frustration, however, one notes a propensity towards promoting just outcomes—‘just solutions,’ ‘just results,’ ‘unjust to hold the parties bound,’ ‘an exception which justice demands.’ It is therefore essential for the purposes of this thesis, as explained in §4.1, to compare the conceptions of justice in

⁹ [1926] AC 497, 510.

¹⁰ [1942] AC 154, 183.

¹¹ [1956] AC 696, 729.

¹² [1951] 1 KB 190, 200.

¹³ [1964] 2 QB 226, 239.

¹⁴ [1981] AC 675, 693.

¹⁵ *ibid* 696.

English and Bulgarian contract law as well as the conceptions of contract to which they are applied.

Before engaging in our discussion, we should clarify that in Bulgaria the word for fairness, justice, and equity is the same—*spravedlivost*. Neither doctrine nor the courts distinguish between these notions. Dikov, whose work we discuss throughout this thesis, was troubled by this linguistic issue and contended that in Bulgarian literature the debate on what justice entails is enhanced by the fact that theorists do not use notions with the same meaning.¹⁶ As explained in §2.2.2, while fairness is a fundamental principle of Bulgarian civil law, it is not defined in the law, so courts interpret it on the basis of the law's spirit, scholarly writing and case law. Since judges are not bound by any interpretation, they may, in theory, reach different results.

The lack of distinction between justice, fairness and equity in Bulgarian law can be troubling from an English perspective. Prior to the Judicature Acts of 1873-74, England had separate courts for the common law and for equity—a system whose origin can be found in Roman law.¹⁷ However, it has been argued that 'the so-called "fusion" of law and equity has never occurred and was never intended' for equity trumps law.¹⁸ Modern English judges dispose of wide equitable powers on which they can rely to enforce just outcomes by developing equitable remedies and by disregarding precedent. However, as early as the 1910s, it had also been contended that the 'great days of equity' were in the past because of increased legislation in modern times.¹⁹ While this is largely true for contemporary English law,²⁰ even in more modern times English judges have relied on their equitable powers to restore justice.²¹

¹⁶ Lyuben Dikov, *Course on Civil Law* (Sofia 1943) 6.

¹⁷ For a comparative analysis of English equity and Roman *aequitas*, see Charles Brice, 'Roman Aequitas and English Equity' (1913-14) 2 *Geo.L.J* 16 and E Koops and WJ Zwolve (eds), *Law & Equity: Approaches in Roman Law and Common Law* (Martinus Nijhoff 2014); Equity and common law have been seen as rivals since the early days of the common law. In 1672, Hale CJ had said: 'By the growth of equity on equity the heart of the common law is eaten out,' *Roscarrick v Barton* (1672) 1 Ch Cas 217, 219.

¹⁸ AWB Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press 1987) 397.

¹⁹ Brice (n 17) 24.

²⁰ Levenstein contends that the development of legislation like the Unfair Contract Terms Act 1977 was 'strongly colored by equitable doctrine,' Michael Levenstein, *Maxims of Equity: A Juridical Critique of the Ethics of Chancery Law* (Algora Publishing 2014) 73.

²¹ Lord Denning is famous for neglecting precedent to remedy injustice, Brady Coleman, 'Lord Denning & Justice Cardozo: The Judge as Poet-Philosopher' (2001) 32 *Rutgers LJ* 485; For example, in *Central London Property Trust*, he resurrected the concept of equitable

4.3 Diverging Conceptions of Contract

The conceptions of contract one can identify in Bulgarian and English law have multiple layers conditioned by the changing socioeconomic circumstances, the evolution of political and philosophical ideas, and government policies.²² The two jurisdictions borrowed the will theory²³ from the same place (France) and in the same time period (19th century).²⁴ However, they assigned it a different place and role.

Prior to the reception of the will theory in England, the heart of contract was the idea of reciprocal agreement and exchange.²⁵ Following the reception, the doctrine of consideration remained in the common law despite the friction between the will theory and the classical model of English contract.²⁶ Progressively in the 20th century, nonetheless, the will theory gave way to social justice considerations.²⁷ These considerations are reflected both in the reasoning of modern judges like Denning who rely on their equitable powers to disregard precedent, but also in the enactment of legislation, such as the Unfair Contract Terms Act 1977, whose rules pertinent consumer agreements have now become part of the Consumer Rights Act (CRA) 2015.

(promissory) estoppel which had been established in *Hughes v Metropolitan Railway* (1877) 2 App Cas 439. He emphasized: ‘a promise to accept a smaller sum in discharge of a larger sum, if acted on, is binding, notwithstanding the absence of consideration, and if the fusion of law and equity leads to that result, so much the better,’ [1947] KB 130, 135.

²² In that light, Hillman emphasizes that the ‘various norms of contract law reflect the major social, economic, and institutional forces of a pluralist society’ and that not only the norms often clash, but also they are themselves ‘internally inconsistent.’ He explains that contract law flourishes largely because it is ‘the fruit of the legal system’s reasonable and practical compromises over conflicting values and interests in a diverse society,’ Robert Hillman, *The Richness of Contract Law* (Kluwer 1997) 268-69.

²³ Georgiev asserts that the development of the will theory was a reaction of liberalism and individualism towards the prevailing absolutism at the time. The will theory was unknown to Roman law which recognized form, ritual, oath, and initial performance as sources of obligations, Emil Georgiev, ‘On Autonomy of Will and Freedom to Contract in the Transitional Period in Bulgaria to a Market Economy’ in Natalia Gudjeva (ed), *Collection of Essays in Memory of Professor Vitali Tadjer* (Sibi 2003) 102.

²⁴ As noted in §2.3.2.1, the 1892 LOC copied most of its provisions from the 1865 *Codice civile*, which in turn was a replica of the *Code civil*. English judges borrowed the will theory from Pothier’s writings, as explained in footnote 74 (Chapter 1).

²⁵ David John Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 203.

²⁶ Ibbetson explains that the incorporation of consideration into a concept of contract based on the will theory is problematic since it may be difficult to find reciprocal consideration in all contracts, Ibbetson (n 25) 221-44.

²⁷ For an overview of this transition, see KM Sharma, ‘From “Sanctity” to “Fairness”: An Uneasy Transition in the Law of Contracts?’ (1999) 18 N.Y.L.Sch.J.Int’l & Comp.L 95-179.

Also, under the influence of EU legislation, civilian notions of substantive fairness have permeated English consumer law.²⁸

According to Brownsword, modern English contract law is dominated by two ideologies—market individualism, which facilitates exchange, and consumer welfarism, which protects consumers and promotes standards of fairness and reasonableness.²⁹ Nevertheless, it has been highlighted that while there is much debate about which side wins, ‘individualist and interventionist principles share the stage.’³⁰ It has also been observed that in recent times English ‘market-individualism’ has turned from static to dynamic: while static market-individualism imposes a particular view on how transactions should be governed, dynamic market-individualism reflects the practice and expectations of the contracting community.³¹

In Bulgaria, by contrast, the conception of contract in legislation, scholarly writing and case law is illustrative of the ‘patchwork approach’ discussed in §2.3.2. It is also affected by the radical transformations of political values and the drastic changes in the socioeconomic circumstances Bulgaria has experienced, which we explained in §2.3.1. The result is a combination between the freedom to contract principle, a strong altruistic element advocated prior to 1944, as well as remnants of communist ideals enshrined in the law and promoted by doctrine after 1950. Unlike English law, which seeks to adapt to the needs of market players, the making of Bulgarian law has been traditionally usurped by a small, elite group of people (usually scholars) who impose their view of what law should be. Furthermore, in contrast to English legislative practice, public consultations are not used in the legislative process. Judges merely apply existing law: as explained in §2.2.2, they, in theory, rely on legal custom and societal notions of fairness only if the law is silent. We explain below, however, that Bulgarian judges have developed diverse strategies to ‘moralize’ contracts and to make law by applying open norms.

²⁸ The Unfair Terms in Consumer Contracts Directive 13/93/EC, implemented by the Unfair Terms in Consumer Contracts Regulations 1999 *SI 1999/2083*, introduced the concept of good faith to English law; On the inconsistencies resulting from this introduction, see Lucinda Miller, ‘After the Unfair Contract Terms Directive; Recent European Directives and English Law’ (2007) 3 ERCL 88-109; The regulations have also been integrated in the CRA 2015.

²⁹ Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (2 edn, OUP 2006) 137.

³⁰ Chen-Wishart, *Contract Law* (n 3) 18.

³¹ Brownsword (n 29) 138.

This section explains the key differences between the English and Bulgarian conceptions of contract and the values they incarnate which can shed light on the dissimilarities we expounded in Chapter 3. Firstly, we pay attention to some of the contextual factors that help understand the distinct notions of contract in the two jurisdictions (§4.3.1). Then we analyze what English and Bulgarian law understand by contract and identify some of the main tools they use to control the agreement's contents to promote just outcomes (§4.3.2 and §4.3.3).

4.3.1 Contract and Context

English and Bulgarian contract law developed in different contexts. Hence, since their early days, they have incarnated different values and adapted to the needs of people with different social standing—factors, which have inevitably influenced the notions of what a contract is and what function it performs in society in the two jurisdictions. In England, the late 18th and early 19th century had seen the industrial revolution and the rise of capitalism. The massive production of new goods and increased competition between capital owners for new markets resulted in palpable socioeconomic changes. Freedom and equality between people, despite their social status, became key organizing principles as England moved away from feudalism.³² Philosophers emphasized the importance of individual freedom, which they viewed both as a natural and a moral right, while economist writers, such as Adam Smith, John Stuart Mill, Bentham and Ricardo, insisted on freedom of bargaining.³³

It has been noted that the task of English individualists was to ‘abolish a body of antiquated institutions that stood in the way of human progress’ and that ‘freedom of contract was the best instrument at hand for the purpose.’³⁴ Having this in mind, it is understandable why English judges borrowed the will theory from Pothier in the 19th century and discarded the 18th century ‘equitable idea of contract’ which enforced fairness of exchange.³⁵ Moreover, it has been emphasized that at the ‘embryonic stage’

³² See Peter Gabel and Jay Feinman, ‘Contract Law as Ideology’ in David Kairys (ed), *The Politics of Law* (3rd edn, Basic Books 1998) 497-510.

³³ Samuel Williston, ‘Freedom of Contract’ (1921) 6 CLQ 365, 366.

³⁴ Roscoe Pound, ‘Liberty of Contract’ (1909) 18 YLJ 454, 457.

³⁵ For a comparison between the 18th and the 19th century conception of contract, see Morton Horwitz, ‘Historical Foundations of Modern Contract Law’ (1974) 87 HLR 917-956.

of English contract law, ‘litigation remained the privilege of those who had financial means.’³⁶ Essentially, when developing the principles of contract and redefining the notion of contract, English judges considered primarily the needs of commercial parties.³⁷

In that light, as already explained in Chapter 2, frustration was created in the 19th century. On the one hand, this may elucidate why Blackburn J grounded his decision on an implied condition—to reconcile his decision with the will theory as the parties had not made a provision in their agreement. On the other hand, the harsh consequences of the doctrine—automatic termination—may be understood from the prism of commercial sensibility. For commercial parties, legal certainty³⁸ is of utmost importance and they cannot leave the terms of their contract to depend on a future unexpected event or the judge who is not a party to the agreement.

In contrast to England, Bulgaria was primarily an agriculturally-oriented region in the 19th and early 20th century. The first textile factories started to appear in the middle of the 19th century, but their peak was not until the verge of the 20th century.³⁹ Heavy industrialization comparable in scale to the one of the English industrial revolution did not start until communism, but it was organized and managed by the State as there was no private initiative. Consequently, when drafting the first LOC, the working group must have had in mind primarily the needs of ordinary people (farmers and tradesmen) who made transactions with people they knew and maintained the commercial relationship for years—a fact, which may explain why the LOC explicitly defines contract as a relationship, as we clarify in §4.3.2.2.⁴⁰ However, at this stage, we should emphasize that this aspect may also shed light on why modification is one of the

³⁶ Lucinda Miller, ‘Specific Performance in the Common and Civil Law’ in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment* (Nijhoff 2007) 291; This still seems true in modern times as English lawyers are known to have the highest fees in Europe and English court fees constitute an obstacle to accessing justice.

³⁷ All leading cases on frustration mentioned in Chapter 3 concern commercial agreements, for instance.

³⁸ Legal certainty is associated with the idea that law should be predictable and should treat similar cases consistently, Iain MacNeil, ‘Uncertainty in Commercial Law’ (2009) 13 *Edin.L.R.* 68, 69.

³⁹ As discussed in §2.3.1.1, Ottoman rule significantly delayed Bulgarian development.

⁴⁰ It should be noted that the primary remedy under English law is damages. English judges recognize specific performance in rare cases, thus illustrating that the preservation of the contractual relationship is not a priority. For the role of specific performance in the common law, see Miller (n 36); As explained below, common law doctrine does not regard contract as a relationship either.

remedies of economic onerosity—it allows the contractual relationship to be maintained in the years to come.

Moreover, considering the disastrous effects of the Balkan Wars and WWI on Bulgaria, the hostility towards French law we elucidated in §2.3.3.1 is logical—scholars were concerned about the interests of ordinary people and the fragile Bulgarian business that had started to develop. In that regard, French doctrinal writers had abandoned the theory of equality of exchange because ‘it involved a paternalistic attitude towards the parties and mystical notions of value’⁴¹ at the same time English judges did. That is why Bulgarian scholars looked for inspiration elsewhere, as discussed in §2.3.3.2. Besides, in a communist framework, the theory of objective value could flourish as the economy is planned and prices are fixed by the government. That is why, it was embraced by communist authorities as part of the principles of socialist coexistence, which remained in Bulgarian law under a different name, as explained in §4.3.2.2.

4.3.2 The Essence of Contract

This section explains that English and Bulgarian law have pronouncedly different conceptions of contract and dissimilar ideas of fairness in agreements. The main reason for this is that they examine contract with regard to different moral reference points. Notably, unlike English law which is rarely concerned about substantive fairness in commercial agreements and prioritizes freedom of contract, Bulgarian law disposes of diverse open norms which control the terms of both merchant and non-merchant agreements. The section also elucidates that while the principle of good faith has been preoccupying the minds of common law scholarship in the past years, Bulgarian law hides scarier monsters in its closet—with the help of scholars, judges have molded the doctrine of ‘good morals’ into a *chapeau* of diverse open norms and have turned it into a powerful tool against substantive injustices in agreements.

⁴¹ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon 1991) 167.

4.3.2.1 The English Conception of Contract

While the nature of contract is a question that stirs debate among scholars from the common law tradition even in modern times,⁴² it is often affirmed that a contract is a ‘bargain’⁴³ or an ‘enforceable promise (or agreement).’⁴⁴ To be enforceable, a promise should satisfy a number of conditions.⁴⁵ The principal one is that it should be supported by good consideration, which is ‘something of... some value in the eye of the law.’⁴⁶ Nonetheless, courts would examine the sufficiency, but not the adequacy of consideration as it is up to the parties to ‘determine what they value and the price... they are prepared to pay for any item.’⁴⁷ Authors have established that ‘English contract law is fundamentally pragmatic in its approach, seeing contracts primarily as market transactions and the main role of contract law, therefore, as being the facilitation of these transactions.’⁴⁸ As underscored above, this particularity has a historical explanation—classical contract law developed with regard to commercial parties in a

⁴² Fried argues that the moral basis of contract lies in the promise principle ‘by which persons may impose on themselves obligations where none existed before.’ For him, morality assures not only that people respect others and their property, but also that they serve each other’s purposes, Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, OUP 2015) 1. The confidence that others would do what is right creates trust which is the foundation of the contractual obligation, *ibid* 1-8; Penner, however, maintains that the notion of agreement rather than promise is the type of voluntary undertaking in light of which contracts should be understood, James Penner, ‘Voluntary Obligations and Scope of the Law of Contract’ (1996) 2 LEG 325; Saprai notes that consent is ‘foundational’ for English contract, Prince Saprai, ‘In Defense of Consent in Contract Law’ (2007) 18 KLJ 361, 370.

⁴³ Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 144.

⁴⁴ Chen-Wishart, *Contract Law* (n 3) 4.

⁴⁵ The four main elements of English contract are offer, acceptance, consideration and intention to create legal relations. However, there may be additional requirements depending on the agreement’s type—pursuant to Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, contracts for the sale of land should be in writing. Also, the scope of consideration may be limited by application of the doctrine of promissory estoppel, which, as mentioned in footnote 19, was developed by Lord Denning.

⁴⁶ *Thomas v Thomas* (1842) 2 QB 851, 859; While consideration is often regarded as the heart of English contract, it has been under attack for being inconsistent and vague and for covering the real motivation behind decisions. See Jonathan Morgan, *Great Debates in Contract Law* (Palgrave Macmillan 2012) 29-41.

⁴⁷ Hugh Collins, *The Law of Contract* (4th edn, LexisNexis UK 2003); There are cases in which judges identified something of negligible value to be good consideration. For instance, in *Chappell v Nestlé* [1960] AC 87 three chocolate wrappers were found to be good consideration for a record and in *Pitt v PHH Asset Management* [1994] 1 WLR 327 a promise to exchange contracts in two weeks was good consideration for a promise not to consider other bids for a property.

⁴⁸ Simon Whittaker and Karl Riesenhuber, ‘Conceptions of Contract’ in Gerhard Dannemann and others (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013) 123.

liberal-individualist setting. Furthermore, pragmatism and instrumentalism have been encouraged and justified by the school of economic analysis of law.⁴⁹

Traditionally, English judges are concerned about procedural unfairness because it involves vitiating of the agreement.⁵⁰ Moreover, although in principle they may intervene in an agreement for public policy reasons, as early as 1875, Jessel MR maintained: ‘...you have this paramount public policy to consider – that you are not lightly to interfere with...freedom of contract.’⁵¹ Whereas ‘public policy’ has been applied to diverse factual circumstances,⁵² it neither enforces equality of exchange nor performance in good faith. By contrast, we explain in §4.3.2.2 that the Bulgarian equivalent of public policy—good morals—is a *chapeau* of diverse moral norms, which judges rely on to limit freedom of contract.

Recently, however, English judges have started to depart from the strict liberal individualist notion of contract to protect weaker parties in commercial agreements. Lord Denning, for instance, formulated the inequality of bargaining power principle which ‘gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair...where his bargaining power is grievously impaired by reason of his own deeds or desires or by his own ignorance or infirmity coupled with undue influences or pressures...’⁵³ It has also been argued that the simplicity of the bargain principle is ‘partly a mirage’ since ‘concepts of fairness were smuggled into contract law even when the principle seemed most secure through doctrines such as the legal-duty rule and the principle of mutuality.’⁵⁴ In §5.2.3, we will also see how English judges may strike out agreed damages clauses in contracts, which also evidences concern for substantive unfairness. Besides, in §5.3.1.2.2, we will discuss how the

⁴⁹ For example, Posner and Rosenfield contend that contract law is an instrument maximizing efficiency. Contracts allocate risks, but risks are costs. If parties have not explicitly distributed risk, contracts should be discharged only when the promisee is the superior risk bearer. If the promisor is the superior risk bearer, non-performance is equivalent to breach, Richard Posner and Andrew Rosenfield, ‘Impossibility and Related Doctrines in Contract Law: An Economic Analysis’ (1977) 6 JLS 83.

⁵⁰ In English law, mistake, duress, and undue influence make contracts void or voidable. On the vitiating factors in English law, see John Cartwright, *Unequal Bargaining* (Clarendon 1991).

⁵¹ *Printing and Numerical Registering* (1875) LR 19 Eq 462, 465.

⁵² See WSM Knight, ‘Public Policy in English Law’ (1922) 38 LQR 207; John Shand, ‘Unblinkering the Unruly Horse: Public Policy in the Law of Contract’ (1972) 30 CLJ 144.

⁵³ *Lloyds Bank Ltd v Bundy* [1975] QB 326, 339-340.

⁵⁴ Melvin Aron Eisenberg, ‘The Bargain Principle and Its Limits’ (1982) 95 HLR 741, 801.

modern contextual approach to contractual interpretation allows judges to impose reasonable outcomes on the parties if they deem necessary.

Nonetheless, despite these examples, in English law judicial intervention for substantive fairness in non-consumer agreements remains considerably more limited compared to Bulgarian law, as we illustrate below. Furthermore, commentators remain divided regarding the merits of equality of exchange. Smith emphasizes that it is widely believed that ‘substantive fairness...is either meaningless, indistinguishable from procedural fairness...impossible to assess, not valuable, [and] beyond the competence of court to protect...’⁵⁵ Gordley notes: ‘According to the treatise writers, the reason the common law courts did not examine the adequacy of consideration was that it would be improper to review the fairness of an exchange.’⁵⁶ Saprai underscores that the theory of equality of exchange rests on unstable philosophical foundations and it is under- and over-inclusive, inefficient, and does not take into account the subjectivity of value.⁵⁷ Others contend that ‘...equality is central to the justice of voluntary exchanges, but it is the equality of the parties that matters, not the equality of what is exchanged.’⁵⁸

The above observations are important in light of our analysis of frustration. Firstly, they elucidate why English judges pursue a different line of reasoning compared to Bulgarian judges when evaluating the impact of supervening events on the agreement. Because they prioritize freedom of contract, they are concerned about the alteration of the promise rather than the substantive unfairness resulting from supervening events. The agreement becomes unfair when parties have to perform something that they did not promise to perform—that is why English judges evaluate foreseeability primarily from the perspective of the risk distribution in the agreement rather than from the prism of an open norm like Bulgarian judges, as explained in §3.4.2.

Since English judges are not concerned about the adequacy of consideration even at the formation stage of contract, they are not worried about any subsequent

⁵⁵ Stephen Smith, ‘In Defense of Substantive Fairness’ (1996) 112 LQR 138, 138.

⁵⁶ Gordley, *The Philosophical Origins* (n 41) 151; Even prior to the first common law treatises, English philosophers opposed the idea of equality of exchange. In *Leviathan* (Chapter XV, Part I), Hobbes underlines: ‘The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give,’ Thomas Hobbes, *Leviathan* (first published 1651, Collier & Son 1910) 422.

⁵⁷ Prince Saprai, ‘Against Equality in Exchange’ (2010) 21 KLJ 71, 94.

⁵⁸ James Bernard Murphy, ‘Equality in Exchange’ (2002) 47 Am.J.Juris 85, 98.

‘modification’ of the consideration which the supervening event can cause.⁵⁹ Moreover, commercial parties often have equal bargaining power, so there is no good reason to interfere unless the agreement is vitiated or there is a specific government policy to enforce. Otherwise, judges would be making contract for the parties. Besides, constrained judicial intervention ensures legal certainty and market efficiency, which is important for commercial parties.

4.3.2.2 The Bulgarian Conception of Contract

In Bulgaria, the definition of contract in the LOC altered with every change of the political regime. Article 8, amended in 1993, currently states:

A contract is an agreement between two or more persons for establishing, settling or terminating a legal relationship between them. Persons shall use their rights to satisfy their interests. They shall not be entitled to exercise these rights if they contravene the interests of society.

Modern Bulgarian legislators seem to have borrowed the essence of this definition from article 2 of the 1892 LOC,⁶⁰ which was copied from the 1865 *Codice civile*. The philosophical foundation of this definition can be found in the writings of the German jurist Savigny whose work influenced Italian legal thought.⁶¹ Savigny argued that legal relations were created, modified or terminated through legal ‘transactions’ which consisted of declarations of intent and were aimed at the creation of obligations.⁶²

Unlike common law writers who still debate whether contract is a promise, an agreement or consent as highlighted above, Bulgarian doctrine from all three periods

⁵⁹ As explained in §3.6.2.1.1, the Law Reform (Frustrated Contracts) Act 1943 obliges judges to examine if counter-performance has been received, but not to establish its adequacy.

⁶⁰ ‘A contract is an agreement between two or more persons to establish, settle or terminate a legal relationship between them.’

⁶¹ For the influence of German philosophy on Italian doctrine, see Federica Furfaro, ‘The Connections between German Pandectist School and Italian Legal Culture at the End of XIX Century’ in *Sources of Law and Legal Protection* (Edizioni Università di Trieste 2012) 55-71.

⁶² Stefan Riesenfeld, ‘The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples’ (1989) 37 *Am.J.Comp.L* 1, 3.

of legal development concurs that contract is an agreement.⁶³ It should be underscored, nonetheless, that while in French law agreement is synonymous to meeting of the wills (*accord de volonté*),⁶⁴ in Bulgarian law, under Germanic influence, agreement is often defined as a transaction consisting of bilateral (or multilateral) declaration(s) of will.⁶⁵ This particularity has important implications for contract interpretation, as explained in §5.3. As seen from article 8 (LOC), the agreement has a specific purpose: establishing, settling or terminating a legal relationship.⁶⁶ However, as clarified in §2.2.2, this relationship is regulated primarily by the LOC which was drafted during communism. While Bulgarian legislators abolished the heavily ideological definition of contract which existed during communism,⁶⁷ they made only cosmetic changes to other provisions which also served ideological purposes. For instance, its current article 9 stipulates: ‘Parties are free to determine the content of the contract insofar as it does not contravene the mandatory provisions of both the law and good morals.’ Pursuant to article 26 (LOC), an agreement contravening good morals is void *ab initio*.⁶⁸ It

⁶³ Kalaidjiev underscores that the argument that ‘contract is an agreement to establish a legal relationship is undisputed,’ Angel Kalaidjiev, *The Law of Obligations: General Part* (5th edn, Sibi 2010) 71; Kozuharov contends that contract is an agreement between two or more parties to create, regulate or annihilate a legal relationship between them, Aleksander Kozuharov, *The Law of Obligations: General Part* (first published 1958, Petko Petkov ed, Jurispres 2002) 53; Dikov argues that ‘contract is an agreement between two or more parties to create or annihilate a legal relationship,’ Dikov (n 16) 357.

⁶⁴ For a comparative analysis between the French and the English concept of contract, see Anne de Moor, ‘Contract and Agreement in English and French Law’ (1986) 6 OJLS 275-287.

⁶⁵ Dikov argued that the legal transaction consists of one or more declarations of will and other legal events to which law assigns legal consequence, Dikov (n 16) 353; In Bulgarian law, legal events are defined as legal facts that depend on nature and not on humans, Rosen Tashev, *General Theory of Law* (Sibi 2010) 235-37; Other types of transactions include unilateral declarations of will, administrative decisions, etc.; Tadjer contended that the transaction is a legal fact whose essential component is the declaration of will of one or more persons and which results in legal consequences defined in the declaration of will, Vitali Tadjer, *Civil Law of People’s Republic of Bulgaria: General Part. Section 2* (Sofia 1973) 192; Pavlova maintains that contract is a type of transaction in which there is a concurrence of content of two or more declarations of will whose purpose is to produce legal effects, Maria Pavlova, *Civil Law: General Part* (Sofi-R 2002) 447.

⁶⁶ The Bulgarian position should be contrasted with article 1101 (*Code civil*): ‘A contract is an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something.’ The *Code civil* does not explicitly define contract as a relationship.

⁶⁷ Before its amendment in 1993, article 8 (LOC) stipulated: ‘Contracts are concluded and performed on the basis of the socialist political framework, socialist ownership of the means of production, and the people’s economic plan. They serve the development of socialism, the fulfillment of the people’s economic plan, and the defense of the material and cultural interests of socialist organizations and citizens according to the principles of socialism.’

⁶⁸ Furthermore, similarly to English law, Bulgarian law is also concerned about procedural unfairness—mistake, fraud, threat, and extreme necessity void contracts under Bulgarian law.

should be noted that prior to its amendment in 1993, article 9 (LOC) stated: ‘Parties may freely determine the content of their agreement as long as it does not contravene the law, the people’s economic plan, and the rules of socialist coexistence.’ It is visible that legislators discarded the economic plan and replaced the ‘rules of socialist coexistence’ with ‘good morals.’

It should be emphasized, nonetheless, that although ‘good morals’ exists as a principle in other legal systems,⁶⁹ it bears little resemblance to Bulgarian ‘good morals.’ To clarify, immediately following the amendments, Bulgarian doctrine warned that ‘interests of society’ (article 8) and ‘good morals’ (article 9) did not exist in Bulgarian law, so in creating these new terms legislators left a wide margin for judicial interpretation as there was no case law or theoretical underpinning to rely upon.⁷⁰ In practice, as we explain below, courts started relying on communist doctrine pertaining to socialist coexistence in interpreting ‘good morals.’ As noted in §2.3.2, the LOC most likely borrowed ‘the rules of socialist coexistence’ from Poland.⁷¹ Bulgarian doctrine, nonetheless, assigned them a special role—it argued that lack of equivalence of obligations, taking advantage of parties without experience, receiving payment not to exercise a right, receiving a tip, etc. all violated the rules of socialist coexistence and voided the agreement.⁷²

Out of these principles only extreme necessity does not have an equivalent in England—known in Roman law as *laesio enormis*, the principle voids a contract if a party entered the agreement under unfavorable terms because of extreme necessity.

⁶⁹ Article 1133 of the *Code civil* declares that the cause of the agreement is illicit when it is contrary to the law, public order and good morals. In France, good morals have been used to justify restrictions in labor and consumer law, Barry Nicholas, *French Law of Contract* (Butterworths 1982) 123-27; The same provision existed in the 1892 LOC; While the law reform implemented by the *ordonnance* removed the explicit references to the cause, the principle seems to have remained in spirit: for instance, the new article 1128 defines ‘licit content’ as a condition of validity of contract and the new article 1169 voids agreements in case counter-performance is ‘illusory’ or ‘derisory.’

⁷⁰ See Christian Takoff, ‘Analysis of the Amendments to the LOC of *State Gazette* 12/1993’ [1993] 2 *Turgovsko pravo* 1-9; Emil Georgiev, ‘The New Amendments to the LOC’ [1993] 1 *Suvremenno pravo* 9, 13.

⁷¹ While the principle was part of the 1936 Soviet Constitution, it was not part of the contract laws of all communist countries. In Bulgaria, Poland, and Hungary, the violation of the rules of socialist coexistence voided the agreement *ab initio*. However, in the Soviet Union and the Czech Republic, it did not result in nullity. See Vitali Tadjer, *Civil Law of People’s Republic of Bulgaria: General Part. Section 1* (Sofia 1972) 85-87; Tadjer, *Civil Law. Section 2* (n 65) 252.

⁷² Tadjer, *Civil Law. Section 2* (n 65) 252-55.

Contemporary Bulgarian doctrine argues that an agreement is unfair when it is vitiated or when the obligations in it are not equivalent.⁷³ It also asserts that the equivalence of performance is a subjective concept which depends on parties' will—as long as an agreement is the expression of free will, obligations are equivalent.⁷⁴ However, court decisions suggest that judges may enforce objective equivalence of obligations by relying on 'good morals.' For example, in 1999 the SCC declared that a contract in which obligations are not equivalent is contrary to good morals and thus void.⁷⁵ In 2010, the District Court of Pleven struck out a compensation clause in a management contract because the compensation was 'immorally high.'⁷⁶ The clause stated that the director should receive 12 salaries if she is dismissed. The court deemed the compensation to be immorally high because the director had only worked for 5 months at the time of dismissal and there was no equivalence of obligations.⁷⁷

These cases illustrate substantial differences between the values of English and Bulgarian law notably because they neither involve vitiation nor non-equality of bargaining power which may be an occasion to apply Denning's principle of unequal bargaining power mentioned in §4.3.2.1. While in the first case we may speculate that judges relied on good morals to prevent the negative effects of the agreement upon a third party and they were enforcing good faith,⁷⁸ in the second case there are no third parties that may be affected. Furthermore, one may either consider that the director and the company had equal bargaining power because she was a professional or that she had less bargaining power compared to the company. Nonetheless, the court still ruled

⁷³ Kalaidjiev, *The Law of Obligations* (n 63) 65-66; Fairness plays a tripartite role. Firstly, as noted in §2.2.2, fairness is a source of Bulgarian civil law. Secondly, fairness is a general principle of Bulgarian civil law. Thirdly, fairness is an underlying principle of Bulgarian contract law. This triple function can be explained with the lack of distinction between justice, fairness and equity which blurs the boundaries between these notions.

⁷⁴ *ibid* 67.

⁷⁵ SCC's Decision 1444/1999 on civ.c.735/99; The case concerned the sale of an apartment at a price lower than its market value.

⁷⁶ Decision 73/2010 by the Pleven District Court on c.463/2009 affirmed by Decision 127/2010 of the Veliko Turnovo Appellate Court on civ.c. 247/2010.

⁷⁷ Because the lady was a member of the board of directors, her contract is governed by the LC and not by Bulgarian labor law.

⁷⁸ The agreement was challenged in court by the apartment's owner who had authorized a friend to sell it.

in favor of the company due to lack of (objective) equivalence of obligations in order to enforce substantive fairness.⁷⁹

4.3.2.2.1 *Development of ‘Equivalence of Performance’ in Bulgarian Law*

The contemporary cases in which the principle of ‘equivalence of performance’ was interpreted rather generously by Bulgarian courts mentioned above call for an examination of the origin and development of the principle in Bulgaria. This is also important in light of the fact that the roots of the principle can be found in the Roman *causa*—the concept that inspired the English doctrine of consideration.⁸⁰ It should be noted that Romans did not have a general theory of *causa* and *causa* was not an essential condition for the validity of contracts.⁸¹ The modern notion of *causa* was formulated in the 16th and the 17th century.⁸² Subsequently, *causa* was recognized as a condition of validity of agreements in both the common law and the civil law, but acquired a different role.

The distinct place of *causa* in Bulgarian and English law may shed further light on the dissimilar approach to impracticability in the two legal systems. To understand the current place of *causa* in the Bulgarian law of obligations, however, one needs to go back in time as each period of development discussed in §2.3.1 affected its meaning and expanded its significance.

⁷⁹ It is also important that the court established the lack of equivalence without considering uneasily quantifiable factors such as the fact that the lady might have given up other opportunities to work for this company, she was not dismissed because of professional negligence, etc.

⁸⁰ Lorenzen has asserted that English courts used the terms *causa* and *consideration* interchangeably for a long time, Ernest Lorenzen, ‘Causa and Consideration in the Law of Contracts’ (1919) 7 YLJ 621, 636.

⁸¹ Its meaning varied in context: it could refer to actionability, juridical reason, presupposition, Lorenzen (n 80) 625-30.

⁸² Bartolus and Baldus distinguished between two reasons for recognizing an agreement: because it was made to receive something in return or because it was made out of liberality. Grotius believed a contract was a type of act which conferred an advantage. Acts could be gratuitous or reciprocal, James Gordley, ‘Equality in Exchange’ (1981) 69 CLR 1587, 1623.

French Connection

Bulgaria borrowed the principle of *causa* indirectly from France through the *Codice civile* of 1865—articles 24, 25, and 27 of the first LOC were replicas of articles 1131, 1132, and 1133 of the *Code civil*.⁸³ Article 1131 of the *Code civil* states: ‘An obligation without cause or with a false cause, or with an unlawful cause, may not have any effect.’ Moreover, as mentioned above, *Code civil*’s article 1133 declares that the cause of the agreement is illicit when it is contrary to the law, public order and good morals. One notes an important difference between the French (and Bulgarian) *cause* and English consideration which is relevant for our study. In French and Bulgarian law, the *cause* has a significantly larger scope than in English law. At least in theory, under French and Bulgarian law, the mere existence of *cause* is insufficient to make the agreement valid. Once identified, judges subject it to legal and moral review. By contrast, we saw above that English judges are concerned about the *existence* of consideration in the context of contract formation and modification,⁸⁴ but control the agreement’s terms through the common law doctrines of illegality and public policy rather than through consideration. Besides, UCTA 1977, whose rules on consumer agreements have now become part of the CRA 2015, subjects certain exclusion clauses in commercial agreements to a reasonableness test.⁸⁵

Moreover, according to classical French theory, ‘the cause of obligations created in non-gratuitous contracts is the contemplation of counter-performance.’⁸⁶ In bilateral

⁸³ While the *ordonnance* deleted the explicit references to the cause, the principle remains in the *Code civil* in spirit. See footnote 69.

⁸⁴ As noted in §4.3.2.1, English courts are concerned about the sufficiency of consideration rather than its adequacy. The primary debate in English law concerns the method by which consideration should be identified (as a matter of law or factually). Nonetheless, once consideration is found to exist, its value is of little relevance; It has been contended that the notion of factual (practical) benefit, which the decision in *Williams v Roffey Bros* [1991] 1 QB 1 introduced, may undermine the doctrine of frustration because the party experiencing difficulties may pass the risk to the performing party if it manages to obtain a promise to obtain more or accept less, Mindy Chen-Wishart, ‘Consideration: Practical Benefit and the Emperor’s New Clothes’ in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995) 139; In practice, however, in such instances, there would be modification of the agreement agreed by both parties which is consistent with the English notion of freedom of contract. If English judges allow the insertion of force majeure clauses which preclude the application of frustration, as discussed in §5.3.2.2, it seems logical that parties are allowed to redistribute the risks later.

⁸⁵ For consumer agreements, terms were controlled primarily by the Unfair Terms in Consumer Contracts Regulations 1999, which have now been integrated in the CRA 2015.

⁸⁶ Henri Léon et Jean Mazeaud, ‘La cause en droit français’ (1956-1957) 3 McGill LJ 1, 12.

contracts, the cause of each party is the *counter-performance of the other party*.⁸⁷ By contrast, as noted in §4.3.2.1, in English law consideration is exchanged against the *promise* of performance. This difference sheds light on the divergent approach towards restitution in the classical common law and in French and Bulgarian law—as we saw in §3.6.2.1, in the common law, loss lies where it falls in cases of frustration.⁸⁸ By contrast, if an agreement is terminated due to force majeure and one party has performed but has not received counter-performance, the other party should return what it has received because there is no *cause* (no *actual* counter-performance).

Modern Expansion

The current LOC does not contain an equivalent to article 1131 of the *Code civil*. *Causa* is mentioned in diverse provisions of the LOC, but its meaning varies depending on the provision.⁸⁹ The LOC itself does not refer to equivalence of obligations or equivalence of reciprocal causes in the agreement. The idea of equivalence was promoted by Bulgarian doctrine and, as noted above, tucked in under the *chapeau* of socialist coexistence, thus giving *causa* a more altruistic dimension compared to French law. Tadjer asserts that socialist morality is concretized ‘on the basis of social feeling, socialist humanism, proletarian internationalism, and solidarity’⁹⁰ and serves both as a criterion for interpretation of agreements and as a criterion for evaluation of the conduct of the subjects of law.⁹¹ That is why during communism judges were sensitive to even minor imbalances (lack of equivalence) in contractual agreements—an approach

⁸⁷ *ibid* 10-11 and 13-15.

⁸⁸ The decision in *Fibrosa* referred to in §3.6.2.1.1 brought the common law approach closer to French law; Mitchell, nonetheless, explains that the common law approach to consideration is bifocal. On the one hand, judges show concern for the rendering of counter-performance. On the other, they may analyze consideration from the perspective of rights—performance may be rendered, but the rights conferred to the counter party in the agreement may not have been satisfied, Paul Mitchell, ‘Artificiality in Failure of Consideration’ (2010) 29 UQLJ 191-210.

⁸⁹ For example, pursuant to article 26 (LOC), an agreement is void for absence of cause. Article 55 on unjust enrichment we discussed in §3.6.2.1.2 bestows a larger scope upon the term as it stipulates that something received without a cause should be returned, thus covering both contract and tort. Bulgarian law also distinguishes between causal and abstract transactions, the latter being valid even at the absence of cause; In that regard, Takoff argues that the Bulgarian concept of *causa* is amorphous and unclear and should be reconsidered, Christian Takoff, ‘Abstract Transactions in Light of the Notions of Abstractness and Causality’ in *Legal Research in Memory of Professor Ivan Apostolov* (Ulpian 2001) 419-451.

⁹⁰ Tadjer, *Civil Law. Section 1* (n 71) 87.

⁹¹ *ibid* 88.

which, depending on the background and legal upbringing of the judge, may be valid even today, as the cases on the immorally high compensation and sale of apartment at a price below market value discussed in §4.3.2.2 demonstrate.

It is also interesting to note that French law examines the *cause* only as a condition of validity of agreements.⁹² By contrast, the communist LOC endorsed the enforcement of equivalence of performance following supervening events, which imbalanced the agreement as well.⁹³ This approach was perhaps influenced both by the *Codice civile* and by Krückmann's theory of equivalence which Dikov had analyzed in his monograph *Historical and Comparative Research on Mistake in the Law of Inheritance, Clausula Rebus Sic Stantibus in Private Law and the Essence of Adjudication*, as explained in §2.3.3.3 and §2.3.3.2.

Finally, the SCC recently rendered a decision on interpretation pertaining to good morals,⁹⁴ which stipulates:

Good morals are norms of morality to which the law has given a legal meaning because the legal consequences of their violation can be equated to a contract's contravening the law. Good morals are not written, systematized or concrete rules. They exist as general principles or result from general principles... One of these principles is fairness, which demands the protection of any interest protected by the law... The assessment of voidability of contract due to a violation of good morals is carried out in the concrete circumstances of entry into contract.

Essentially, the SCC self-extended its discretionary powers by molding 'good morals' into a *chapeau* of diverse open unsystematic norms. The two main general (moral) principles of Bulgarian contract law are fairness and good faith. These norms have derivatives like equivalence of obligations, duty of good husband, etc. Essentially, the

⁹² It is yet to be seen if the introduction of the new article 1195 on changed circumstances will lead to a change of attitude: the provision does not explicitly mention lack of equivalence as a condition of application.

⁹³ As discussed in §2.3.3.3, communist legislators enacted a partial principle on economic onerosity applicable only to manufacturing contracts. The implications of this principle are discussed in §5.2.2.

⁹⁴ Decision on interpretation 1/2010; The decision covered several questions of law, including the voidability of payment clauses, which we discuss in §5.2.3.

SCC has declared that the violation of any of these principles may void an agreement if the judge deems necessary in the concrete circumstances of the case, thus providing judges with a variety of tools to interfere with the agreement's terms for moral reasons—a concept unthinkable from an English perspective because it compromises legal certainty. Moreover, it is interesting that while the SCC did not explicitly reveal where it took this definition of 'good morals' from, my research shows that this citation copies verbatim parts of Tadjer's explanation of socialist coexistence.⁹⁵

Relevance to Economic Onerosity

The above observations are important regarding our comparative study because they reveal key conceptual differences between Bulgarian and English law. Unlike English judges, Bulgarian judges subject contract to moral scrutiny and attack agreements for lack of equivalence of performance even at their formation stage. Contrary to claims by Bulgarian doctrine that economic onerosity is an exception to the spirit of Bulgarian law, in fact, it illustrates its values. If Bulgarian judges may be concerned about substantive fairness even at the formation stage, they have a reason to interfere in the name of fairness if the agreement becomes subsequently imbalanced.

Moreover, our discussion elucidates why judges evaluate foreseeability primarily from the perspective of an open norm—that of good merchant/husband, as discussed in §3.4.2. Since communist times, courts have been encouraged to 'moralize' contract and to constrain its terms to promote altruistic values. While certainly communist ideology is a thing of the past, its remnants continue to influence court practice and doctrine—we should not forget that senior Bulgarian judges and leading scholars earned their degrees and began their careers in communism, so *a priori* they may enforce altruism conditioned by socialist values, even if they believe they are keeping an open mind. While this commitment to altruism may seem like a factor compromising legal certainty from an English or even French perspective, from a Bulgarian standpoint this is not necessarily so.

⁹⁵ See the second to last paragraph in Tadjer, *Civil Law. Section 2* (n 65) 252.

Bulgarian doctrine prior to communism distinguished between static and dynamic legal certainty.⁹⁶ While the former entails the security of keeping the agreement's contents untouched, the latter implies the security that judges would achieve socially acceptable outcomes. Although this distinction has not been formally embraced by Bulgarian courts or contemporary doctrine, the courts' decisions enforcing substantive fairness and Bulgarian doctrine's advocacy of more fairness in agreements⁹⁷ evidence that the idea of dynamic legal certainty may have been internalized. We discuss the implications of this conceptualization of legal certainty for the harmonization project in §6.5.

4.3.2.3 Comparative Observations on Good Faith

As noted in §4.2, Bulgarian law justifies judicial intervention in cases of economic onerosity both with the principle of fairness and the principle of good faith. In §1.2.2, we also explained that during the International Week of Comparative Law in Paris in 1937, it was concluded that the divergent approach towards impracticability in the continental tradition stems from dissimilar concepts of good faith—in the Romanistic tradition good faith required performance despite a change of economic circumstances while in the Germanic tradition good faith served as grounds to terminate or modify the agreement in similar instances. This observation calls for an analysis regarding what Bulgarian law understands by good faith.

The question is also relevant considering the plethora of recent literature dedicated to good faith both in the common law world and in continental Europe.⁹⁸ As noted above,

⁹⁶ See Lyuben Dikov, 'Die Abänderung von Verträgen den Richter' in *Hedemann-Festschrift* (Jena 1938).

⁹⁷ See, for instance, Angel Kalaidjiev, 'On the Autonomy of Will, Freedom of Contract, and Fairness in Contract' in Atanas Shopov (ed), *Legal Research in Memory of Professor Ivan Apostolov* (Ulpian 2001).

⁹⁸ Michael Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 CBLJ 385; JF O'Connor, *Good Faith in English Law* (Dartmouth 1990); Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995); Roger Brownsword and others (eds), *Good Faith in Contract: Concept and Context* (Dartmouth 1999); Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000); Zimmermann's chapter on good faith in Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (OUP 2001); Brownsword's chapter on good faith in Brownsword (n 29); Martijn Hesselink, 'The Concept of Good Faith' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011).

good faith was transplanted to English law by the Unfair Terms in Consumer Contracts Regulations 1999 *SI 1999/2083* implementing the Unfair Terms in Consumer Contracts Directive 13/93/EC.⁹⁹ In §1.2, we also explained that authors have raised concern about the incoherence resulting from the introduction of the doctrine as English judges interpret it in different ways. Generally, doctrinal opinions regarding good faith's merits, meaning, and implications significantly diverge.

For instance, it has been argued that good faith exists in the common law because honesty, fairness, and reasonableness are all principles of English law and at the same time they are 'universally accepted and distinctive moral elements associated with good faith.'¹⁰⁰ It has also been contended that the absence of a general principle of good faith in English law is 'partly compensated by the law of remedies, which greatly limits the possibility of abuse of rights.'¹⁰¹ Yet, good faith offers 'considerable advantages:' it can bridge 'the gap between English law and other common law and continental legal systems.'¹⁰² It has been affirmed that '[good] faith, like reasonableness, only makes sense relative to some particular moral reference point.'¹⁰³ Theoretically the reference point could either be the standards of fair dealing in the contractual community or standards based on the best moral theory. However, the latter would be difficult to justify.¹⁰⁴

All of these assertions, however, underestimate the role of good faith in continental jurisdictions. It is certainly true that good faith like all open norms, such as reasonableness, makes sense relative to a moral reference point. It is also true that good faith prevents abuse of rights and encompasses various standards of honesty, respectability, etc. However, in the continental tradition, particularly its Germanic branch, it performs a variety of functions—from reallocating risks in contracts to serving as a foundation to develop jurisprudential solutions,¹⁰⁵ such as terminating or

⁹⁹ The common law rejected good faith as a notion which was 'unworkable in practice,' *Walford v Miles* [1992] 2 AC 128, 138.

¹⁰⁰ JF O'Connor, *Good Faith in English Law* (Dartmouth 1990) 10.

¹⁰¹ Daniel Friedmann, 'Good Faith and Remedies for Breach of Contract' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995) 425.

¹⁰² *ibid.*

¹⁰³ Brownsword (n 29) 135.

¹⁰⁴ *ibid.*

¹⁰⁵ On the role of good faith in Germany, see Werner Ebke and Bettina Steinhauer, 'The Doctrine of Good Faith in German Law' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995).

modifying contracts due to changed circumstances. Essentially, as Hesselink has justly denounced the continental hypocrisy—good faith is not simply a norm, but a ‘mouthpiece for new rules.’¹⁰⁶ Hesselink also maintains that good faith is a cover for judges to make law because they may feel uncomfortable to openly declare they are changing the law since they are supposed to be its appliers.¹⁰⁷

As explained in §2.2 and §2.3, Bulgarian judges, unlike their continental counterparts, have always been granted the explicit right to make law, so they do not need a doctrinal pretext like good faith. As we noted in the same Chapter, because of historical reasons, Bulgarian law had many gaps, so this right was relied upon in practice. Moreover, in the same Chapter we underlined that the SCC renders special decisions on interpretation binding for all courts—essentially, the SCC makes primary law because it defines, develops and clarifies the meaning of norms and principles. Furthermore, as highlighted in the previous section, unlike other continental systems, Bulgarian law disposes of other tools to moralize both contract and existing law—notably its doctrine of ‘good morals’ which has been molded into a gateway through which open unsystematic norms can be applied upon judicial discretion. In that light, while good faith has been called a ‘monster’ for blurring the lines between interpretation of the law and judicial development of law,¹⁰⁸ in Bulgaria 1) lines have been blurred since the creation of Bulgarian civil law 2) good faith has many sisters (fairness, equivalence, etc.) and an adoptive mother (‘good morals’) which makes the principle less scary in comparison.

Nevertheless, the fact that there are scarier monsters in Bulgarian law, such as ‘good morals,’ is no consolation to those who fear that through these open norms judges impose their morality rather than the morality of the community intended by legislators. While good faith is mentioned in multiple places in the LOC¹⁰⁹ and other texts like the LC, it is not defined in the law. Furthermore, just like good morals, good faith has socialist baggage—prior to its amendment in 1993, the LOC contained the term

¹⁰⁶ Hesselink, ‘The Concept of Good Faith’ (n 98) 645.

¹⁰⁷ *ibid.*

¹⁰⁸ Reinhard Zimmermann and Simon Whittaker, ‘Good Faith in European Contract Law: Surveying the Legal Landscape’ in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000) 22.

¹⁰⁹ To illustrate, article 12 (LOC), which copies article 1187 of the current *Codice civile*, requires negotiations to be carried out in good faith. Article 20 (LOC) mentions good faith as one of the principles of interpretation of agreements. Article 63 (LOC), which copies article 1375 of the *Codice*, requires obligations to be performed in good faith, etc.

‘socialist good faith.’ Doctrine is not unanimous about the definition, nature and implications of good faith either. One may argue that good faith in Bulgarian law is conceptually loose and fuzzy and houses a variety of moral principles and expectations of conduct in the civil realm whose purpose is to enforce both commutative and distributive justice.¹¹⁰

To illustrate, Apostolov, a prominent scholar from the first period of development of Bulgarian law, describes good faith as a ‘scale of social ethics’ which is of ‘primordial importance’ for the law.¹¹¹ It serves as a criterion to evaluate the scope, means and precision of performance.¹¹² Apostolov contends that good faith allows for flexible jurisprudence, which considers the opposing interests of both parties to an agreement as long as they are worthy of legal protection.¹¹³ He argues that judicial intervention in case of economic onerosity was justified on the grounds of good faith and that good faith also rationalizes judicial discretion regarding the remedy—decrease of the promisor’s due performance, increase of the promisee’s counter-performance, releasing the promisor from his obligations, etc.¹¹⁴

Dikov, another distinguished authority, proposed an interpretation resembling the English standard of reasonableness which we discuss in §5.3.1.2.2:

¹¹⁰ Note that Western authors have suggested various dichotomies of good faith. For instance, Wightman distinguishes between core good faith, contextual good faith, and normative good faith, John Wightman, ‘Good Faith and Pluralism in the Law of Contract’ in Roger Brownsword and others (eds), *Good Faith in Contract: Concept and Context* (Dartmouth 1999); In Germany, doctrine distinguishes between objective and subjective good faith, Hesselink, ‘The Concept of Good Faith’ (n 98) 619-620; Bulgarian law does not have a separate terminology to distinguish between the different types of good faith. As explained below, authors either analyze good faith normatively or explain what it means regarding a particular question of law.

¹¹¹ Apostolov (n 4) 34.

¹¹² *ibid* 34-35.

¹¹³ *ibid* 242; While the first LOC was borrowed indirectly from France, Bulgarian scholars relied on Germanic theories to interpret it. In that light, Jhering’s theory of legally protected interests plays an important role in Bulgarian law. In *The Struggle for Law* published in 1872 Jhering argues that ‘a legal right... is nothing but an interest protected by the law,’ Rudolf von Jhering, *The Struggle for Law* (John Lalor tr, 2nd edn, Lawbook Exchange 1997) 58. He maintains that interest and not will are at the basis of the law; In his two-volume work *Law as a Means to an End* written in the period 1877-1883, Jhering goes further by explaining that ‘purpose is the creator of the entire law... there is no legal rule which does not owe its origin to a purpose, i.e. to a practical motive,’ Rudolf von Jhering, *Law as a Means to an End* (Isaak Husik tr, Boston Book Company 1913) liv; Citing Jhering’s views, Apostolov declares that the ‘obligation is a means to fulfill the legally protected interests of the promisee’ and highlights that interests encompass not only material interests, but also moral ones, Apostolov (n 4) 6-7.

¹¹⁴ Apostolov (n 4) 34-35.

*...the legislator consciously left the judge a margin for interpretation to take a decision the way a...sane man would. When trying to identify what good faith is and what justice is, you carry out the same mental operation that you would when you are looking for a new legal norm to substitute an old one which is no longer fit for purpose...or when you are looking for that which is expedient and useful.*¹¹⁵

Dikov, nonetheless, rationalized economic onerosity by suggesting a modification of the socio-philosophical platform underlying contract law, as clarified in §5.4.

In contrast to Apostolov and Dikov, communist authorities have asserted that good faith is a limit to the exercise of rights.¹¹⁶ A similar view is shared by contemporary authors who argue that good faith is a lawful limitation of free will.¹¹⁷ Yet, similarly to Apostolov, Stoychev maintains that good faith implies consideration for the public interest. He also claims that good faith does not limit free will, but accompanies it: a choice is truly free only if it is ethical.¹¹⁸ This theory, however, seems to blur the distinction between fairness and good faith. While as discussed in §4.3.2.2 under Bulgarian contract law fairness implies lack of vitiating and equivalence of performance, it has been asserted that as a principle of private law, fairness requires an optimal coordination of the interests of all subjects of law.¹¹⁹ This haziness of notions may explain why some authors examine the implications of fairness and good faith in article 307 together rather than separately,¹²⁰ as underlined in §3.5.1.

¹¹⁵ Lyuben Dikov, 'The Essence of Adjudication' in *The Modification of Contracts by the Judge* (first published 1923, Feneya 2010) 107-108.

¹¹⁶ Tadjer, *Civil Law. Section 1* (n 71) 191.

¹¹⁷ See Todor Todorov, 'Constitutional Protection of Freedom to Contract' in Atanas Shopov (ed), *Legal Research in Memory of Professor Ivan Apostolov* (Ulpian 2001) 471-480.

¹¹⁸ Krasen Stoychev, *Contract Negotiations and Precontractual Liability* (2nd edn, Sibi 2007) 129-130.

¹¹⁹ See Staykov (n 5) 71 and Ekaterina Mateeva, 'Necessary Changes in the Principle of Economic Onerosity in Article 307 of the LC' in *Contemporary Law—Problems and Tendencies* (Sibi 2011) 243.

¹²⁰ Historically authors have also mixed up equity and good faith. Baldus regarded good faith as an equitable remedy. Gordley explains that that is why later he had to clarify the confusion by distinguishing between two types of equity—generic, which demands the achievement of just results, and specific, which demands deviating from the law when circumstances require, James Gordley, 'Good Faith in Contract Law in the Medieval *Ius Commune*' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000) 112; As noted in §4.2, in Bulgarian the word for fairness, justice and equity is the same, which

It is also interesting that scholars have emphasized that the meaning of good faith may vary even in the same legal text.¹²¹ There seems to be agreement that good faith emanates as knowledge or lack of knowledge of certain facts and encompasses the requirements of due care.¹²² In that light, in §3.4.1 we explained that Bulgarian law evaluates fault differently depending on whether the entity or person is a merchant or not. It has been contended that in some of LOC's provisions good faith should be treated as an ethical or a moral category, which is used as a criterion of assessment with the purpose of making conclusions producing a legal effect.¹²³ It has also been contended that good faith as an ethical category refers to the concepts of honesty, respectability, loyalty, and correctness which are entertained in practice.¹²⁴

Essentially, similarly to good faith in the Germanic tradition, Bulgarian good faith is multifaceted and performs diverse functions. With regard to economic onerosity itself, it enforces several objectives. As an ethical category, good faith justifies judicial intervention to enforce distributive justice and commutative justice, or an optimal coordination of the interests of the subjects of law. As discussed in §3.5.1, the judge interferes because society is concerned about the economic existence of the aggrieved party. Moreover, good faith emanates as lack of knowledge of certain facts and as a standard of care. In §3.4.1, we discussed that the supervening event should not be caused by the aggrieved party and it should not have been foreseen even in exercising the relevant degree of care.

Considering the above, one can further understand why frustration is not applicable to supervening onerosity from a Bulgarian perspective—English judges do not dispose of an open norm enforcing both morality and societal considerations in commercial agreements. In that regard, Bulgarian good faith is a partial functional equivalent to diverse English notions—the principles of reasonableness and public policy, implied terms, but also, more broadly, the court's equitable powers. It is a mega norm enforcing all of these notions at once—an approach which English judges would be wary of

sheds light on why overlap and confusion of terminology is unavoidable and undetectable by non-comparatists.

¹²¹ Lyuben Vassilev, *Civil Law* (TedIna 1993) 61; Stoychev (n 118) 117.

¹²² Krustyu Tzonchev, *The Improvements* (Sofi-R 2001) 112 and 119; Stoychev (n 118) 117-18.

¹²³ Stoychev (n 118) 117-20.

¹²⁴ Zlatka Soukareva, 'Good Faith and the Presumption of Good Faith as Principles of the Law of Obligations' in *Essays in Honor of Zhivko Stalev* (Sibi 2005) 374-390.

taking, especially regarding commercial agreements, to safeguard (static) legal certainty and promote commercial sensibility.

4.4 Conclusion

The Chapter examined if the diverse approach towards impracticability in Bulgaria and England can be explained with the distinct conceptions of contract and justice in the two jurisdictions. It first emphasized that both economic onerosity and frustration have elusive grounds. However, an examination of Bulgarian academic commentaries on economic onerosity and English case law on frustration shows that both seem rationalized with the enforcement of just outcomes. Since both doctrines reach different results, it is interesting to see where the difference stems from—the fact that Bulgarian and English law entertain different conceptions of justice in contract or the fact that they seek justice regarding dissimilar conceptions of contract.

We then expounded the important links between contract law and historical context that should be borne in mind. English and Bulgarian contract law developed in pronouncedly different circumstances and addressed the needs of different social groups. While English contract law developed primarily with regard to parties having the financial means to go to court, Bulgarian contract law was modeled to serve the needs of ordinary men.

After that, we demonstrated that English and Bulgarian law diverge on what they understand by contract and by justice in contract law. English law regards contracts as bargains or promises in return for good consideration. However, absent vitiation of the agreement or public policy concerns, judges are rarely troubled by the inequality of exchange in commercial agreements. Hence, if they are not worried about the objective value of consideration even at the formation stage, it is understandable why they would not interfere if the objective value subsequently alters due to supervening events.

Bulgarian law, nonetheless, traditionally regards contracts as relationships constrained by social morality. During communism legislators created the principle of ‘socialist coexistence’ which was the primary means to control contractual terms. Furthermore, Bulgarian doctrine managed to tuck into the *chapeau* of ‘socialist coexistence’ a variety of notions, including equivalence of performance—the idea that what the promisor

gives should be equivalent to what it receives. While the principle was later renamed ‘good morals,’ it inherited the meaning of socialist coexistence. Furthermore, in recent years, the SCC, relying on communist doctrine, transformed ‘good morals’ into a mega norm encompassing all underlying principles of Bulgarian law, thus further opening the door to judicial intervention. Hence, if courts are concerned about equivalence even at the formation phase, they have reasons to intervene if the contractual balance is subsequently compromised by supervening events.

Finally, we made comparative observations regarding the principle of good faith, which justifies economic onerosity together with the principle of fairness. We underscored that although some scholars argue that good faith exists in the common law in all but name since there are other principles/remedies that play similar roles, these assertions underestimate the function of good faith in continental traditions. In the Germanic branch of continental law, good faith serves multiple purposes—from redistributing risks in agreements to developing jurisprudential solutions. In Bulgaria, good faith operates similarly—it is an open norm allowing judges to moralize both the law and agreements. While there is no consensus about what it entails, one notes a propensity to associate it both with the enforcement of commutative and distributive justice. Although this approach blurs the line between fairness and good faith, it explains why Bulgarian judges are sensitive both to the balance of the transaction and its effects on third parties.

Now that we established that English and Bulgarian contract theory may shed light on why frustration and economic onerosity achieve different results in practice, we focus on the role of the judge regarding agreements in the two jurisdictions.

Chapter 5

The Role of the Judge Regarding Agreements in Bulgarian and English Contract Law

5.1 Introduction

The previous Chapter explained the substantial differences between economic onerosity and frustration established in Chapter 3 from the perspective of contract theory. It underscored that England and Bulgaria have developed different conceptions of contract and have dissimilar views on what justice in contract law entails. These divergences provide more clarity regarding why economic onerosity and frustration reach different results in practice. This Chapter, by contrast, purports to ascertain if the differences between English and Bulgarian law can be further rationalized by the distinct roles which English and Bulgarian judges have acquired regarding agreements.

Case law has defined the English judge as the speaker of the reasonable man.¹ It is interesting, from a continental perspective, that common law judges prioritize the rational even through their choice of words: English decisions use terms, such as commercially sensible, reasonable, practicable, etc.² Similarly to other continental

¹ In *Davis Contractors* [1956] AC 696, 729, Lord Radcliffe maintains: ‘And the *spokesman of the fair and reasonable man*, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself.’

² In *Walford v Miles* [1992] 2 AC 128, 138, Lord Ackner said: ‘A duty to negotiate in good faith is as *unworkable in practice* as it is inherently inconsistent with the position of a negotiating party.’ In *Burncopper v International Travel Catering Association Ltd* [2014] EWHC 148 (Comm) [24], Judge Mackie QC declared: ‘Where there are competing meanings the court will choose the more *commercially sensible* of rival interpretations of express terms.’

jurisdictions, Bulgaria has confined the role of the judge primarily to a law-interpreter.³ However, as explained in Chapter 4, Bulgarian law is permeated with open norms which serve as gateways for altruism to enter the law. Moreover, Bulgarian doctrine has encouraged judges to ‘apply [the law] tactfully and with a *sense of social justice*, so that they improve the law and serve social life.’⁴ It is interesting to compare if the ‘speaker of the reasonable man’ and the ‘tactful law-applier’ have similar discretions regarding the agreement’s contents.

§5.2 explores the limits of judicial discretion to modify agreements in the two jurisdictions to establish if the approach of English and Bulgarian judiciary to impracticability is an illustration or an exception to the acceptable level of judicial intervention in agreements. §5.3 compares the approach towards contractual interpretation in the two jurisdictions to elucidate whether it is possible for English judges to achieve similar results to Bulgarian judges simply because they use dissimilar methodologies of contractual construction. §5.4 examines the likely links between contract law and social contract theory and considers how the differences between the English and the Bulgarian ‘social contract’ may shed light on the distinct roles that judges have acquired regarding agreements.

5.2 The Judge and Contract Modification

Article 20a, para 2⁵ (LOC) identifies two instances in which contracts may be modified—by mutual consent of the parties and on the grounds provided for in the law. A survey of the Bulgarian legislation in force reveals diverse provisions authorizing changes to be made into an agreement without the consent of both parties and in the absence of breach/vitiating.⁶ For the purposes of my study, I have concentrated on three

³ §2.2.2, nonetheless, underscored that judges can make law when there is no applicable rule. Furthermore, they render decisions on interpretation which serve as primary sources of law.

⁴ Lyuben Dikov, ‘The Essence of Adjudication’ in *The Modification of Contracts by the Judge* (first published 1923, Feneya 2010) 146.

⁵ The provision stipulates: ‘Contracts may be amended, terminated, avoided or revoked only by mutual consent of the parties or on grounds provided for in the law.’

⁶ For example:

- 1) Article 92, para 2 (LOC): ‘Where the liquidated damages are excessive as compared with the damage sustained or the obligation had been performed improperly or only in part, the court may decree to reduce the amount of such damages.’

examples, which I deem to illustrate most clearly Bulgarian and English judges' different degrees of discretion regarding contractual content—supplement agreements, agreements in which the price was agreed as a total sum, and agreed damages.

5.2.1 Supplement Agreements

As noted in §3.4.2 and §4.3.2.1, English judges encourage parties to explicitly distribute the risk of foreseen events by themselves to enforce freedom of contract and commercial sensibility. By contrast, Bulgarian law permits parties to explicitly agree that they would supplement their agreement in the future when certain foreseen events arise, without stipulating a mechanism for the modification. Such an agreement allows the judge to supplement their contract when these events arise. Article 300 (LC) stipulates:

Where the parties agree to supplement the contract upon the occurrence of certain circumstances, and should they fail to reach agreement in the event of such occurrence, either party may petition the court to do so. When rendering its decision, the court shall take into consideration the objective of the contract, the remainder of its contents and commercial custom.

Similarly to article 307, this provision allows *either* party to petition before the court in case of failure to agree with the other party on the modification when the foreseen event arises. Nevertheless, there is one important difference: in contrast to article 307, article 300 requires the parties' *prior mutual agreement* that the contract should be modified when foreseen circumstances arise. It should be stressed that parties only

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- 2) Article 210, sentence 1 (LOC): 'In selling an immovable property where the total area and the price per unit area are specified, if the real area turns out to be larger or smaller than what was specified in the contract, the price of the property shall be increased or decreased respectively.'
 - 3) Article 16, sentence 1 (Law on Agricultural Tenancy): 'If circumstances that the parties did not consider at the time of entry into contract modify and induce non-equivalence of their obligations, any of the parties may demand contract modification.'
 - 4) Article 43 of the Law on Public Procurement allows contract modification in several instances among which failure to comply with the timeframe set in the contract due to unforeseen circumstances, changes of State-regulated prices, etc.

agree on the *possibility* of modification⁷—if either of them goes to court, both will be bound by the modifications the judge makes. The requirement for prior agreement on the intervention, nonetheless, is strictly enforced. For example, the SAC refused to make modifications to a contract because ‘the provisions of the agreement do not contain a *declaration of will* by both parties for supplementing their contract which means that [article 300] is not applicable to the dispute at hand.’⁸

While I could not identify case law in which the Bulgarian court supplemented an agreement, the existence of such provisions in legislation illustrates the power vested upon the judge by Bulgarian legislators. From a Bulgarian perspective, agreements to negotiate in the future are an invitation for the judge to intervene and determine the terms of the supplement agreement. In §5.4, we explain how this approach could be rationalized from the perspective of social contract theory—unlike English law whose underlying structure remains liberal individualism, Bulgarian law operates in a semi-organic socio-philosophical framework in which the judge is a party to the agreement.

In contrast to the Bulgarian approach, it is unlikely that an English judge would interpret a clause to negotiate in the future as an agreement for judicial supplementation of the contract. Generally, English law allows parties to specify the mechanisms for modification upon the rise of certain events—for example, by an expert or by a specific formula indicated in the agreement. In *Superior Overseas Development*⁹ which we discuss in §5.3.2.2 in relation to construction of hardship clauses, the agreement subject to the dispute contained specific provisions on price controls. In that light, the role of judges is to construe the provisions and declare what the specified mechanisms imply in the case, but *not to determine the actual mechanisms* themselves. This would entail their making contract for the parties, which English judges avoid.

One of the few cases in which English judges may modify the contract is by applying the equitable remedy of rectification allowing courts to change the words used in written contracts. The purpose of rectification, however, is to reflect the ‘actual intentions of both parties’ in case of common or unilateral mistake¹⁰ and not to add further terms to the agreement. Treitel contends: ‘...the mistake must in all cases

⁷ If they agree on the actual modification, then article 300 cannot apply.

⁸ SAC’s Decision 399/2010 on civ.c.77/2010.

⁹ [1982] 1 Lloyd’s Rep 262.

¹⁰ For an overview of the principle, see Andrew Burrows, ‘Construction and Rectification’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009) 85.

simply be one in recording the agreement. If the remedy were not limited in this way, it would indirectly subvert the principles which limit the kinds of mistake that affect the validity of contracts.¹¹ Furthermore, because rectification is an equitable remedy, it is discretionary unlike article 300, which does not allow the judge to refuse intervention if the conditions explained above are fulfilled.

While there is no equivalent doctrine to rectification in Bulgaria, it is likely that such cases would be resolved either by applying the tools of interpretation or the doctrines of mistake and fraud. In §5.3.1.2.1, we emphasize that in interpreting agreements, Bulgarian judges, unlike English judges, have to establish the *real common will* of the *actual* parties rather than the will of reasonable men construed from the transaction. Consequently, they allow parties to present extrinsic evidence, including evidence from the negotiations, witness statements, etc.¹² The doctrines of mistake and fraud, stipulated in articles 28 and 29 (LOC), may also be applicable. However, there may be differences in the consequences between English and Bulgarian law because corrections in the agreement are allowed only for mistakes in ‘mathematical calculations.’¹³ In case of all other mistakes or fraud (when one party is misled by another), agreements are voidable.

5.2.2 Price Modification When Agreed as a Total Sum

One of the most interesting English cases from a Bulgarian standpoint is *Davis Contractors*¹⁴ in which, as discussed at several points in this thesis, Lord Radcliffe formulated the modern test of ‘radically different circumstances.’ The case concerned a contract for the building of 78 houses for 8 months at a fixed price of £94,424. There were shortages of labor and material and a long period of frost, which made performance more onerous for Davis and also slowed down completion—the houses

¹¹ Guenter Treitel, *An Outline of the Law of Contract* (OUP 2004) 144.

¹² Arguably, rectification developed in response to the literal approach to construing agreements, which prevailed in England until recently, Stefan Vogenauer, ‘Interpretation of Contracts: Concluding Comparative Observations’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009) 139-140.

¹³ Article 28, para 2 (LOC); For instance, in Decision 655/1981 on civ.c.203/1981 the SCC allowed the correction of the price in a contract for the sale of an apartment because it was not calculated according to the rules on pricing which were in force at the time.

¹⁴ [1956] AC 696.

were built in 22 months instead. Davis filed a claim arguing frustration and requesting payment on a *quantum meruit* basis. The actual cost of construction turned out to be £115,233¹⁵—approximately 22% more costly for Davis. Davis Contractors’ claim did not succeed. Furthermore, it was emphasized:

*In a contract of this kind the contractor undertakes to do the work for a definite sum and he takes the risk of the cost being greater or less than he expected. If delays occur through no one's fault that may be in the contemplation of the contract, and there may be provision for extra time being given: to that extent the other party takes the risk of delay. But he does not take the risk of the cost being increased by such delay.*¹⁶

The case would have likely had a different outcome had it been examined in Bulgaria. As explained in §2.3.3.3, under the influence of Italian law, legislators enacted a provision on economic onerosity pertinent to manufacturing contracts as article 266, para 2 (LOC):

If in the course of the performance of the contract the duly determined prices of materials or labor change, the compensation shall be adjusted accordingly, even where it was agreed upon as a total sum.

In the same section I also highlighted that unlike the Italian provision, from which it was inspired, the Bulgarian provision does not stipulate a threshold of change, so technically any degree of change in the price of labor and/or material should lead to a modification of the price determined in the agreement. Hence, some authors have criticized article 266, para 2 as anachronous and incompatible with the principles of a market economy.¹⁷ Nonetheless, in §5.4, I clarify that this article is one of the indicators of Bulgarian law’s organic framework. The fact that from a liberal-individualist standpoint it creates tension with the principle of sanctity of contracts does not necessarily mean that it is incompatible with the encouragement of market activity.¹⁸

¹⁵ *ibid.*

¹⁶ *ibid* 724.

¹⁷ See Miroslav Dimitrov, *The Contract for Construction* (Sibi 2012) 209-215.

¹⁸ While in England the notion of ‘market economy’ is traditionally associated with a free price system, other countries have developed models promoting solidarity—Germany’s social

It should be noted that from a Bulgarian perspective, construction contracts are manufacturing contracts, which are governed by several laws, including LOC's rules on manufacturing contracts.¹⁹ Moreover, case law suggests that article 266, para 2 is applicable to construction agreements and that modifications of the price when agreed as a total sum are awarded by the courts in such instances.²⁰ In Decision 169/2003 on civ.c.2520/2002 concerning a pre-contractual agreement for the construction and sale of an apartment at a fixed price, the SCC concluded:

After construction, the price of immovable property subject to a pre-contractual agreement of sale can be determined regarding its value at the moment of completion of construction in case of changes in the prices of labor and materials to determine if the payment made in advance constitutes performance of the obligation to pay the remuneration of the constructor which is equivalent to the latter's counter-obligation to transfer the title of property.

However, the SCC seems committed to penalizing delay in performance by clearly distinguishing between modification of the price due with regard to the date of completion stipulated in the agreement and modification with regard to the *actual* completion. In Decision 671/2008 on com.c.290/2008, it declared that the price of an apartment subject to a contract of construction and sale has to be adjusted with regard to the date the apartment was supposed to be completed (16 October 1998) and not with regard to the date it was actually completed (28 November 2000) to prevent the constructor from 'deriving rights from his failure to perform on time, which would worsen the position of the appellant that performed its obligations.'²¹ Essentially, after the moment the constructor fell in delay, the risk of increased cost of labor/materials

market economy, Italy's civil market economy, etc. On the various capitalist models, see Ștefan Mureșan, *Social Market Economy: The Case of Germany* (Springer 2014) 127-151.

¹⁹ On the nature of construction agreements, see Solunka Popova, *Contractual Relations in the Construction Process* (Neofit Rilski 2012) 17-55.

²⁰ Note the definition of manufacturing contract in the LOC is rather broad, which permits the application of the rules on manufacturing contracts to different agreements. Article 258 (LOC): 'Under a manufacturing contract, the contractor shall be liable at his own risk to manufacture something in accordance with the other party's order, and the latter—to pay a compensation.'

²¹ From an English standpoint, it may be striking that the buyer did not sue for damages for delay (breach of contract)—it was the constructor suing the buyer for the supposed rise in the price of construction. Such examples also evidence cultural differences between the Bulgarian and the English contractual community.

transferred to him, but the rise of the cost and labor prior to the date of completion stipulated in the contract is at the expense of the apartment's buyer.

This approach is rationalized with the enforcement of equivalence of obligations and good faith whose philosophical justification we discussed in Chapter 4. In principle, Bulgarian law enforces social justice regarding parties performing in good faith (not delaying performance, for instance).²² In other decisions, the SCC has explicitly expressed its concern about the underlying principles of Bulgarian law. For instance, in Ruling 763/2013 on com.c.1106/2012 it rejected the appeal for cassation by stressing: 'Accepting the appellant's thesis and excluding the application of article 266, para 2 would violate the principle of the equivalence of obligations as well as the principles of justice and good faith...A party cannot enrich itself at the expense of the other party...' These decisions provide ample illustration of the divergent values of Bulgarian and English law—if faced with a fixed price contract which does not itself provide mechanisms for price modification, it is likely that an English court would conclude that risk is expressly distributed, as evidenced by *Davis Contractors*.

Returning to *Davis Contractors*, it is certain that the appellants would be able to receive compensation for the increase of the price of labor and materials upon application of article 266, para 2. The key issue is whether they would be able to recover the additional costs incurred up to the 8th month (the deadline stipulated in their contract) or up to the 22nd month (when they completed the project). As noted in the case, the project was partly delayed because of a long period of frost—an unavoidable event which may amount to 'insurmountable force' and excuse part of the delay.²³ Furthermore, a recent case suggests that Fareham UDC could also be found at fault for part of the delay and be ordered to make further payment with an interest.

SCC's Decision 1/2013 on com.c.921/2011 concerns an agreement for construction between a company and a local municipality at a fixed price supposed to be paid in tranches. The company had delayed performance because of increased costs and the municipality withheld its last tranche to enforce a liquidated damages clause. While the lower courts had stipulated that the clause was enforceable, the SCC quashed their decision because it violates article 266, para 2. Since the price of materials and labor

²² As discussed in §3.4.1.2, delay prevents a party from benefiting from the protection of the rules on impossibility.

²³ For the conditions of application of the 'insurmountable force,' see §3.4.1.3.1.

had increased, the municipality owed the company an additional payment, which it did not make, so it caused itself the delay. Not only the liquidated damages were unenforceable, but also the municipality was ordered to pay the last tranche with interest.

The aforementioned case suggests that on the grounds of article 266, para 2 Davis could either demand their additional costs after the completion of construction *or* amidst construction when their expenses soared. As article 266, para 2 does not stipulate a threshold of change, it seems that it has a larger scope than article 307, which has more stringent criteria of application, such as a formal petition in court, unforeseeability and a significant contractual imbalance, as discussed in Chapter 3.

5.2.3 Agreed Damages Clauses

A third example, which illustrates Bulgarian and English judges' different roles regarding agreements, is the approach to agreed damages. Depending on whether the transaction is merchant or non-merchant (civil),²⁴ Bulgarian law enforces different rules. Article 92 (LOC) states:

Liquidated damages²⁵ shall secure the performance of the obligation and shall serve as compensation for damages caused by non-performance, which need not be proven. The promisee may claim compensation for greater losses as well. Where the liquidated damages are excessive as compared with the damage sustained or the obligation had been performed improperly or only in part, the court may decree to reduce the amount of such damages.

For non-merchant transactions, the law authorizes either party to subsequently petition the courts to *modify* the clause (scale up or down) although parties have explicitly

²⁴ The notions of 'merchant' and 'merchant transaction' do not overlap. See footnote 14 (Chapter 2).

²⁵ Unlike English or French law, Bulgarian law has not embraced the term 'penalty clause.' As explained below, Bulgarian law distinguishes between liquidated damages and exorbitant liquidated damages, implying that the latter are against good morals; For an explanation of the English and French concept of penalty, see Lucinda Miller, 'Penalty Clauses in England and France: A Comparative Study' (2004) 53 ICLQ 80.

agreed on the amount of the liquidated damages when entering the agreement. By contrast, article 309 (LC), which is applicable to merchant transactions only, stipulates:

The liquidated damages due under a merchant transaction concluded between merchants may not be reduced on grounds of excessive amounts.

The provision allows judges to *scale up* liquidated damages when the promisee of the obligation has experienced greater loss due to non-performance by the promisor, but *not to scale them* down on the grounds that they significantly surpass the loss.

Article 309 is an example of poor legislative drafting contrary to the spirit of Bulgarian law as it violates the principle of equivalence of performance explained in §4.3.2.2.1. Its enactment is the result of an attempt to remedy a prior *faux pas* in the legislative frenzy of the 1990s discussed in §2.3.1.3. Article 92 cited above was part of the original 1950 LOC. However, by an amendment in 1993 Bulgarian legislators *forbade any judicial revision* of agreed damages clauses—a decision possibly taken because of ill-conceived notions about freedom of contract and market activity. Thus it is not surprising that scholars criticized this step.²⁶ In 1996, legislators attempted to fix the *faux pas* by restoring the original version of article 92 (LOC) and by introducing article 309 regulating agreed damages clauses in merchant transactions between merchants in the LC. This approach must have seemed appropriate in light of the progressive restoration of Bulgarian private law’s dualism we discussed in §2.2.2.

This background is important to emphasize the extent of judicial activism regarding the defense of key principles of Bulgarian law and the control of contractual terms. Following the enactment of the article, many courts began striking out agreed damages clauses in merchant contracts on the grounds of violation of ‘good morals’ whose origin we discussed in §4.3.2.2.1. This approach was commended by Bulgarian doctrine²⁷ and encouraged by the SCC. In Decision 530/2008 on com.c.242/2008, the SCC asserted:

²⁶ For example, Popov called the 1993 amendment ‘improper’ not only ‘because the legislation of France and Germany as well as the 1892 LOC allow the reduction of liquidated damages in certain circumstances, but also because such interdiction contradicts the principle of justice and puts non-merchants in a disadvantageous position,’ see Petko Popov’s commentaries in Aleksander Kozhuharov, *The Law of Obligations: General Part* (Jurispres 2002) 402.

²⁷ Takoff, for instance, deemed the phenomenon a moral reaction to the excessively rigorous rule. See Christian Takoff, ‘On the Question of the Reduction of Liquidated Damages’ in *Collection of Essays in Honor of Professor Zhivko Stalev* (Sibi 2005) 391-446.

Some court practice suggests that agreed damages clauses can be declared void when they are against good morals due to the absence of imperative legal norms which limit contractual freedom in determining the amount of damages. Undermining good morals is present when there is a violation of a legal principle, which may not be explicitly defined by the law, but whose observance is guaranteed through the creation of other provisions part of the legislation in force. An agreed damages clause may be void as it violates the principle of fairness in cases when, after its enforcement, it leads to lack of equivalence of the reciprocal obligations in a contract...The legislator has in mind the violation of principles that are important to society...and not to the individual interest of a concrete subject of law...The question whether such a clause goes beyond what is ethically acceptable should be evaluated in the concrete case.

It is interesting to observe the judicial reasoning in overcoming the logical difficulty of refusing to apply an explicitly stated rule in the LC: the court opposes the rule to the fundamental principles of law that are embedded in legislation to justify an exception to the principle. Nonetheless, it does not set forth criteria that judges should use to apply this exception and leaves the door open to interpretation and judicial discretion by emphasizing that what is ethically acceptable should be evaluated in the concrete case. Judicial discretion was further encouraged by Decision on interpretation 1/2010 we discussed in §4.3.2.2.1. While the SCC enumerates criteria²⁸ that can be used to determine if liquidated damages are excessive, it also specifies that courts may use ‘other criteria based on the facts and concrete circumstances in every case.’²⁹ In that regard, we discuss the role of fundamental principles for interpretation of EU harmonization instruments in §6.5.2.

Although we will see below that English judges may strike out excessive agreed damages in certain instances, what is interesting about the aforementioned cases is the

²⁸ Examining whether performance has been secured through other means such as a mortgage, the correlation between expected loss and the agreed damages, etc.

²⁹ It should be noted that some judges dissented arguing that the decision opens the door to subjectivism and violates an explicit rule in the LC.

fact that the SCC encourages courts to ignore legislation under the guise of the *legislator's real intent* to enforce control of contractual terms. SCC's activism goes beyond what is tolerable in the UK as English judges cannot strike down or ignore statutory instruments.³⁰ Moreover, as mentioned in §2.3.1.3, the Motivation of the Bill Amending and Supplementing the Law on Commerce of 1996, which introduced hundreds of changes in the law, was just five pages long, so it is difficult to ascertain from the context what the precise intent was regarding article 309. Had legislators intended for judges to scale down clauses, they would not have created two separate rules for merchant and non-merchant transactions. Moreover, by relying on 'good morals' which void agreements, the SCC has endorsed an all-or-nothing attitude which, in a sense, contradicts the spirit of Bulgarian law to restore equivalence by modifying contract.

Unlike Bulgarian law, English law does not have two separate rules for agreed damages clauses. The common law enforces payment clauses when they operate as liquidated damages clauses, but does not give effect to them when they function as penalty clauses.³¹ To distinguish between the two, courts traditionally examine whether the compensation stipulated in the contract is a genuine pre-estimate of loss at the time of entry—one of the tests developed in *Dunlop Pneumatic Tyre*.³² This rule, however, has been criticized from the perspective of promissory theory, the dominant theory of contract in the common law world discussed in Chapter 4. It has been contended that promissory logic would 'require the promise to be kept and for the courts to enforce it if it is not.'³³ Indeed, in *Cavendish Square Holding BV v Talal El Makdessi, ParkingEye Limited v Beavis*, the UK Supreme Court (UKSC) emphasized that '[the] penalty rule is an interference with freedom of contract'³⁴ and that it is 'based on public policy.'³⁵

³⁰ The Bulgarian Constitution grants only the Constitutional Court the power to strike out legislation.

³¹ A rare exception is *Jobson v Johnson* [1989] 1 WRL 1026 in which the clause was scaled down to reflect actual loss. Under Bulgarian law, the result would have been similar pursuant to article 92 (LOC).

³² [1914-15] All ER Rep 739, 741-742.

³³ Prince Saprai, 'The Penalties Rule and the Promise Theory of Contract' (2013) 26 CJLJ 443, 444.

³⁴ [2015] UKSC 67 [33].

³⁵ *ibid* [243].

Perhaps this is why the UKSC stated that the ‘categorization’ between a ‘penalty’ and a ‘genuine pre-estimate of loss’ was ‘artificial.’³⁶ It asserted that ‘[the] real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss.’³⁷ It put forward a broader test than *Dunlop*—‘whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.’³⁸ Essentially, one should, firstly, examine how the relevant obligation is ‘framed’ in the contract—as ‘a conditional primary obligation’ or as ‘a secondary obligation providing a contractual alternative to damages at law.’³⁹ Then, in case the obligation is secondary, one should see if it is ‘extravagant, exorbitant or unconscionable.’⁴⁰

From a comparative perspective, it is also crucial to note that the UKSC:

- 1) stressed that ‘...the courts do not review the fairness of men’s bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party’s primary obligations, not the primary obligations themselves.’⁴¹
- 2) declared that the circumstances in which the contract was made could also be relevant—notably, in a ‘contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.’⁴²

Bulgarian law, nonetheless, is concerned about the substantive fairness of the clause at the time the innocent party seeks to enforce it—the ultimate question is whether the compensation corresponds to the *actual loss* suffered by the aggrieved party. The court aims at protecting ‘good morals’ and preventing unjust enrichment. In its Decision on interpretation 1/2010, the SCC emphasized that ‘the excessiveness of liquidated damages is established with regard *to the moment of non-performance* and considering

³⁶ *ibid* [31].

³⁷ *ibid*.

³⁸ *ibid* [32].

³⁹ *ibid* [14].

⁴⁰ *ibid* [152].

⁴¹ *ibid* [13].

⁴² *ibid* [35].

the damages actually suffered.’ This position should be distinguished both from the reasoning in *Dunlop* and UKSC’s recent judgment cited above.

In *Dunlop*, Lord Dunedin emphasized that ‘the question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as *at the time of the making of the contract*, not as at the time of the breach.’⁴³ As noted above, in UKSC’s judgment, it was asserted that the obligation in question should be characterized as primary or secondary based on the contract’s terms. Essentially, the English and Bulgarian approach to characterizing a clause as penal provides further illustration of the different values of the two jurisdictions discussed in Chapter 4: while in Bulgaria the unjust factor troubling judges is the lack of equivalence of performance, in England injustice arises from violating the agreement’s terms and jeopardizing the performance interest of the innocent party.

A further important difference between England and Bulgaria stems from the fact that Bulgarian courts do not consider the equality of bargaining power or the circumstances in which the agreement was concluded unless there are grounds for vitiation. Bulgarian judges would characterize the transaction as merchant (they can strike out the clause if it is excessive) or non-merchant (they can modify the clause) but they would not be influenced by the access of parties to legal counsel, for instance. In that regard, it should be noted that even prior to UKSC’s long-awaited judgment, English courts had started relying on a contextual approach: they refrained from blindly following the rule on genuine pre-estimate of loss and limited its scope of application.⁴⁴

For example, in *Steria Ltd v Sigma Wireless Communications Ltd*, one of the arguments which Judge Davies gave to explain his refusal to strike out a clause as penal was that the contract was ‘commercial’ and ‘entered into between two substantial and experienced companies with knowledge of the difficulties which can occur where after the event one party seeks to recover general damages from the other for delay.’⁴⁵ In *Azimut-Benetti v Healey*, the court upheld a payment clause because the parties had

⁴³ [1914-15] All ER Rep 739, 741-742; As noted above, UKSC’s judgment demands that the obligation be characterized as primary or secondary based on the contract.

⁴⁴ In §5.3 we explain that this approach can be further rationalized with the evolution of the principles of construction.

⁴⁵ [2007] EWHC 3454 (TCC), 118 ConLR 177 [106].

‘expert representation in the conclusion of the contract’ and the ‘terms were freely entered into.’⁴⁶

Essentially, Bulgaria and England may characterize the same facts differently. Under Bulgarian law, it is possible to have a non-merchant transaction between merchants if one of them does not operate in its usual sphere of activity. In the *Azimut* case, for example, Azimut (a constructor of yachts) and Shoreacres (an SPV solely owned by Mr. Healey) had entered into an agreement for the construction and sale of a superyacht. Azimut demanded the enforcement of the agreed damages clause after Shoreacres failed to pay the first instalment. If Shoreacres’ purpose to buy the yacht did not involve plans to use it to make profit (resale it, organize cruises for money, etc.), then under Bulgarian law, the transaction would be non-merchant and the agreed damages could be scaled down pursuant to article 92 (LOC).

Finally, a further key difference between English and Bulgarian law is that Bulgarian law allows judges to *scale up* agreed damages clauses in both merchant and non-merchant transactions. By contrast, in some common law decisions agreed damages clauses have been taken as evidence of explicit risk distribution—hence as a limitation on recoverable damages.⁴⁷ These differences once again can be rationalized with the common law’s tendency to prioritize freedom of contract. By contrast, if faced with a dilemma on whether to prioritize freedom or equivalence, many Bulgarian judges may opt to promote equivalence in line with the organic framework of Bulgarian law we discuss in §5.4. Furthermore, limiting recoverable damages by relying on an estimate in a liquidated damages clause cannot be accommodated within the Bulgarian approach to non-performance—the aggrieved party may demand specific performance, damages or performance by a third party or a combination of these remedies.

5.3 The Judge and the Parties’ Will

The previous section provided examples illustrating that economic onerosity and frustration are not exceptions, but illustrations of the acceptable level of judicial discretion regarding the agreement’s contents in the two jurisdictions. This section pays

⁴⁶ [2010] EWHC 2234 (Comm), 132 ConLR 113, 126.

⁴⁷ See the discussion in Miller, ‘Penalty Clauses’ (n 25) 82-85.

attention to a fundamental issue which may, in certain cases, result in subtle contract modification—interpreting agreements. Moreover, contractual construction has important practical implications for determining the degree of foreseeability and the consequences of supervening events.

As discussed in §3.4.2, in evaluating foreseeability, English judges examine primarily what parties agreed upon in the agreement, whether the risk of the supervening event was explicitly assumed by any party, and whether the consequences of the supervening event had been determined in the contract. Nevertheless, we also saw that Bulgarian judges evaluate foreseeability predominantly based on an objective standard of care—care of good husband/merchant depending on the type of the agreement. We underlined that parties cannot exclude the operation of economic onerosity because article 307 gives them the right to a claim in court. They may, however, agree on the consequences of economic onerosity—termination or modification—in their agreement.

Chapter 4 proposed an explanation for the divergences between English and Bulgarian law based on the contractual values of the two jurisdictions—while in England judges are primarily committed to the enforcement of freedom of contract, commercial sensibility and legal certainty, in Bulgaria freedom of contract is significantly restrained by the principles of fairness and good faith.

This section examines if the different approach towards establishing foreseeability in the two jurisdictions can be further explained with the dissimilar rules of contractual interpretation in England and Bulgaria. It is also important to analyze if English judges may achieve similar outcomes to economic onerosity by relying on the rules of construction. If they may not, this is evidence that economic onerosity does not have a functional equivalent *at all* in English law—a further indication of the divergences of values between the two jurisdictions.

5.3.1 The ‘How’ and ‘When’ of Interpretation

Interpretation has been defined as ‘the process of determining the meaning of a contractual agreement—of determining...what it is that contractual parties have in fact

agreed or promised to do.’⁴⁸ Bulgarian and English judges use dissimilar tools to establish what the parties have agreed on and engage in interpretation at different times.

5.3.1.1 Mandatory Rules v Guidelines

From a continental perspective, it may be striking that the current LOC contains just one provision on contractual interpretation.⁴⁹ Article 20 (LOC) stipulates:

In interpreting contracts, the real common will of the parties shall be sought. Individual provisions shall be interpreted in their interconnection and each of them shall be understood in the context of the overall contract by considering the purpose of the contract, usage, and good faith.

This article, nonetheless, is mandatory. It enumerates the precise interpretative tools that should be used and puts them on par with one another. By contrast, English law provides judges with guidelines rather than mandatory rules⁵⁰—an approach which leaves courts a margin to choose which principle they would favor in a given case. While at first glance English judges appear to have more flexibility, we will see that both approaches permit judicial activism within limits.

Furthermore, article 20 clearly indicates that Bulgarian judges should apply a contextual approach—they must establish the parties’ *real common will* by considering the context and purpose of the contract, the interconnection between its articles, usage, and good faith. It should be emphasized that since the creation of Bulgarian civil law, Bulgarian legislators and scholars have adhered to the subjective theory of interpretation requiring the establishment of the true intention of the parties rather than

⁴⁸ Stephen Smith, *Contract Theory* (OUP 2004) 271.

⁴⁹ The first LOC contained 9 articles on contract interpretation, which were translations of articles 1131 to 1139 of the 1865 *Codice civile*, which in turn copied provisions 1156 to 1164 of the *Code civil*. The 1942 *Codice civile*, whose Book IV on obligations largely inspired the current LOC, contains 10 provisions—articles 1362 to 1371.

⁵⁰ McMeel asserts that ‘many judges have cautioned against too lavish an adherence to any supposed rule of construction,’ Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (OUP 2007) 21; For instance, in *Hollier v Rambler Motors* [1971] 2QB 71, 80, Lord Salmon contends that ‘rules of construction are merely our guides and not our masters.’ In *Investors Compensation Scheme* [1998] 1 All ER 98, 114, Lord Hoffmann also refers to his restatement of the law on interpretation as ‘principles.’

the objective theory which calls for literal interpretation. This approach to construction was borrowed from the *Code civil* via the *Codice civile* in the first LOC⁵¹ and remained in Bulgarian law. It should be noted that Bulgarian scholars have not questioned the merits of subjective interpretation. Tashev, for instance, has emphasized that Bulgarian law ‘categorically’ exhibits a preference for the subjective theory of interpretation.⁵² It is interesting that unlike in England, contract interpretation has been the subject of little academic analysis.⁵³ This phenomenon can be understood in two ways—either that Bulgarian authors do not think the issue is important, which is unlikely, or that they believe that the rules on contract interpretation are clear and do not need critical analysis.

The Bulgarian consensus on subjective interpretation is in stark contrast with the heated debate in the common law world. Essentially, common law doctrine distinguishes two schools of interpretation—the literalist and the purposive school. The literalist school (traditional approach) endorses the literal interpretation of contract. It seeks to identify the objective intention of the parties, abides by the ordinary meaning of language, and admits extrinsic evidence only in cases of ambiguity.⁵⁴ The purposive school, however, seeks to identify the meaning that the contract would convey to a reasonable person, prefers a common sense approach to the meaning of language, and does not recognize ambiguity as a precondition for the use of extrinsic evidence.⁵⁵ Whereas McMeel emphasizes that the differences between the two approaches are largely differences of emphasis,⁵⁶ Collins characterizes the opposition between the two schools as a ‘fissure of legal reasoning.’⁵⁷ We will see below that despite the different methodology of the two approaches, they share one crucial similarity—they enforce the same concept of contractual intention. We will also see that the Bulgarian concept of contractual

⁵¹ See footnote 49.

⁵² Rosen Tashev, *Theory of Interpretation* (Sibi 2001) 107.

⁵³ Few authors have written on this issue. In his monograph *Theory on Interpretation*, Rosen Tashev dedicates just four pages to contractual interpretation, Tashev (n 52) 104-107. Some textbooks on contract law, notably Kozhuharov’s and Kalaidjiev’s, also contain short commentaries. See Kozhuharov (n 26) 111-114; Angel Kalaidjiev, *The Law of Obligations: General Part* (5th edn, Sibi 2010) 102-106.

⁵⁴ Gerard McMeel, ‘The Principles and Policies of Contractual Construction’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009) 39.

⁵⁵ *ibid* 40-41.

⁵⁶ *ibid* 39.

⁵⁷ Hugh Collins, ‘Introduction: The Research Agenda of Implicit Dimensions of Contract’ in David Campbell and others (eds), *Implicit Dimensions of Contract* (Hart 2003) 7.

intention significantly differs from the English one—that is why Bulgarian judges engage in interpretation in different instances and use dissimilar tools to determine it.

5.3.1.2 Evolving Methods of Interpretation

In both England and Bulgaria, the approach to contract interpretation has palpably evolved. In Bulgaria, the communist LOC deviated from the first LOC by changing the method of determining the contractual intention and by introducing the principle of good faith as a tool of interpretation. In England, courts have progressed from the literal approach to the contextual approach to construction. We will see, nonetheless, that despite this significant change, their approach to determining the contractual intention has remained unaltered.

5.3.1.2.1 *The Bulgarian Approach*

Although there is no debate on the issue in Bulgaria, the drafters of the current LOC made several important modifications with respect to the first LOC. Article 36 of the first LOC (verbatim copy of article 1156 of the *Code civil*) obliged the court to look for the *common intention* of the parties.⁵⁸ By contrast, as noted above, article 20 of the current LOC obliges the court to seek the parties' *real common will*. Furthermore, the articles on contractual interpretation of the first LOC, which were verbatim copies of the relevant provisions in the *Code civil*,⁵⁹ do not oblige the judge to interpret the contract in good faith. However, as visible from article 20, modern Bulgarian judges are supposed to interpret the contract in good faith.

This evolution in Bulgaria took place due to German and Italian influence. As noted in §4.3.2.2, while the first LOC was heavily inspired by the *Code civil*, Bulgarian scholarship often relied on Germanic theory to interpret it. Hence, while French doctrine defines contract as an *accord de volonté* (meeting of the wills), Bulgarian doctrine from the pre-communist period defines contract as a bilateral (or a

⁵⁸ Art. 1156 (*Code civil*): 'One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms.'

⁵⁹ See footnote 49.

multilateral) *declaration of will*. This definition remained undisputed both during communism and in the current period. It seems that it has also influenced the wording of article 20. Moreover, the requirement to interpret the agreement in good faith seems borrowed either from article 1366 of the 1942 *Codice civile*⁶⁰ or from Section 157 of the first BGB.⁶¹

The shift in emphasis in the current LOC has important practical implications. Obliging the judge to establish the *real common will* rather than the *common intention* implies looking for outward signs rather than inward signs—determine what the intention expressed in the contract is rather than ascertain the subjective, inner intention of the parties, which might not necessarily be expressed in the agreement. Valcke, for instance, asserts:

*At French law the contractual intention is the parties' very own. It is the "actual", "private", "internal" intention of the contracting individuals...not that intention as interpreted by others or reconstructed by law. French jurists have long considered that the subjective conception of contractual intention follows logically from the moral ideal of the individual as self-governing agent, which they in turn view as the conceptual building block of their entire law of obligations.*⁶²

Essentially, Bulgarian law has taken a major turn from French law—it still regards parties' intention as their own and internal, but it is concerned about its *outward expression* in the agreement. That is why the focus is on the purpose of the contract and the interconnection between its clauses. Unlike English judges, they may examine surrounding evidence, including records of pre-contractual negotiations, witness statements and subsequent conduct.⁶³ They do so to understand the meaning of the clauses in the agreement, but they cannot substitute unambiguous language with prior arrangements.

⁶⁰ 'The contract shall be interpreted in good faith.'

⁶¹ 'Contracts are to be interpreted as required by good faith, taking customary practice into consideration'; It is probable that the Italian provision was inspired by the German one.

⁶² Catherine Valcke, 'On Comparing French and English Contract Law: Insights from Social Contract Theory' (2009) IV JCL 69, 72.

⁶³ Kalaidjiev (n 53) 103.

Furthermore, the requirement to interpret in good faith allows judges to ‘moralize’ the parties’ will. Kozhuharov explains that interpretation in good faith means that ‘contracts should be interpreted vis-à-vis the likely common intention of two contractors acting in good faith.’⁶⁴ As discussed in §4.3.2.3, good faith is an elusive notion which entails the enforcement of both commutative and distributive justice. Thus Bulgarian judges have to put themselves in the shoes of parties with moral standards and consideration for their community. Moreover, as seen from article 20, judges should also consider usage. Doctrine contends that the party relying on usage should prove the existence of commercial custom in court.⁶⁵ To prove usage, the party may present oral or written evidence, and if usage is demonstrated, it is treated as an implied condition.⁶⁶

The Bulgarian rules on contractual interpretation shed further light on the Bulgarian approach to determining foreseeability explained in §3.4.2. As noted above, the context and the interconnections between its articles, usage and good faith have equal weight in determining the contractual intention. While the judge would seek the parties’ real common will, he will also ‘moralize’ it *in parallel* to enforce good faith. This feature provides more clarity regarding why in the cases we examined in Chapter 3, Bulgarian judges established foreseeability primarily from the perspective of good faith rather than from the agreement’s content. The lease cases discussed in §3.5.2 did not contain hardship clauses—one of them contained an early termination clause against damages. While the decisions do not mention article 20, it is likely that the judges put themselves in the shoes of parties acting in good faith to conclude that the future existence of an imbalanced agreement could not be contemplated by parties acting in good faith.

5.3.1.2.2 *The English Approach*

In England, the approach to interpretation has also evolved, as evidenced by Lord Hoffmann’s restatement of the principles of construction in *Investors Compensation*

⁶⁴ Kozhuharov (n 26) 114.

⁶⁵ Vitali Tadjer, *Civil Law of People’s Republic of Bulgaria: General Part. Section 2* (Sofia 1973) 233.

⁶⁶ Vitali Tadjer, *Civil Law of People’s Republic of Bulgaria: General Part. Section 1* (Sofia 1972) 76-77.

Scheme.⁶⁷ Lord Hoffmann emphasizes that a ‘fundamental change’ has taken place in this branch of law and that ‘[almost] all the old intellectual baggage of ‘legal’ interpretation has been discarded.’⁶⁸ In the said decision, he defines interpretation as ‘the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.’⁶⁹ Hoffmann’s approach, nonetheless, excludes reference to prior negotiations and, by extension, to subsequent conduct, which commentators and judges have identified as an unnecessary restriction.⁷⁰ We saw above that such evidence is permissible under Bulgarian law because it helps establish the parties’ real common will.

Scholars have observed that while Lord Hoffmann claims to have consolidated principles that were already stated by Lord Wilberforce⁷¹ in *Prenn v Simmonds*⁷² and *Reardon Smith Line*,⁷³ Hoffmann’s speech initiated the change in the attitude of courts and commentators.⁷⁴ However, Hoffmann has also been vehemently criticized for ignoring what the parties to an agreement actually said and imposing his view⁷⁵ and for blurring the line between construction and rectification.⁷⁶ While Bulgarian judges

⁶⁷ [1998] 1 All ER 98.

⁶⁸ *ibid* 114.

⁶⁹ *ibid*.

⁷⁰ McLauchlan argues that ‘if all the relevant background must be considered before determining the meaning of a contract, excluding the prior negotiations is unprincipled and unworkable, and the policy reasons advanced in support of the exclusion are unconvincing,’ David McLauchlan, ‘Contract Interpretation: What is It about?’ (2009) 31 SLR 5, 8-9; Writing extra-judicially, Lord Bingham of Cornhill emphasized that Scottish courts have favored examining subsequent conduct of parties since the 19th century, Lord Bingham of Cornhill, ‘A New Thing under the Sun? The Interpretation of Contract and the *ICS* Decision’ (2008) 12 Edin.L.R 375, 390.

⁷¹ [1998] 1 All ER 98, 114.

⁷² [1971] 3 All ER 237.

⁷³ [1976] 3 All ER 570; At 574 Lord Wilberforce explains: ‘No contract is made in a vacuum: there is always a setting in which they are to be placed. The nature of what is legitimate to have regard to is usually described as ‘the surrounding circumstances’ but this phrase is imprecise. In a commercial contract, it is certainly right that the court should know the commercial purpose of the contract, and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.’

⁷⁴ McLauchlan explains that the principles defined by Hoffmann are ‘widely applied by the courts and accepted by academic commentators,’ McLauchlan (n 70) 6.

⁷⁵ Richard Calnan, ‘Construction of Commercial Contracts: A Practitioner’s Perspective’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009) 18.

⁷⁶ *ibid* 19; Burrows, however, does not argue that the two concepts have been confused, but emphasizes that ‘some cases that would previously have required rectification can now, under the contextual approach to construction, be satisfactorily dealt with by construction,’ Burrows

moralize the parties' intentions, they cannot ignore what the contract said unless it is ambiguous, as explained below. On the other hand, the latter issue—blurring the line between interpretation and rectification—seems unavoidable when one applies a contextual approach. Continental scholars, for instance, have argued that even 'the boundary between interpretation and revision [modification] cannot be drawn with any great degree of precision.'⁷⁷

Essentially, Hoffmann's speech enunciates an important transition from literal to contextual interpretation of agreements. At first glance, it seems that this transition brought the English approach closer to the Bulgarian approach. Nonetheless, there are a few important differences. Firstly, Bulgarian judges are supposed to engage in interpretation only if the meaning of a particular clause is ambiguous. Bulgarian doctrine insists that there be no place for contractual interpretation when the parties have unambiguously and clearly expressed their will.⁷⁸ Kozhuharov contends that modifying the contract under the pretext of interpretation is strictly forbidden. The SCC has also endorsed this approach. In Decision 81/2009 on com.c.761/2008, it declared: 'Only unclear contractual provisions on whose meaning parties disagree may be subject to interpretation by the courts. The courts should consider the parties' will as expressed in their contract and not their presumed will and they cannot change [the agreement's] content.' In Ruling 3/2013 on com.c.19/2013, the SCC reaffirmed: 'The will of the parties was not supposed to be interpreted by the courts in application of article 20 (LOC) because it was clearly expressed in the contract.'

By contrast, following the evolution of the rules of construction in England, it has been noted that the 'literal meaning may be overridden, although there is no ambiguity, because the background makes clear that the parties have used the wrong words or syntax.'⁷⁹ Moreover, English courts dispose of flexibility of construction if the results to which a certain construction leads are unreasonable. For instance, in *Lancashire County Council*, Simon Brown LJ concluded: 'The principles governing the

(n 10) 90; For instance, in *Chartbrook* [2009] 3 WLR 267, the HL corrected a mistake in the contract through construing the contract.

⁷⁷ Pierre Legrand, 'Judicial Revision of Contracts in French Law: A Case-Study' (1988) 62 Tul.L.Rev 963, 968.

⁷⁸ Kozhuharov (n 26) 112; The approach of French law is similar. Legrand explains: 'Interpretation of a contract refers to the process whereby a court seeks to give effect to the parties' intention on a particular issue. A court engages in this exercise when the parties' intention is absent from or is inadequately expressed in the contract,' Legrand (n 77) 967.

⁷⁹ Burrows (n 10) 81.

construction of commercial contracts are not in doubt: the more unreasonable the result of a given construction, the readier should the court be to adopt some less obvious construction of the words.⁸⁰ In that light, it has been asserted that the new approach to construing agreements in England can be dismissed as a ‘smokescreen’ which ‘sanctions judicial activism in the commercial sphere by allowing reasonable outcomes to be imposed on the parties.’⁸¹ By contrast, while Bulgarian judges moralize the contractual intention, they may only do so when the words are ambiguous or the real common will is unclear—not when a particular clause leads to unacceptable results. Bulgarian judges would address unfair outcomes by applying doctrines like ‘good morals’ which we discussed in §4.3.2.2.

Secondly, it has been contended that whereas English courts have relaxed their approach to construction, English law continues to ‘reject the parties’ joint (subjective) intent—their “real” intent, as opposed to that of a reasonable person—as an interpretive criterion.’⁸² Doctrine has characterized the objective criterion used by English judges as the main conceptual difference between the methods that English and continental courts use in interpretation.⁸³ It has also been emphasized that in English law ‘objective intention presents itself as a normatively neutral, factual notion: it is the intention which can be attributed to two actual individuals.’⁸⁴ Yet, it has been asserted that ‘[at] the same time, it stands for the reasonable, not the actual, intention of these (actual) individuals, which qualifier opens the way for a substantial infusion of normativity.’⁸⁵ In that light, as explained above, while the Bulgarian approach also permits infusion of normativity through the principle of good faith (unlike French law), good faith is an interpretative tool on par with several others in establishing the real common will of

⁸⁰ [1996] 3 All ER 545, 552; Similarly, in *Barclays Bank plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248 [26], it was declared: ‘If a clause is capable of two meanings... it is quite possible that neither meaning will flout common sense. In such circumstances, it is much more appropriate to adopt the more, rather than the less, commercial construction.’

⁸¹ Catherine Mitchell, ‘Obligations in Commercial Contracts: A Matter of Law or Interpretation?’ (2012) 65 CLP 455, 474.

⁸² Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi tr, PUP 2005) 320.

⁸³ Vogenauer underscores that ‘the sharp distinction between “objective” and “subjective approaches” that is often said to exist [between the common law and civilian systems] refers rather to fundamental values, ideologies and perceptions as to what constitutes a contract than to the practical results reached in comparative situations,’ Vogenauer (n 12) 150.

⁸⁴ Valcke (n 62) 80.

⁸⁵ *ibid.*

the actual individuals, as expressed in the contract,⁸⁶ rather than the common will of two abstract individuals construed from the transaction's context.⁸⁷

Finally, it seems relevant to make several observations regarding the differences between the standard of reasonableness and the principle of good faith. As explained in §4.3.2.3, good faith is a moral standard, an idealized concept of what is acceptable in contractual relationships—it enforces idealized standards of commutative and distributive justice. The reasonable man is also an idealized concept. In *Hardy v Motor Insurers' Bureau*, for example, Pearson LJ underlined:

*Normally in legal mythology the reasonable man is an idealized average man, behaving always as the average man behaves in his good moments. The average man may have his bad moments when, for no sufficient reason, he loses his temper or suffers from panic, or when he becomes careless, or when he is stupid or biased or hasty in his judgments. The reasonable man, as normally understood, has no such bad moments.*⁸⁸

Nevertheless, writing extra-judicially, Lord Steyn has asserted that reasonableness is 'concerned with contemporary standards not of moral philosophers but of ordinary right thinking people.'⁸⁹ It has also been contended that there is a tendency to correlate reasonableness with expectations associated with good practice.⁹⁰ Hence, some authors have warned of 'the danger of paying too much attention to the needs of the commercial contracting community and perceiving the common law of contract as little more than a commodity, a product with a discernible market that must be designed to fit market needs.'⁹¹ Essentially, both reasonableness and good faith are moral standards.

⁸⁶ Kalaidjiev underscores that what an abstract, average person will understand when reading a contract is irrelevant. Courts should find the meaning which the parties *themselves* implied, Kalaidjiev (n 53) 103.

⁸⁷ DiMatteo clarifies that the 'reasonable person is construed from the background of the transaction or relationship' and that courts look to various sources in construing him, including 'the characteristics of the parties, the totality of the circumstances surrounding the formation of the contract, and evidence of pertinent custom and trade usage,' Larry DiMatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment' (1997) 48 SCLR 293, 318.

⁸⁸ [1964] 3 WLR 433, 442.

⁸⁹ Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 434.

⁹⁰ Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, OUP 2006) 135.

⁹¹ Mitchell (n 81) 474.

Nonetheless, reasonableness reflects the evolving expectations of the *contractual community* while good faith reflects the (idealized) evolving morality of *society*. In contrast to English judges who have an important role in regulating market activity through contract, Bulgarian judges are there to apply the law with a sense of social justice.

5.3.2 *Alternative Remedies for Impracticability?*

Now that we have established the important differences between the Bulgarian and English approach to contractual interpretation and determining the parties' contractual intention, we will examine if English judges may reach similar results to economic onerosity by relying on the rules of construction. §5.3.2.1 analyzes the likely English response in the absence of a force majeure/hardship clause while §5.3.2.2 explores how such clauses are construed. The latter question is particularly interesting as the practice of including force majeure/hardship clauses in agreements developed in response to the development of frustration: cases on frustration inform the drafting of force majeure/hardship clauses.⁹²

5.3.2.1 The Rules of Construction as a Remedy for Impracticability?

A well-known case in which a long-term agreement was terminated by applying the rules of construction is *Staffordshire Area Health Authority*.⁹³ It concerned an agreement for the supply of water 'at all times hereafter' to a hospital at a fixed price. The hospital and the water company had entered the agreement in 1929, but by the 1970s due to inflation the hospital authorities were paying one-twentieth of the water rate at the time. While the agreement did not contain an explicit termination clause, Lord Denning declared that it was terminable on reasonable notice. In practice, the

⁹² For instance, following *The Eugenia* we discussed in §3.4.1.3.2, 'it is now common practice to include the closure of the Suez Canal in the list of events that trigger the operation of a force majeure clause,' Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 712.

⁹³ [1978] 1 WLR 1387.

hospital and the water authority had to negotiate a new agreement following the termination. Lord Denning stressed:

*But I think that the rule of strict construction is now quite out of date. It has been supplanted by the rule that written instruments are to be construed in relation to the circumstances as they were known to or contemplated by the parties, and that even the plainest words may fall to be modified if events occur which the parties never had in mind and in which they cannot have intended the agreement to operate.*⁹⁴

He also cited Lord Wilberforce's explanation of the new approach to construction in *Reardon Smith*:

*When one speaks of the intention of the parties to the contract, one is speaking objectively—the parties cannot themselves give direct evidence of what their intention was—and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties...What the court must do must be to place itself in the same factual matrix as that in which the parties were.*⁹⁵

These citations illustrate the different legal reasoning of English and Bulgarian courts. As noted above, Bulgarian courts cannot engage in interpretation if the words expressed in the agreement are clear. If a Bulgarian court has to interpret the phrase 'at all times hereafter,' there are two possible outcomes:

- 1) to decide that it clearly expresses the parties' real will (the agreement is perpetual);
- 2) to decide that the phrase is ambiguous in which case the parties should present extrinsic proof regarding what it really means.

⁹⁴ *ibid* 1395.

⁹⁵ [1976] 1 WLR 989, 996-997.

It is inadmissible for a Bulgarian court to change the parties' real intention by construing an abstract man like the reasonable man and ignore the proof submitted by them. However, a Bulgarian court may reach a similar result to Denning's if the water company files a claim for economic onerosity because following inflation, the agreement has become imbalanced and violates the principles of equivalence of performance and good faith.⁹⁶

While it may seem that despite the different justifications of judicial intervention, the English and Bulgarian approach lead to similar results, it should be noted that the work of Lord Denning is the exception rather than the illustration of the typical reasoning of English judges.⁹⁷ In *Staffordshire* itself, Denning was criticized by Cumming-Bruce LJ: 'With all respect to Lord Denning MR, I do not find my decision on the existence of an implied term that the agreement should not continue to bind the parties on the emergence of circumstances which the parties did not then foresee.'⁹⁸ Subsequent case law also illustrates reluctance to follow Denning's reasoning. In *The Mayor and Burgesses of the London Borough of Tower Hamlets*, Kerr LJ declared: 'Our courts have no power to absolve parties from their contracts when these turn out to be less beneficial than expected...'⁹⁹ In *Watford Borough Council*,¹⁰⁰ Tudor Evans J concluded that the contractors intended to be bound in perpetuity and that the *Staffordshire* case was unhelpful because the contract in question was not at a fixed rate.

5.3.2.2 Force Majeure/Hardship Clauses

English judges traditionally encourage parties to explicitly allocate risk in their agreements. In contrast to Bulgarian practice, the inclusion of force majeure clauses, but also hardship clauses, is standard commercial practice in England. McKendrick asserts that while judges are cautious to apply the doctrine of frustration due to their concern for legal certainty and due to its drastic consequences, they honor force majeure clauses because their role is 'confined to interpreting and giving effect to

⁹⁶ See our discussion in §3.5, §4.3.2.2 and §4.3.2.3.

⁹⁷ See footnote 19 (Chapter 4).

⁹⁸ [1978] 1 WLR 1387, 1406.

⁹⁹ (CA, 14 December 1983).

¹⁰⁰ (QB, 18 December 1987).

[them].¹⁰¹ He maintains that in such a case ‘there is no danger of becoming involved in making a new contract for the parties or imposing an outcome irrespective of their wishes.’¹⁰²

However, it has also been contended that ‘the only perfectly general statement which can safely be made about the operation of [such express provisions] is that their effect depends in each case on the words used and that it is, therefore, a matter of construction.’¹⁰³ Additionally, it has been clarified that ‘[although] evidence is scanty, it would appear that force majeure clauses properly so called are not given the strained construction previously reserved for exclusion clauses.’¹⁰⁴ Nonetheless, some authors affirm that the approach to construing such clauses is inconsistent—Valcke, for instance, observes that ‘with respect to frustration, English courts have long deployed creative interpretation arguments designed to avoid the issue altogether, while at times proving overly generous in their interpretation of force majeure clauses.’¹⁰⁵

As explained in §5.3.1, the English rules on interpretation are not mandatory, so judges have discretion regarding which principle of construction to apply. On the one hand, the success of a force majeure/hardship clause depends on the rule of construction applied by the judge. On the other, the legal reasoning of English judges is conditioned and constrained by the key values of English law. Consequently, while in principle force majeure/hardship clauses may reach similar results to the Bulgarian doctrines of ‘impossibility’ and economic onerosity,¹⁰⁶ in practice that would be rare.

To illustrate, the *Wijsmuller*¹⁰⁷ case we discussed in §3.4.1.3.2 is particularly interesting because the agreement between Wijsmuller and Lauritzen contained a force

¹⁰¹ Ewan McKendrick, ‘Force Majeure Clauses: The Gap between Doctrine and Practice’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009) 239.

¹⁰² *ibid.*

¹⁰³ Guenter Treitel, *Frustration and Force Majeure* (2nd edn, Sweet & Maxwell 2004) 478.

¹⁰⁴ William Swalding, ‘The Judicial Construction of Force Majeure Clauses’ in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd’s Press 1995) 18.

¹⁰⁵ Valcke (n 62) 85.

¹⁰⁶ For instance, in *Bremer Handelsgesellschaft* [1978] 2 Lloyd’s Rep 109, the HL excused non-performance by giving effect to a force majeure clause. The case concerned supervening illegality following US export restrictions on soya bean. It is likely that the said case would have a similar outcome in Bulgarian law by applying the doctrine of ‘insurmountable force’ mentioned in Chapter 3 even if there was no force majeure clause in the agreement. However, the ‘insurmountable force’ would just excuse delay. If illegality is temporary, the promisor needs to perform after the restrictions are levied unless the promisee has no interest.

¹⁰⁷ [1990] 1 Lloyd’s Rep 1.

majeure clause. Article 17.1 of their contract provided for cancellation in several events among which ‘perils or danger and accidents of the sea.’ Bingham LJ remarked: ‘The language of clause 17.1 is, I think, wide enough to embrace events caused by Wijismuller's negligence.’¹⁰⁸ However, he also noted: ‘But the general tenor of the clause, opening with a reference to force majeure and acts of God and including such events as acts of war, civil commotion, canal closure and harbor congestion, strongly points towards events beyond the direct or indirect control of Wijismuller.’¹⁰⁹

Essentially, while the barge's sinking did not amount to frustration, the force majeure clause would have been applicable had the event not been the result of Wijismuller's negligence.¹¹⁰ In other words, if Wijismuller had not had the power to elect, the force majeure clause would have succeeded and the result would be the same as under Bulgarian law. However, in §3.4.1.3.2 we also underscored that the power to elect would not be of importance in Bulgaria. Whether this clause was in the agreement or not, the key issue for Bulgarian courts would be why the ship sank. If Wijismuller did not cause the sinking, then with or without the clause, non-performance would be excused. If they caused the sinking and this clause was in the agreement, the result would depend on two factors:

- 1) The degree of fault: As noted in §3.4.1.1, Bulgarian law distinguishes between different types of fault. The characterization of fault is important because article 94 (LOC) explicitly forbids the exemption from liability for gross negligence.¹¹¹ Parties may limit their liability for negligence, but as noted in §4.3.2.2, such arrangements (even in a commercial agreement) would be

¹⁰⁸ *ibid* 7.

¹⁰⁹ *ibid*.

¹¹⁰ McKendrick, however, explains: ‘There is no rule of law which prohibits the inclusion of an event caused by the negligence of one of the contracting parties within a force majeure clause. But, as a matter of construction, a court is unlikely to reach the conclusion that such an event falls within the scope of a force majeure clause unless the word “negligence” or a synonym for negligence is used expressly in the clause.’ He also underlines that force majeure clauses may potentially be excluded on the basis of the UTCCR 1999. Their falling in the scope of UCTA, nonetheless, depends on various factors: whether the clauses seek to cancel the contract, whether the type of contract is excluded from the application of UCTA, etc., McKendrick, ‘Force Majeure Clauses’ (n 101) 250-51; Note the UCTCCR 1999 and the rules in UCTA on consumer agreements have become part of the CRA 2015.

¹¹¹ Article 94 (LOC): ‘Arrangements which *a priori* rule out or reduce the promisor's liability for deliberate actions or gross negligence shall be null and void.’ This provision seems inspired by Art. 1229, para 1 of the current *Codice civile*: ‘Null is any agreement which excludes or limits the liability of the debtor for willful misconduct or gross negligence.’

subjected to moral review¹¹²—judges have to establish whether they violate ‘good morals.’

- 2) The construction of the clause: If the ship did not sink due to gross negligence, Bulgarian judges have to determine whether the force majeure clause covers instances of negligence. As the clause does not explicitly mention negligence, the real will of the parties is unclear: hence judges have to interpret it using the tools explained in §5.3.1. Unless Wijsmuller provide convincing evidence that negligence is covered by the clause, it is likely that Bulgarian judges would moralize the contractual intention to conclude that parties acting in good faith cannot exclude liability for negligence especially because the clause explicitly mentions force majeure which takes place independent of parties’ actions or omissions—essentially, the reasoning will be similar to Bingham’s.

Finally, depending on how the force majeure/hardship clause is written, it is also theoretically possible for English law to reach similar results to the Bulgarian doctrine of economic onerosity. As noted in §5.3.1.2.2, English judges put themselves in the shoes of reasonable men construed from the context of the transaction. They may also, contingent on the case, impose a less obvious construction to enforce reasonable results. Thus, if the appellants in the lease disputes we discussed in §3.5.2 were to have a successful claim in an English court, they would need to rely on hardship clauses that specifically mention the precise inflationary change that would trigger the application of the clauses and the effects that the clauses should produce. If the clauses used vague language, such as ‘significant change of inflation,’ then their success would be questionable in the circumstances. In the same section, we noted that the inflation change was 6%, which can hardly be qualified as significant.

This conclusion is reinforced by *Superior Overseas Development Corporation*¹¹³ which concerned a long-term agreement for the sale of gas extracted from the North Sea. The agreement contained an explicit hardship clause allowing price adjustment in case of a ‘substantial change in the economic circumstances’ when any party feels that ‘such change is causing it to suffer substantial economic hardship.’¹¹⁴ A key issue

¹¹² By contrast, England subjects to moral review only certain terms defined in the UCTA 1977 and the UTCCR 1999. Note the latter and the rules in UCTA on consumer agreements have now become part of the CRA 2015.

¹¹³ [1982] 1 Lloyd’s Rep 262.

¹¹⁴ *ibid* 264.

confronted by the court was what ‘substantial’ meant in the circumstances because the clause mixed objective hardship (substantial change in circumstances) with subjective hardship (a party should feel that the change is causing substantial hardship). While the hardship clause succeeded, the case indicates the importance of the use of non-ambiguous language.¹¹⁵ Also, it should be noted that the clause provided for price modification by experts. In Bulgaria, nonetheless, in case of economic onerosity, the aggrieved party *unilaterally* specifies the remedy’s type (modification/termination) and extent (in case of modification it specifies what changes should be made in the contract). The latter would be inadmissible in English law because there is no agreement between the parties and freedom of contract is compromised.

5.4 The Judge, the Contract and the Social Contract

§5.3 demonstrated that in certain instances English law may achieve similar results to Bulgarian law’s open norms by relying on the contextual approach to construction. While English judges have larger discretion regarding interpretation than Bulgarian judges, they cannot impose constructions which the contract as written cannot tolerate—their discretion is confined by freedom of contract. Bulgarian judges, however, can interpret the contract only when it is unclear. Nonetheless, they may strike out or modify terms if they violate key principles like fairness and good faith, without having to reconcile their choice with freedom to contract.

This section explores if the dissimilar degrees and nature of judicial discretion in the two jurisdictions can be explained from the perspective of social contract theory. Valcke has recently suggested that social contract theory may be helpful in understanding the differences between French and English contract law.¹¹⁶ With some exceptions,¹¹⁷ literature on the possible, yet complex links between contract and social contract is missing. These links, however, become more visible when one compares jurisdictions, which have a different historical path of development like England and

¹¹⁵ For a commentary, see Karen Kemp, ‘Applying the Hardship Clause’ (1983) 1 *J Energy & Nat Resources L* 119.

¹¹⁶ See Valcke (n 62) 69.

¹¹⁷ Prior to Valcke, Ibbetson has argued that the Hobbesian social contract has influenced English contract by downplaying the role of consideration and by modeling contract as an ‘executory agreement,’ David John Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 216.

Bulgaria. Despite the fact that the social contract is a rational concept and not an historical event, the prominence of particular socio-philosophical ideas in a jurisdiction may provide insights regarding the function that has been attributed to contract law and the role assigned to the judge.

5.4.1 Dikov's Typology of Contracts

In the 1930s the Bulgarian jurist Lyuben Dikov,¹¹⁸ one of the most influential scholars prior to communism, published a series of articles dedicated to the relationship between contract law and social theory in prestigious journals and editions in Bulgaria, Germany, France, and Italy.¹¹⁹ As explained in §2.3.3, Dikov was one of the main proponents of allowing judges to modify or terminate extremely onerous agreements in Bulgaria. His work on impracticability in the 1920s, which I referred to in §2.3.3.2, served as a catalyst for his reappraisal of the notion of contract in the 1930s. The originality of his articles consists in bringing together two fields of knowledge—contract law and social theory—and in highlighting the usefulness of social theory in *explaining and redefining* contract. While Dikov's articles have been ignored and forgotten,¹²⁰ Dikov's redefinition of contract may prove helpful in showcasing conceptual differences between England and Bulgaria which go beyond the

¹¹⁸ Note that his names are written differently in the various languages in which he published because Bulgarian is transcribed phonetically—Lüben, Luben, Lyuben/Dikoff, Dikov, Dikow; Also, his first name is written as Lubomir in some of his Italian publications—see, for instance, 'Norma giuridica e volontà privata' (1934) 14 *Rivista internazionale di filosofia del diritto* 681. Evidence that this is the same person is the fact that Dikov explicitly identifies these articles as his in his writing, Lyuben Dikov, 'The Evolution of Contract' (1938) 33 *Annuaire de l'Université de Sofia* 437, 438; Furthermore, the Italian articles identify the author as Sofia University's Rector, which Dikov was at the time. See footnote (*) in 'Norma giuridica e volontà privata.'

¹¹⁹ 'Il Diritto civile dell'avvenire' (1931) 11 *Rivista internazionale di filosofia del diritto* 153-180; 'Norma giuridica e volontà privata' (1934) 14 *Rivista internazionale di filosofia del diritto* 681-706; 'The Evolution of Contract' (1938) 33 *Annuaire de l'Université de Sofia* 437-52, published in France as 'L'évolution de la notion de contrat' in *Etudes de droit civil à la mémoire de Henri Capitant* (Daloz 1939) 201-18; 'Die Abänderung von Verträgen den Richter' in *Hedemann-Festschrift* (Jena 1938), published in Bulgarian as 'Modification of Contracts by the Judge' in *Modification of Contracts by the Judge* (Feneya 2010) 15-31.

¹²⁰ Following 1944, there was a purge at the Law Faculty. As a prominent scholar, Dikov was sent to concentration camp, stripped off his academic honors, and his work was deemed 'Fascist.' Throughout his life he had been district judge, Dean of the Law Faculty, Rector of Sofia University, Minister of Justice. Dikov had written the first Bulgarian textbooks on merchant law. His treatises on the law of obligations and family law and his numerous articles are some of the most sophisticated examples of Bulgarian legal writing.

divergences of legal principles. Furthermore, despite scanty evidence, there are grounds to argue that Dikov's ideas directly influenced the drafting of the communist LOC.¹²¹

The scholar emphasized that concepts like will, legal norm, contract, etc. were simply 'incarnations of the leading social-philosophical systems during a given historical period.'¹²² Dikov maintained that law had a historical, a political, and a philosophical dimension,¹²³ but believed that the philosophical dimension had the strongest influence. The scholar distinguished two main types of socio-philosophical theories that explained the relationship between the individual and society—individualism and universalism. He also differentiated two subtypes of individualism—liberal and democratic. Dikov contended that each of these social systems had given rise to distinct notions of contract, private will, and legal norm.¹²⁴

Before explaining these three distinct concepts, it should be emphasized that Dikov argued that law was in transition and one could find elements of all of these concepts operating simultaneously.¹²⁵ He also believed that individualist or universalist concepts of contract had to be invoked depending on the problem at hand—the choice of concept and the timeframe of its operation depended on 'legal policy.'¹²⁶ In that light, Dikov was a proponent of a dynamic approach to legal certainty¹²⁷ (greater freedom of the

¹²¹ The scholars mentioned in §2.3.2.2 who Professor Sarafov suspects to have drafted the LOC were students and/or colleagues of Dikov; Dikov believed that the 1942 *Codice civile* was the best example of codification as it incarnated organic values. See Lyuben Dikov, 'The New Italian Civil Code' (1942) 37 *Annuaire de l'Université de Sofia* 57; Throughout this thesis, we pinpointed articles from the *Codice* which were directly transplanted to the LOC.

¹²² Dikov, 'The Evolution' (n 119) 438.

¹²³ *ibid.*

¹²⁴ *ibid* 444-47.

¹²⁵ Dikov, 'Norma giuridica' (n 119) 706; Dikov was writing in the interwar period, characterized by a clash of values and ideas of governance.

¹²⁶ Dikov, 'Modification of Contracts by the Judge' (n 119) 29; Dikov's ideas, nonetheless, evolved as he was progressing with his research. In the 1920s, he argued that *rebus sic stantibus* should be at judges' disposal at difficult times, Lyuben Dikov, *Historical and Comparative Research on Mistake in the Law of Inheritance, Clausula Rebus Sic Stantibus in Private Law and the Essence of Adjudication* (Sofia 1923); In the 1930s, he was already convinced that constructs like *rebus sic stantibus* were artificial because their starting point was an individualist concept of contract and contended that it was better for judges to approach impracticability from a universalist perspective, Dikov, 'Modification of Contracts by the Judge' (n 119); In the 1940s, however, amidst WWII, he argued that universalism was more adapted to society's needs and that individualism was outdated, Dikov, 'The New Italian Civil Code' (n 121) 57.

¹²⁷ Dikov, 'Il Diritto civile dell'avvenire' (n 119) 173.

courts) and believed that judges needed proper tools to address the issues they confronted.¹²⁸

5.4.1.1 Individualist Notions of Contract

The central element and starting point of both liberal and democratic individualism is the human being: in both frameworks society is regarded as the total sum of individuals. However, the two social-philosophical systems differ in the authority they bestow upon the State. Dikov identifies as liberal individualists representatives of the Enlightenment from the 17th and 18th century—Hobbes, Locke, Rousseau, and Kant.¹²⁹ Despite the differences in their social contract theories, all of them argue that men are born free and independent and dispose of natural rights. However, men enter into a social contract¹³⁰ and transfer *some of their rights* to the State, while preserving certain rights for themselves (what Dikov calls ‘a private sphere of activity’).¹³¹ In this framework, the State creates legal norms applicable to all individuals. Nonetheless, in their private spheres of activity, individuals make their own ‘private laws’ known as contracts, which have the force of law only for the individuals entering into them.¹³² Dikov contends that this logical consequence of the liberal individualist social contract is incarnated in *Code civil*’s article 1134.¹³³

¹²⁸ As explained in §2.3.3.1, Bulgarian jurists concurred the *Code civil*, which Bulgaria had borrowed through Italy, was outdated and inadequate.

¹²⁹ Dikov, ‘Norma giuridica’ (n 119) 684.

¹³⁰ These philosophers held different views regarding the state of nature and the reasons for entering the social contract. For Hobbes, life in the natural state was unbearable for man because it was ‘solitary, poor, nasty, brutish, and short,’ Thomas Hobbes, *Leviathan* (1651) ch XIII; For Locke, while men in the state of nature were free, equal, and independent, enjoyment of property was unsafe and unsecure, John Locke, *Second Treatise of Government* (1690) ch VIII and IX; By contrast, Rousseau believed that men in the state of nature were physically unequal and enjoyed an unlimited right to everything. However, they entered into society to gain civil liberty, proprietorship and moral equality. Rousseau argued, nonetheless, that the institutions of his time promoted moral inequality. See Jean-Jacques Rousseau, *Du contrat social* (1762) ch IV and ch IX. Also Jean-Jacques Rousseau, *Discourse Upon the Origin and the Foundation of the Inequality among Mankind* (1754); For Kant and Hobbes, individuals may be coerced in the social contract, while for Locke they enter voluntarily. See John Locke, *Second Treatise of Government* (1690) ch VIII, Immanuel Kant, ‘Theory and Practice’ (1793), Thomas Hobbes, *Leviathan* (1651) ch XII.

¹³¹ Dikov, ‘The Evolution’ (n 119) 443.

¹³² Dikov, ‘Norma giuridica’ (n 119) 685.

¹³³ ‘Agreements lawfully entered into take the place of the law for those who have made them.’

By contrast, Dikov identifies as proponents of democratic individualism authors from the early 20th century—Kelsen, del Vecchio, etc.¹³⁴ What is common between the theories of these authors is that individuals transfer *all of their rights* to the State, while in return the State allows them to act freely within limits. From this perspective, contracts between individuals cannot be equated to law. Rather, a contract is a tool for regulation of private legal relationships within the limits of freedom of contract delineated by the State through its laws. Contracts do not create law, but legal relationships giving rise to rights, which are recognized by the law.¹³⁵ While they differ significantly in their approach to the origin of contractual rights, both liberal and democratic individualism result in a natural opposition between the interests of the individual and those of society.

Although French authors have proposed to resolve this problem in the framework of liberal individualism by introducing the idea of contractual solidarity,¹³⁶ Dikov believes that solidarity only reduces, but does not eliminate the tension—solidarity simply constitutes a restriction in the name of public interest.¹³⁷ Furthermore, solidarity has found only limited application by the *Cour de cassation*.¹³⁸

5.4.1.2 A Universalist Concept of Contract

Dikov argued that the ultimate conflict between social and individual interests can be resolved through the prism of universalism—an organic theory of the relationship between the individual and society by the Austrian philosopher Othmar Spann who was inspired by German philosophical idealism. Spann was looking for an alternative to capitalism (individualism) and Marxian socialism.¹³⁹ In his frame of reference, the starting point is society rather than the individual. Individuals are perceived as cells of an organism (society). Just like cells, they cannot exist by themselves, but only make

¹³⁴ On the differences between their theories, see Dikov, ‘Norma giuridica’ (n 119) 687-97.

¹³⁵ Dikov, ‘The Evolution’ (n 119) 444.

¹³⁶ In the early 20th century, Gény, Duguit and Gounot reacted against legal positivism and advocated contractual solidarity as a mechanism to correct the inequality of bargains.

¹³⁷ Dikov, ‘The Evolution’ (n 119) 452.

¹³⁸ On the limited importance of contractual solidarity in French law, see Jean Cédras, ‘Le solidarisme contractuel en doctrine et devant la Cour de cassation’ in *Rapport 2003 de la Cour de cassation* (la Documentation française 2004) 186-204.

¹³⁹ For an introduction to his theories, see Bart Landheer, ‘Othmar Spann’s Social Theories’ (1931) 39 *J.Pol.Econ* 239.

sense as parts of the whole. From this perspective, what is good for the organism is good for every individual cell and for groups of cells and vice versa.¹⁴⁰ Moreover, there is no social contract as society precedes the individual. In contrast to communism, which denies private will and promotes equality (in the sense of sameness), in an organic framework the community's members have certain freedoms and stay united in difference.

Before explaining why Dikov thought that Spann's theory was fundamental for revolutionizing contract law, an important clarification should be made. Spann's theories were misused by the Nazis to defend their totalitarian regime and limit free will which is why universalism has a bad name in Germany. However, it has been argued that the bad reputation is not justified. Scholars have underlined the fundamental differences between Spann's theories and Nazi ideology.¹⁴¹ Spann himself suffered from the Nazi regime: following the annexation of Austria to Nazi Germany, he was imprisoned by the Nazis and was banned from teaching at the University of Vienna.¹⁴² Similarly to Bulgarian scholars during communism, academics in Fascist States at the time had to bow to the regime to avoid persecution.¹⁴³ Also, it has been emphasized that some of Spann's ideas are still 'prominent... in contemporary German political and legal culture'¹⁴⁴—an observation which equally applies to Bulgaria, as I argue in §5.4.2.2.

Dikov believed that universalism could fundamentally redefine contract. From an organic perspective, he argued, contract is a legal relationship between members of the legal community and can only exist within the legal community. Because of the dependence of all cells to one another and to the whole, contract is not isolated from the organism¹⁴⁵ (no private sphere of influence). Thus, contract is a *unity of subjective and objective will*—the will of the parties and the will of the community. The terms of

¹⁴⁰ Dikov, 'The Evolution' (n 119) 447.

¹⁴¹ Samuel Rosenberg, 'Three Concepts in Nazi Political Theory' (1937) 1 *Science & Society* 229-30; Tomas Riha, 'Spann's Universalism—The Foundation of the Neoromantic Theory of Corporative State' (1985) 31 *AJPH* 255-268.

¹⁴² For a summary of his biography, see Tamara Ehs, 'The Other Austrians' (2011) 2 *Journal of European History of Law* 16-25.

¹⁴³ This does not mean that there were not scholars who supported these regimes. However, due to fear of 'witch-hunting,' many academics had to adapt their work to pass through censorship, which has also led to subsequent, often unjust labeling of their work.

¹⁴⁴ Anthony Carty, 'Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law' (1995) 6 *EJIL* 78, 97.

¹⁴⁵ Dikov, 'The Evolution' (n 119) 446.

contract are determined not only by the parties' will, but also by the will of the legal community as expressed in legislation and the concrete requirements for good faith and mutual trust.¹⁴⁶ Dikov clarified that the limitations that laws put on freedom of contract are not true restrictions, but unavoidable consequences of the dependencies that cells have upon one another and society. These dependencies result in relative freedom of self-determination.¹⁴⁷

Dikov himself used the theory to justify judicial intervention in contracts. He argued that if the State is a party to a contract, it had to intervene when the enforcement of contract as written was harmful to the community. As the *speaker of the community*, the judge is the only figure of authority that can interfere in its name.¹⁴⁸ In this framework, notions like freedom of contract and fairness are no longer competing, but complementary. The requirement for contractual fairness is a natural consequence of the belonging of the individual units to a community, which precedes them.

5.4.2 Applying Dikov's Typology

Dikov's typology is helpful in expounding that contract law is socio-politically biased because it incarnates the State's philosophy of governance. In this subsection, I argue that the examination of the complex links between social contract theory and contract law can further elucidate why Bulgarian and English judges have acquired different roles regarding contracts and why the diverse values of contract law are perceived as complementary in Bulgarian law.

While England has had the same form of government—a constitutional monarchy—since the 17th century, Bulgaria has experienced almost the entire spectrum of political regimes in the past century and a half—it was part of an empire (until 1878), a vassal principality of an empire (1878-1908), a constitutional monarchy (1908-1932), a military dictatorship (1932-1933), a dictatorial monarchy (1933-1944), a communist State (1944-1989), and a parliamentary republic (1989-onwards). Without any major political turbulence, England has witnessed a gradual development of its contract law within the same framework—liberal individualism. By contrast, Bulgaria has changed

¹⁴⁶ *ibid* 450.

¹⁴⁷ *ibid* 446.

¹⁴⁸ Dikov, 'Modification of Contracts by the Judge' (n 119) 25-28.

frameworks several times. After the Liberation, Bulgarian legislators transplanted *Code civil*'s liberal individualist framework. With the rise of communism, nonetheless, Bulgaria switched from a liberal individualist to a purely organic framework. Following the cosmetic amendments of the LOC in the early 1990s, liberal individualist values were induced in the already operating organic framework.

5.4.2.1 The Private Sphere of the Individual in English Law

In Chapters 3 and 4 as well as in §5.2 and §5.3, I asserted that English judges have remained committed to freedom of contract and refuse to intervene in agreements to avoid making contract for the parties. This approach is in line with the main idea of liberal individualism—citizens dispose of both inalienable rights and rights they transfer to the sovereign. The rights that parties keep for themselves are sacred and, consequently, so is their freedom to enter into agreements with one another. In their inalienable ‘private spheres’—in the language of Dikov—they are free to make contracts which result in rights and duties only for them. The State’s responsibility involves the interpretation and enforcement of the rights and duties that parties have *explicitly* agreed upon. The State can neither make laws violating the citizens’ inalienable rights nor can it intervene in their private spheres unless the parties unambiguously want it to.

In the instances common law judges have combatted issues of substantive unfairness, they have relied exclusively on the ‘tools’ permitted from a liberal individualist standpoint, thus preserving English contract law’s internal consistency and focus on the individual. Traditionally, the English common law, unlike Bulgarian law, uses the will theory itself as an instrument to remedy unjust outcomes or as an excuse not to. Essentially, judicial activism is confined to molding and developing the will theory because the judge cannot enter the individuals’ private spheres of influence. As noted in §5.4.1.1, in a liberal individualist framework, the individual has transferred only *some of his rights* to the State—based on this partial transfer, the judge may intervene only for public policy reasons. However, there are boundaries that he cannot cross.

The example of frustration illustrates how careful judges are to restrain their activism within the limits imposed by English law’s liberal individualist framework. In §3.1, I

explained that in *Taylor v Caldwell*, Blackburn J grounded frustration on an *implied condition*.¹⁴⁹ In §3.2, I stressed that in *Davis Contractors* frustration was grounded on the *radical change of the promise*—Lord Radcliffe declared that a contract could be frustrated only if due to the radical changes, the party has to do something that it did not promise. In §3.4.2, I highlighted that judges establish foreseeability primarily by construing the agreement to establish if the event was *contemplated* by the parties.

Furthermore, §5.3 demonstrated that modern English law has departed from the rigidity of classical English law which strictly adhered to the literal meaning of words. Nonetheless, the individual (and his will) have remained the points of departure for analysis. The common law may, in certain cases, reach similar results to Bulgarian law by interpreting the agreement contextually and by applying the standard of reasonableness. However, judicial discretion is limited to choosing the meaning which is deemed commercially sensible in the context—judges cannot impose interpretations which the words as written in the contract cannot bear.

Other strategies, which the common law employs to achieve just outcomes, involve establishing *vitiating of the agreement*. English law has developed various principles like misrepresentation, duress, undue influence, etc. The purpose of all of them, nonetheless, is to demonstrate that the contract as written does not indicate the parties' true *will*—by intervening judges do not make contract for the parties, but enforce their rights to 'legislate' in their private sphere of influence. Even Denning's inequality of bargaining power principle mentioned in §4.3.2.1, which has not been subsequently retained, does not go beyond the limits of judicial discretion delineated by liberal individualism. Denning had emphasized: 'One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself.'¹⁵⁰ In other words, the agreement had been vitiated.¹⁵¹

The English process of private law reform also reflects the values of a liberal individualist approach to governance. The Law Commission is known to consult

¹⁴⁹ While some authors have argued that implied conditions in English law play the same role as good faith in continental jurisdictions, others have asserted that implied conditions are an objective method to 'to identify what would likely have been agreed had the matter been discussed,' Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar 2011) 29.

¹⁵⁰ *Lloyds Bank Ltd v Bundy* [1975] QB 326, 339.

¹⁵¹ *Laesio enormis* (extreme necessity) is one of the vitiating factors recognized in the LOC (articles 27 and 33).

stakeholders, businesses, and academics on its proposals and to provide detailed reports regarding its suggestions for reform. The UK Government and Parliament also issue calls for evidence on various subjects requiring the opinion of stakeholders, such as EU proposals for harmonizing legislation. In Bulgaria, by contrast, laws are written by small groups of technocrats appointed *ad hoc* by the government in power. These working groups neither consult the general public nor stakeholders. Furthermore, laws are often adopted without comprehensive discussion by parliamentarians, as explained in Chapter 2. The process is not only less complex and transparent compared to the English approach, but also distinctively prioritizes the interests of the ruling government.

Finally, as noted in §4.3, in modern times market individualism has been challenged by a rival ideology—consumer welfarism. Nonetheless, this transition to promoting fairness in certain agreements has not altered the underlying framework of English contract law. In Dikov’s language, statutory instruments like UCTA 1977 and UTCCR 1999 (both, for the most part, integrated in the CRA 2015) can be interpreted as attempts to mitigate the injustices of liberal individualism—restrictions in the name of public interest. Essentially, these acts protect the private sphere of influence of individuals who are unable to defend their inalienable rights themselves—consumers. Nonetheless, from an English perspective, fairness and freedom of contract are still perceived as rival values and the tension between them has neither been eliminated in theory nor in practice.

5.4.2.2 The Individual and Society: Two Reference Points with Equal Weight in Bulgarian Law

The radical, yet piecemeal revisions of Bulgarian law due to the drastic political changes Bulgaria experienced have resulted into a strange paradox—the coexistence of the individualist and the universalist concept elaborated by Dikov in modern Bulgarian contract law. The symbiosis of these notions has led to internal incoherence from the perspective of social contract theory. Nevertheless, it has eliminated the rivalry between the competing values of contract law by endorsing two points of departure with equal weight—the individual and society.

5.4.2.2.1 *The Transition from Liberal Individualism to ‘Organic’ Socialism*

As explained in Chapter 2, until 1950 Bulgaria had an LOC based on the 1865 *Codice civile* which was largely a replica of the *Code civil*. This LOC reflected a liberal individualist approach to contracts. Parties were free to determine the content of the agreement, which had the force of law for them.¹⁵² However, the agreement needed to have a lawful cause—not to be contrary to the law, good morals or public order.¹⁵³ When Bulgaria became a communist country, nonetheless, the 1892 LOC was abolished and a new LOC reflecting communist ideology was enacted in 1950. The communist LOC abandoned the notion that contracts have the force of law. Rather, contracts were regarded as mere tools facilitating the completion of the state economic plan.¹⁵⁴

While freedom of contract was allowed, it was limited by the State’s economic objectives and standards of moral behavior. As noted in §4.3.2.2, article 9 of the communist version of the 1950 LOC stipulated: ‘Parties are free to determine the content of their agreement as long as it does not contradict the law, the national economic plan and the rules of socialist coexistence.’ The consequence for violations of these restrictions was invalidity. Article 26, para 1 (LOC) stated: ‘Void are contracts that contradict the law or the state economic plan, contracts that circumvent the law or contracts that violate the rules of socialist coexistence...’ Moreover, state entities could be forced to enter into a contract to fulfill the state economic plan.¹⁵⁵

What looks surprising, however, is that these restrictions can be reasoned from the perspective of the universalist approach described by Dikov—what is good for the State is good for groups of individuals (socialist cooperatives and state-owned entities¹⁵⁶) and individuals themselves. Since the state economic plan is approved by the State, it is not a restriction, but a natural consequence of the fact that individuals belong to the socialist community and are building a socialist future together. Likewise, the members

¹⁵² Article 28, para 1 of the first LOC corresponds to article 1134, para 1 (*Code civil*).

¹⁵³ Article 27 of the first LOC corresponds to article 1133 (*Code civil*).

¹⁵⁴ See the 1950 version of Article 8 (LOC) in footnote 67 (Chapter 4).

¹⁵⁵ Article 11 of the communist version of the LOC; On this peculiarity of socialist law, see Stephen Szasz, ‘The Duty to Conclude a Contract in East European Law’ (1964) 13 *The International and Comparative Law Quarterly* 1470.

¹⁵⁶ The two main types of socialist economic structures.

of the community (cells) could not violate the rules of socialist coexistence because this would impact negatively the social organism.

As noted in §2.3.2.2, one of the contributions of this study was to disprove the two myths that the 1950 LOC was an original Bulgarian piece of legislation and that it was based solely on the principles of socialist law and planned economy. We indicated that while the LOC is a creative compilation, it is primarily based on Book IV (and partially Book II) of the 1942 *Codice civile*, which was drafted during the rule of Mussolini. One can only make conjectures about the reasons for the choice of *Codice civile* as a model. It should be noted that Bulgaria was the first socialist country out of the Soviet Union to modify its contract law to reflect communist values and it had no proper example to follow.¹⁵⁷ Besides, as underscored in §2.3, in the 1920s and 1930s Bulgarian jurists had become disappointed by the *Code civil* and had turned their attention to other jurisdictions which had started to deviate from the French model. They were well-acquainted with Italian law and philosophy and engaged in intellectual exchange with Italy.¹⁵⁸

Above all, however, the 1942 *Codice civile* provided for a larger degree of State control of agreements, which was also a goal of socialist law. Furthermore, compared to the *Code civil* which puts a strong emphasis on personal property by dedicating its entire second book to property and ownership, the *Codice civile* prioritizes the interests of social collectives. In that light, it has to be emphasized that it is known that Spann, whose organic theory we discussed above, had an important influence on Italian corporatism,¹⁵⁹ the philosophy that underlay the 1942 *Codice civile*. Mattei and di Robilant, for example, have underlined the ‘social orientation’ and ‘collective dimension’ of Italian doctrine and case law which carried ‘the seeds of corporate

¹⁵⁷ As explained in Chapter 2, the 1922 Soviet Union Code was a compilation of Western laws. That is why the Soviet Union adopted a new heavily ideologized code in 1964.

¹⁵⁸ See footnotes 81 (Chapter 2) and 121 (this Chapter).

¹⁵⁹ On the development and current state of corporatism in Italy, see Mariucca Salvati, ‘The Long History of Corporatism in Italy: A Question of Culture or Economics?’ (2006) 15 Contemporary European History 223; On the links between Spann’s universalism and Mussolini’s theoreticians, see Chiara Spinsante, ‘Il corporativismo fascista: Il dibattito italiano sulla riforma corporativa dello Stato durante gli anni Venti e la sua recezione da parte del conservatorismo tedesco nella Repubblica di Weimar’ (Doctoral Thesis, University of Macerata 2012)

< http://ecum.unicam.it/595/1/TESI_DOTTORATO_COMPLETAx.pdf>.

ideology that played a major role in the genesis of the code.¹⁶⁰ Furthermore, the *Codice civile* recognizes the company as the central element of social organization which is also illustrated by the abandonment of the distinction civil/commercial code.¹⁶¹

It has also been emphasized that the first version of the 1942 *Codice civile* reflected the strong accent on the productivity of the enterprise, economic solidarity and the superior interest of the nation, which was a feature of the Italian Fascist notion of contract.¹⁶² In a chapter dedicated to the motivation and character of Italian codification, Filippo Vassalli, the head of the working group that drafted the 1942 version as well as the group that defascized the code following the fall of Mussolini in 1943, clarifies:

*The regime of obligations and individual rights is constantly adapted to the needs of the national economy either by regulatory action of the corporate order expressly referred to in the [civil] code, or by a number of criteria, such as the protection of production...the duty to act honestly and in good faith, the duty of corporate solidarity, which...tend to place the rights of individuals in an organic link with the economic life and morality of the nation.*¹⁶³

Considering these particularities of the original version of the 1942 *Codice civile*, it is easier to understand why LOC's drafters managed to transform the rightist organic dimension into a socialist organic dimension and why the Italian legislative model was convenient. In contrast to Soviet law, Bulgarian law recognized a limited right to private property. That is why *Codice civile*'s approach was helpful—the topic was covered, but it was not the main emphasis. Similarly to Italian corporatism, Bulgarian communism stressed the superior interest of society and collectivity—the economy's building block was the state-owned companies and 'cooperatives.' Bulgarian communism also gave precedence to the productivity of these organizations through the state-approved economic plan. In Italy, at the time, the government also set

¹⁶⁰ Ugo Mattei and Anna di Robilant, 'Les longs adieux. La codification italienne et le code Napoléon dans le déclin du positivisme étatiste' (2004) 4 RIDC 847, 851.

¹⁶¹ *ibid* 852.

¹⁶² Pier Giuseppe Monateri and Alessandro Somma, 'The Fascist Theory of Contract: A Comparative and Historical Inquiry into the Darker Side of Contract Law' (2009) Cardozo Electronic Law Bulletin 1, 10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1347692>.

¹⁶³ Filippo Vassalli, *Studi Giuridici. Volume III* (Giuffrè 1960) 615 (emphasis mine).

production targets. Finally, in communism, the distinction civil/commercial code is also abandoned.¹⁶⁴

To illustrate the transformations and highlight why the approach worked in practice, one may compare articles from the two legislative documents, which were transplanted and modified by Bulgarian legislators. For example, article 1322 of the original 1942 *Codice civile* stipulated: ‘Parties are free to determine the content of the contract within the limits imposed by law and by *corporate rules*. Parties may enter agreements which are non-standard as long as they aim at realizing an interest that deserves protection by the law.’ Article 9 of the communist LOC cited above accorded the parties freedom to contract as long as the content did not contradict the law, the *national economic plan* and the *rules of socialist coexistence*. Furthermore, article 1175 of the original 1942 *Codice civile* stipulated: ‘The promisor and the promisee should behave according to the rules of decency in relation to the *principles of corporate solidarity*.’ Article 63 of the communist LOC stated: ‘The promisee and the promisor should abide in their relations by the *rules of socialist coexistence, socialist good faith, and the state economic plan*.’ In both documents, societal norms considerably restricted private will and subjected the content and performance of the contract to moral and economic judicial review. Moreover, in both instruments there was no reference to universal human morality, but to the specific moral rules and economic objectives embraced by the State.

5.4.2.2.2 *From ‘Organic Socialism’ to a Hybrid Approach*

After communism ended, Bulgarian legislators chose simply to amend the LOC rather than to draft a new one from scratch. They reintroduced the classical liberal individualist idea that contracts have the force of law for the parties into the LOC.¹⁶⁵ They also deleted the references to the state economic plan and socialist economic structures. However, they did not alter the LOC’s underlying organic framework. The ‘collage method’ they adopted resulted in the confluence of conflicting concepts of contract in Bulgarian law, which does not exist in English law. This internal

¹⁶⁴ Communism also denies the distinction private/public law.

¹⁶⁵ Article 20a, para 1 (current LOC).

incoherence, from the perspective of social theory, has formally reconciled the competing values of contract law, which are seen as complementary.

§4.3.2.2, for instance, explained that legislators decided to rename ‘the rules of socialist coexistence,’ which restrained freedom of contract during communism, to ‘good morals.’ It also noted that ‘good morals’ existed in the first LOC. Nonetheless, in interpreting the new ‘good morals,’ courts rely on communist doctrine on socialist coexistence rather than on doctrine on ‘good morals’ from the pre-communist period. Because of the cosmetic amendment of article 9, the LOC preserved the organic approach to freedom of contract characterizing Bulgarian communist law—contractual content is subjected to moral review by the judge who is society’s lawful speaker.

§5.2.3 showed how judges rely on good morals to disregard explicit legal norms in order to enforce commutative and distributive justice. This activism can be better understood and justified from an organic perspective. The LOC is permeated with open norms like good faith as well as rules allowing contractual modification like article 266, para 2 which I discussed in §5.2.2. Since Bulgarian judges reason within this framework and are supposed to render decisions in line with the spirit of Bulgarian law, they benefit from larger discretionary powers compared to English judges and their creativity is not confined to molding the will theory.

Finally, the organic reasoning also informs Bulgaria’s legislative culture. In §5.2, I underlined that modern legislators included article 300 (LC) allowing the judge to supplement the agreement in certain instances. This new legislative choice is an emanation of the organic approach to contract, which has been internalized by the Bulgarian legal community. Unlike modern English law, which enforces welfarism primarily in relation to consumers, Bulgarian law enforces welfarism for all members of its community. In that light, in England, consumer welfarism developed as a reaction against the unjust results of market individualism. By contrast, in Bulgaria contemporary merchant law span off from civil law when dualism was restored in the early 1990s. Thus the organic approach was transferred to the LC. It also seems relevant to note that unlike the UK whose law was ‘irritated’ by the imposition of European

consumer directives, in Bulgaria the consumer directives simply fine-tuned certain principles of contract by adding more nuances.¹⁶⁶

5.5 Conclusion

This Chapter demonstrated that Bulgarian and English judges have acquired dissimilar roles regarding agreements—an aspect, which further elucidates why the two jurisdictions approach impracticability differently.

Notably, Bulgarian judges have greater discretion regarding the modification of the contract's contents than English judges. While there are diverse examples, I focused on three I deem to exemplify the differences most clearly—the principle on supplementing agreements, the rule on price modification when agreed as a total sum, and the approach to agreed damages. I showed that the first two rules have no equivalents in English law as English judges refuse to make contract for the parties. Then, I demonstrated that while English judges have progressively become more reluctant to strike out payment clauses and consider the equality of bargaining power to qualify such clauses as penalties, Bulgarian judges rely on creativity to strike out excessive liquidated damages clauses in merchant agreements although the LC explicitly forbids them to do so.

Moreover, after demonstrating the key differences between the discretion of English and Bulgarian judges regarding contractual interpretation, I showed that English judges may achieve similar outcomes to Bulgarian judges via the rules of construction in limited cases. Absent a force majeure/hardship clause, English judges are wary to interfere. Also, the success of force majeure/hardship clauses depends on their drafting. It is essential that the mechanisms for modification/termination they provide have been agreed by both parties. By contrast, the effects of economic onerosity on the contract depend on a unilateral decision by one of the parties seconded by the judge.

Finally, I provided a more in-depth explanation of the differences between the roles of English and Bulgarian judges regarding agreements by examining the complex, yet likely links between social contract theory and contract law. I presented an analytical

¹⁶⁶ Because of its separate regimes of merchant and non-merchant transactions, even before the development of consumer law, Bulgaria disposed of more rigorous methods to control the terms of a contract between a company and a natural person or between a company and another entity, which did not operate in its usual sphere of activity.

summary of a long-forgotten typology of contracts based on their underlying social contract which was developed by Lyuben Dikov. He argued that the nature of contract depends primarily on the socio-philosophical framework in which contract operates. I deemed his explanation of the liberal individualist and the organic notion of contract may shed light on the differences between English and Bulgarian contract law.

While English contract developed in a liberal individualist context, Bulgaria changed frameworks several times due to its turbulent history which resulted into a confluence of the liberal-individualist and the organic notion of contract. Whereas in a liberal individualist framework freedom of contract and fairness lie in natural opposition because agreements are sacred, in a hybrid framework the two are complementary because agreements are a union of the parties' will and the community's will. In a liberal individualist framework, the judge is wary to intervene because he is not a party to the agreement. In an organic framework, the judge intervenes to restore the organic balance between the interests of the individuals and the community.

The next Chapter informs the harmonization debate on the basis of my comparative study.

Chapter 6

Lessons for the Harmonization of Contract Law in the European Union

6.1 Introduction

This Chapter explains how the findings of my study may enrich the debate on the harmonization of contract law in the EU. Before that, I remind the reader that, as mentioned in §1.1, I have submitted my thesis during the turbulent times following the referendum on ‘Brexit.’ Hence, it is currently uncertain if and to what extent England will be affected by ongoing harmonization initiatives. Nonetheless, I believe the below analysis may still be relevant, albeit to a lesser extent, even if the fears of an exit materialize. If the UK renegotiates its position with the EU and wants to maintain access to the single market, it will have to consider the advantages and risks of harmonization no matter whether EU institutions explicitly insist on harmonization as a condition to grant such access. Moreover, comparing the positions of English and Bulgarian law in the harmonization process exposes some of the project’s cultural biases and weaknesses which may affect its success even if the UK is not part of it.

As explained in §1.2, the future of the harmonization project is also currently uncertain. After implementing a series of directives on consumer protection,¹ the Commission emphasized the need for broader harmonization in the law of obligations, and more particularly in contract law, to encourage cross-border trade in the EU. A Draft Common Frame of Reference (DCFR), which has the scope and structure of a civil

¹ See footnote 10 (Chapter 1).

code, was produced, but it remained an academic undertaking following the responses to the Commission's green paper on its future.² The subsequent proposal for a regulation on a Common European Sales Law (CESL) establishing an optional regime for digital and distance B2C and B2B contracts in which at least one party is an SME was not approved by the Council of the EU due to pressure by leading Member States (MS).³

In December 2015, nonetheless, the Commission proposed two directives—one pertaining to 'certain aspects concerning contracts for the supply of digital content'⁴ (SDC) and the other pertaining to 'certain aspects concerning contracts for the online and other distance sales of goods'⁵ (OSD), which form part of the Digital Single Market Strategy presented in May 2015. The joint explanatory memorandum indicates the proposed directives 'draw on the experience acquired during the negotiations for...[CESL].'⁶ Yet, there are noticeable differences between CESL and these instruments. They have a narrower scope—they would apply only to consumer agreements for the supply of digital content and distance sales of goods and they focus primarily on the rules on conformity and consumer remedies. It is also interesting that while the directives avoid sensitive issues like the rules on contract formation, they go beyond their formally announced scopes because they provide a definition of contract.⁷ Unlike CESL which was in the form of a regulation, the two new instruments are in the form of maximum harmonization directives.⁸

² See footnote 13 (Chapter 1).

³ See footnote 16 (Chapter 1).

⁴ COM(2015) 634 final.

⁵ COM(2015) 635 final.

⁶ COM(2015) 634 final, page 2.

⁷ See footnote 21 (Chapter 1).

⁸ Unlike minimum harmonization directives which only set a common floor of protection and allow MS to determine the ceiling themselves, maximum harmonization directives set both the floor and the ceiling. It has been asserted: 'A minimum model allows more space for diversity and local autonomy; a maximum model seems to promise greater uniformity in the pattern of regulatory intervention chosen for the internal market,' Stephen Weatherill, 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market' in Niamh Nic Shuibhne and Laurence Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (OUP 2012) 176; Recently, the Commission has shown a preference for maximum harmonization directives to prevent the phenomenon of 'gold-plating'—MS' imposing higher standards for their nationals, thus putting them at a disadvantage compared to other EU citizens and distorting the internal market. See Carsten Gerner-Beuerle, 'United in Diversity: Maximum versus Minimum Harmonization in EU Securities Regulation' (2012) 7 CMLJ 317, 319-321.

While much awaited, these instruments have received controversial feedback both by supporters and opponents of the harmonization project. Hence, it seems questionable whether they would be implemented in their current version. Shortly after their announcement, Eric Clive, one of DCFR's authors and a member of the Expert Group advising the Commission on CESL, emphasized:

From the point of view of anyone interested in the development of a more principled and coherent European contract law these proposed Directives are profoundly disappointing. It is back to the bad old days of itsy-bitsy rules on particular topics.⁹

In a report commissioned by the EP, Hugh Beale, another author of the DCFR and member of the Expert Group, also criticized the narrow scope of the directives: he asserted that an optional instrument like CESL which 'dealt with so many more issues' combined with a minimum harmonization directive on the supply of digital content 'would be a better way forward.'¹⁰

The French Senate raised concern about the choice of maximum harmonization: it deems this would force certain MS to lower their standards of consumer protection, which violates the principle of subsidiarity.¹¹ Moreover, there is skepticism regarding the practicability of establishing two separate regimes for the sale of goods—face-to-face sales would be governed by national laws while distance sales would be primarily

⁹ Eric Clive, 'The Proposed New Digital Single Market Contract Law Directives' (*European Private Law News*, 19 January 2016) <<http://www.epln.law.ed.ac.uk/2016/01/19/the-proposed-new-digital-single-market-contract-law-directives/>>.

¹⁰ Hugh Beale, 'Scope of Application and General Approach of the New Rules for Contracts in the Digital Environment' page 26 <<https://polcms.secure.europarl.europa.eu/cmsdata/upload/12df1896-c8eb-4e91-9cf8-fbf711578bb8/new%20rules%20for%20contracts%20in%20the%20digital%20environment.pdf>>; Note that in its response to the Commission's public consultation launched prior to the announcement of the new proposals, the largest SME umbrella organization (UEAPME) argued that the rules on digital content should also cover B2B contracts. See UEAPME's Response <http://www.ueapme.com/IMG/pdf/UEAPME_reply_tangiblegoods.pdf>.

¹¹ See the French Senate's Reasoned Opinion <<http://www.senat.fr/leg/tas15-103.pdf>>. Note the French Senate raised similar concerns in its Reasoned Opinion on the Directive on Consumer Rights 2011/83/EC which is a maximum harmonization instrument. <http://ec.europa.eu/dgs/secretariat_general/reactions/reactions_other/npo/docs/france/2008/com20080614/com20080614_senat_opinion_fr.pdf>; By contrast, in its Opinion on the new proposals, the Austrian Federal Council expressed concern that some consumer protection standards may be 'raised to an unjustified level.' <<http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20150287/atbun.do>>.

governed by the OSD.¹² Furthermore, there is discontent about the quality of the wording—voices have been raised against the unclear definition of ‘digital content’ and the ambiguity of the rules on termination.¹³

Considering the mixed feedback the proposed directives have received, it seems relevant to take a step back and rethink the implications of the harmonization initiative. Could it be that committed to its goal of enhancing the internal market and driven by its desire to reach a compromise with stakeholders and move the harmonization project forward, the Commission has ignored some inconvenient truths: the initiative is so complex and ambitious that it is doomed due to political and legal cultural reasons unless there is a change in strategy?

Despite the concessions it has made following CESL’s withdrawal, the Commission is facing criticism similar in spirit to the arguments against CESL—that the proposal does not respect the principle of subsidiarity.¹⁴ Nevertheless, because of the legal apparatus put in place to enforce the principles of subsidiarity and proportionality, their application, regrettably, is a question of political bargaining rather than a question of law *per se*.¹⁵ It is also worth noting that the traditional opponents of broader

¹² See Rafał Mańko’s summary of stakeholders’ views in ‘Contracts for Supply of Digital Content to Consumers’ pp 10-11
<[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI\(2016\)58198_0_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI(2016)58198_0_EN.pdf)>.

¹³ *ibid.*

¹⁴ This principle, articulated in article 5(3) of the Treaty on European Union (TEU), defines the circumstances in which it is preferable for the Union to take action instead of MS; In their reasoned opinions on CESL, the Bundestag and the House of Commons argued that the proposal violates this principle. The House of Commons also argued that the Commission’s proposal violates the principle of proportionality articulated in TEU’s article 5(4) according to which the Union’s actions should not exceed what is necessary to achieve EU Treaties’ objectives. See the Bundestag’s Reasoned Opinion on CESL
<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/887/887301/887301en.pdf>; See The House of Commons’ Reasoned Opinion on CESL
<<http://www.parliament.uk/documents/commons-committees/european-scrutiny/Reasoned-Opinion-Common-EU-Sales-law.pdf>>.

¹⁵ The CJEU reviews compliance with these principles *ex post* only if a MS or the Committee of the Regions brings action against EU legislation; In its Resolution of 8 April 2003, the EP declared that differences regarding the application of these principles ‘should preferably be settled at the political level.’ (Resolution P5_TA(2003)0143); While article 12 (TEU) provides for *ex ante* control of European legislative drafts by national parliaments, in practice this mechanism is rarely used. See Judge Lars Bay Larsen, ‘The Judicial Review of the Principle of Subsidiarity at the Court of Justice of the European Union’ (6th Subsidiarity Conference, Berlin, December 2013).

harmonization have economic interests to protect,¹⁶ which casts doubt about the motivation behind their contesting the Commission's competences in that area.

Moreover, when one examines the Commission's tactics in promoting the initiative, one sees it focuses only on the positive implications and does not mention the risks it involves—while in line with the Commission's role, this approach can certainly raise the eyebrows of Eurosceptics. Just like CESL, the new proposal is accompanied by what appears to be a marketing campaign with grandiose promises. For instance, the press release announcing CESL claimed 'traders who are dissuaded from cross-border transactions due to contract law obstacles forego at least €26 billion per year'¹⁷ and quoted a Eurobarometer survey¹⁸ according to which 71% of European companies would use one single European contract law for consumer transactions. The proposal was accompanied by an impact assessment¹⁹ and a Panel Survey among SMEs which claimed 78% of respondents would use a European contract law.²⁰ The EP echoed the

¹⁶ Notably, England, Germany, and France have a stronger financial interest to promote their national laws than to support the implementation of common contractual principles; According to the 2012 White & Case Arbitration Survey

<[http://annualreview2012.whitecase.com/International Arbitration Survey 2012.pdf](http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf)>, 40% of respondents use English law most frequently; McKendrick asserts that by the end of the last millennium the UK legal services attracted about £800 million a year in invisible earnings, Ewan McKendrick, 'Harmonization of European Contract Law: The State We are in' in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonization of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart 2006) 20; In an attempt to persuade international users of English law to choose German law instead, Germany translated the BGB in English and started a marketing campaign. On how this approach was triggered by the marketing efforts of the Bar Council of England & Wales, see Stefan Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) 20 ERPL 13, 30-35; Furthermore, in 2010 some German States passed a Bill allowing for hearings in civil cases to be conducted in English, thus encouraging forum shopping for international contracts, Heidi Hellwig, "'English Spoken" in German Commercial Court Litigations' Paul Hastings March 2010

<<http://www.paulhastings.com/docs/default-source/pdfs/1528a922df6923346428811cff00004cbded.pdf>>;

France supported the establishment of the *Fondation pour le droit continental* whose mission is to 'reinforce the dissemination of continental law...and to ensure its position as a point of reference on an international scale.' See the initiative's website: http://www.fondation-droitcontinental.org/jcms/c_5659/la-fondation.

¹⁷ See 'European Commission Proposes an Optional Common European Sales Law to Boost Trade and Expand Consumer Choice' <http://europa.eu/rapid/press-release_IP-11-1175_en.htm>.

¹⁸ 'Flash Eurobarometer on European Contract Law in Consumer Transactions' <http://ec.europa.eu/public_opinion/flash/fl_321_en.pdf>.

¹⁹ SEC(2011) 1166 final.

²⁰ 'SME Panel Survey on the Impacts of European Contract Law' <http://ec.europa.eu/justice/contract/files/report_sme_panel_survey_en.pdf>.

Commission's enthusiasm—for example, when one reads the report of the Committee on Legal Affairs on CESL, one sees the initiative is called 'ground-breaking,' 'of key importance,' and 'with huge potential advantages.'²¹ Similarly, the explanatory memorandum of the recent proposal contains promises for a boost of EU GDP and increase of cross-border spending²² supported by Eurobarometer statistics.

The Commission's statistics on CESL were contested by MS.²³ Moreover, scholars have already raised concern about the 'significant methodological anomalies' in Eurobarometer surveys, which 'blur the line between research and propaganda.'²⁴ Stakeholders have complained that the impact of diverse national laws on cross-border trade is exaggerated as the Commission ignores the role of transportation costs and linguistic barriers.²⁵ To this list, I may add cultural preferences²⁶ and a country's image.²⁷

In that light, the Commission's forecast for turnover mentioned above is based entirely on surveys consisting of solely one question (how often contract law related obstacles deterred [your] company from conducting cross-border trade?) which allowed respondents to answer: 'always,' 'often,' 'not very often,' 'never,' 'do not know.'²⁸ As visible from the way the question is phrased, interviewees were not given an

²¹ See A7-0301/2013; The style of expression sadly reminds of the ideological speeches at the sitting in which the communist LOC was enacted. See §2.3.2.2; In communist Bulgaria, every proposal by the Party was deemed to be hugely important and to promote a new level of socialism.

²² See page 12 of COM(2015) 635 final.

²³ For instance, the UK claimed there is no clear 'evidence of need' of CESL. See 'A Common European Sales Law for the European Union—a Proposal for a Regulation by the European Commission. The Government Response' page 33

<<https://consult.justice.gov.uk/digital-communications/common-european-sales-law/results/cesl-government-response.pdf>>.

²⁴ Martin Höpner and Bojan Jurczyk, 'How the Eurobarometer Blurs the Line between Research and Propaganda,' Max Planck Institute for the Study of Societies Discussion Paper 15/6 <http://www.mpifg.de/pu/mpifg_dp/dp15-6.pdf>.

²⁵ Position Paper by the Association of German Chambers of Industry and Commerce on the new proposals <www.dihk.de/ressourcen/downloads/dihk-statement-online-trade.pdf>.

²⁶ For example, horse meat is traditional food for parts of France and Italy—considering the 2013 scandal which exposed that it is taboo food in the UK, it is unlikely that a harmonized contract law would significantly increase its import to the UK.

²⁷ Bulgaria's unfortunate reputation as the leader in piracy in the EU may hamper its import and export of digital content. See 'Bulgaria Tops EU Software Piracy Rate' Novinite (Sofia, 12 May 2011)

<<http://www.novinite.com/articles/128170/Bulgaria+Tops+EU+Software+Piracy+Rate>>.

²⁸ On how the '26 billion' estimate was reached, see Annex III of SEC(2011) 1166 final.

opportunity to mention a factor different from contract-related barriers, which casts doubt whether the impact of contract-related barriers is not overexposed.

While the above considerations make me worried about the reliability of the Commission's numbers, I believe there are bigger issues. Even if we give the Commission the benefit of the doubt and assume its numbers accurately show the unexplored potential of the internal market which can be unleashed through harmonization, the underlying assumption is that harmonization is *feasible* and that the *cultural sacrifices it entails are worth it*.

At the beginning of this thesis, notably in in §1.2, I emphasized that Western academics remain divided on key issues like the cultural repercussions of harmonization and the possibility of uniform interpretation of harmonizing instruments across the EU. As explained in §1.3, nonetheless, opportunities for dialogue between West and East European scholars have been missed and the effect of the 'Iron Curtain' can still be felt in comparative law. The harmonization debate has been monopolized by Western commentators who traditionally concentrate on the dissimilarities between Western jurisdictions—habitually the so-called 'parent' systems²⁹ (England, France, and Germany), but occasionally others.³⁰ Consequently, they have failed to notice other axes of difference between the various contract laws in the EU and they have largely ignored the diverse contract laws of former-communist countries like Bulgaria. It is also doubtful that East European voices were properly heard in the process of drafting of harmonizing instruments.³¹

²⁹ On the taxonomy of legal families, see footnote 33 (Chapter 1).

³⁰ For instance, in 1992 the Netherlands heavily amended its civil code after examining French, German, and English law. Consequently, Dutch scholars were in a position to engage in the harmonization debate earlier than many others. They also published substantial research comparing Dutch law to other West European laws.

³¹ As visible from the lists of participants in DCFR's drafting committees, contributors from recent MS joined shortly after their respective countries accessed the Union. See *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* 39-45; However, it is unlikely that the Bulgarian and Romanian representatives who joined the committees in 2006 had the physical capacity to comment critically all provisions before the interim edition of the DCFR was published in 2008 or even the subsequent final version.

In that light, my Bulgarian-English comparative study may contribute to the harmonization debate by reaffirming the concerns of Western sceptics. The lessons for harmonization I draw on the basis of my research are predominantly negative:

- **Lesson 1. Change of Circumstances in the DCFR and in CESL: Interpretational Difficulties**

Both the DCFR and CESL contain provisions on changed circumstances.³² By analyzing the interpretational difficulties related to the provisions in the DCFR and CESL in §6.2, I argue the documents would not have achieved the Commission's goal of reducing parties' costs in trading abroad—instead of researching foreign law, they would have had to research foreign interpretation.

- **Lesson 2. The Principle of Changed Circumstances as an Emanation of the Social Contract: The Ignored Liberal Individualist/Organic Divide in the EU**

§6.3 criticizes the pragmatic approach of the Commission towards the selection of principles for harmonizing instruments. One of the contributions of this study is to demonstrate that contract law is not value-neutral and that, from a theoretical perspective, is related to the 'social contract' of a particular jurisdiction. Principles like changed economic circumstances, which were included in the DCFR and CESL, are signs of progressive organicization of contract. Broader harmonization as implied by abandoned instruments like the DCFR and CESL involved progressive harmonization of the 'social contracts' of MS—a step, which involves political compromises.

- **Lesson 3. The Necessity to Reconsider the Traditional Taxonomies of Comparative Law**

§6.4 reminds the reader that behind the reluctance to study East European systems in the West, one sees the 'ghost' of the theory of legal families which is culturally prejudiced. I argue this theory should be reconsidered and present a further footing to the argument in favor of legal pluralism—East European States also have to make cultural sacrifices for the harmonization project.

³² III.–1:110 (DCFR) and Article 89 (CESL); The principle did not make its way into the recently proposed directives.

- **Lesson 4. Learning from a Newcomer: What Strategies to Manage Drastic Legal Change?**

§6.5 emphasizes that unlike Western States, Bulgaria has experienced radical legal change several times in its recent history. Consequently, it is interesting to examine the strategies it uses to manage *drastic* legal change.

6.2 Lesson 1. Change of Circumstances in the DCFR and in CESL: Interpretational Difficulties

This section analyzes the similarities and differences between the provisions on changed circumstances in the DCFR and CESL. Then, it highlights why both provisions would have been interpreted differently in Bulgaria and England on the basis of my study. Finally, it clarifies why this discussion is relevant for the harmonization project.

Before that, I remind the reader that the DCFR and CESL are documents with very different purposes. As noted above, the DCFR has the scope of a civil code. While indeed the Commission once suggested it can be implemented as a civil code for the EU,³³ it has remained an academic undertaking which may serve as a toolbox for national and EU legislators and judges. CESL, nonetheless, would have been implemented as a regulation creating an optional regime for certain types of cross-border transactions. As it does not cover all aspects of contract, it would have interacted with national laws.

6.2.1 An Overview of the Provisions

Both the DCFR and CESL contain elaborate provisions on changed circumstances.³⁴ They bear important similarities regarding the principle's criteria of application. Both specify that the change should be 'exceptional.'³⁵ Moreover, both stipulate that the

³³ See footnote 13 (Chapter 1); It is doubtful whether it actually favored this option.

³⁴ III.-1:110 (DCFR) and Article 89 (CESL). Appendix A and B provide the full text of these provisions.

³⁵ III.-1:110(2) and article 89(1).

change should have occurred after entry, it should not have been foreseen, and the relying party should not have assumed it as risk.³⁶ Yet, there are noticeable differences between the two provisions, which illustrate some of the compromises which have been made during the drafting of CESL to make the document more accessible for English lawyers.

Firstly, one notices what seem to be ‘technical’ changes. Notably, the provision in the DCFR uses the term ‘debtor’³⁷ while the article in CESL uses the neutral term ‘party.’ Moreover, the provision in the DCFR refers to performance of both contractual obligations and obligations ‘arising from a unilateral juridical act.’ The term ‘juridical act’ defined in II.-1:101(2) of the DCFR was deemed to ‘[make] the draft look more...Germanic than necessary.’³⁸ It is interesting that CESL opted for the term ‘unilateral statement or conduct’ (article 12), which has a narrower scope than ‘juridical act’³⁹ and may be conceptually more familiar to common lawyers.⁴⁰ Yet, the CESL provision on changed circumstances only refers to performance of obligations without specifying their source.

Secondly, the DCFR provision requires the debtor to ‘reasonably and in good faith...achieve by negotiation a reasonable and equitable adjustment...’⁴¹ to be allowed to petition the court. From a conceptual perspective, it is interesting that the provision obliges him to try to save the contractual relationship before going to court.⁴² By contrast, the CESL provision abandons the notion of good faith, which, as noted in §1.2 and §4.3.2.3, irritates English law. Besides, it encourages parties to negotiate with a view to *either* terminate *or* adapt before petitioning⁴³ and, in case of adaptation, does not oblige parties to seek an ‘equitable’ adjustment. Certainly, from an English perspective, it would have been problematic to force parties to seek an equitable

³⁶ Compare paragraphs (3)(a), 3(b) and 3(c) of III.-1:110 (DCFR) to paragraphs 3(a), 3(b), and 3(c) of article 89 (CESL).

³⁷ In the common law tradition, debtor means an entity in financial debt to other entities. In continental traditions, debtor is a party owing an obligation (promisor).

³⁸ Martijn Hesselink, ‘The Common Frame of Reference as a Source of European Private Law’ (2009) 83 *Tulane LR* 919, 969; The term would also be familiar to a Bulgarian audience.

³⁹ A juridical act may be unilateral, bilateral or multilateral.

⁴⁰ The leading case *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1 established the notion of unilateral contract in English law.

⁴¹ III.-1:110(3)(d).

⁴² §4.3.2.2 clarified that unlike English law, Bulgarian law explicitly defines contract as a relationship.

⁴³ Article 89(1).

solution themselves before going to court considering the particular role of equity in England.⁴⁴

Thirdly, the CESL provision has different requirements regarding the impact of the supervening event compared to the DCFR provision. While the DCFR provision authorizes judicial intervention when ‘performance...becomes so onerous because of an exceptional change of circumstances that it would be *manifestly unjust* to hold the debtor to the obligation,’⁴⁵ the CESL provision allows intervention when ‘performance becomes *excessively onerous* because of an exceptional change of circumstances.’⁴⁶ There is an important difference in emphasis: while the DCFR focuses on the manifest injustice in keeping the promisor bound to its obligation in such circumstances, CESL focuses on the burden’s extent. We will see below, however, that despite its more neutral formulation, the provision in CESL can also give rise to interpretational difficulties.

Fourthly, the two provisions differ in the remedies they provide. The DCFR allows the judge to vary the obligation to make it ‘reasonable and equitable’ in the new circumstances⁴⁷ or to terminate it.⁴⁸ By contrast, CESL allows the judge to ‘adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account’⁴⁹ or to terminate the contract.⁵⁰ Essentially, CESL significantly confines judicial discretion by obliging judges to put themselves in the shoes of the parties—the provision resonates the English test of reasonableness, which we discussed in §4.3.2.2 and which is unfamiliar to a Bulgarian audience.

Finally, on the basis of our analysis of the key factors English and Bulgarian judges examine before establishing frustration and economic onerosity in Chapter 3, it is interesting to remark that neither the DCFR provision nor the CESL provision explicitly refer to the key issue of fault. It seems regrettable that CESL’s drafters did not take the opportunity to correct this omission, especially in light of the different

⁴⁴ See our discussion on equity at the end of §4.2.

⁴⁵ III.–1:110(2).

⁴⁶ Article 89(1).

⁴⁷ III.–1:110(2)(a).

⁴⁸ III.–1:110(2)(b).

⁴⁹ Article 89(2)(a).

⁵⁰ Article 89(2)(b).

notions of fault national judges entertain and the different causal chains they examine to establish it.⁵¹ We discuss this issue further below.

6.2.2 *The Challenges*

In this section, I argue that both the DCFR and the CESL provision on changed circumstances would be interpreted differently in England and Bulgaria. Scholars have already emphasized that although international instruments call for autonomous interpretation, it is likely that lawyers would approach them with ‘national assumptions,’ which inevitably leads to divergent interpretations.⁵² One of the reasons why one may approach CESL with national assumptions is the fact that it does not cover all aspects of contract and thus refers judges to their national laws. Moreover, we will see that it may be difficult to infer the intent of the drafters of the DCFR and CESL alike regarding some provisions. In that light, it should be noted that a key difference between the DCFR and CESL is that the DCFR contains comparative notes and comments supposed to guide the reader. However, they seem of little help.

The comparative notes, including those on changed circumstances,⁵³ are brief: it is likely that without knowledge of a particular jurisdiction, one cannot comprehend their meaning. For instance, the note on changed circumstances in English law mentions *Davis Contractors*,⁵⁴ but neither clarifies its facts, which are essential to understand its significance, nor refers to the ‘radically different test.’⁵⁵ Moreover, most notes on changed circumstances in continental jurisdictions do not contain references to case law: they just state the general rule in the particular jurisdiction. Furthermore, some jurisdictions are missing from the notes which evidences that East European voices were not properly heard in the drafting—there are no comparative notes on changed

⁵¹ See §3.4.1.

⁵² Phillip Hellwege and Lucinda Miller, ‘Control of Standard Contract Terms’ in Gerhard Dannemann and others (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013) 467.

⁵³ *Principles, Definitions...*(n 31) 741-744.

⁵⁴ *ibid* 743.

⁵⁵ On the basis of my analysis of *Davis Contractors* in §5.2.2, it seems crucial to at least specify the extent of the burden (performance became 22% costlier) and the reasons for the burden (increase of the price of labor/material) to help foreign readers understand the differences between their system and English law.

circumstances in Bulgaria, Romania, Lithuania or Latvia although these jurisdictions were part of the EU when the DCFR was published.

If these comparative notes are meant to help legislators or judges to compare the approach of their jurisdiction to that of others, then the purpose is unfulfilled. Inexperienced comparatists may assume that terms with similar names play the same role: in §2.3.3.3, for example, we saw that Bulgarian academics rarely go beyond comparisons of the wordings of provisions, thus ignoring the functional method.

More importantly, as discussed below, the comments do not provide sufficient clarity on how the provision should be interpreted.⁵⁶ Considering that CESL built upon the DCFR, this is regrettable as many national judges may have been tempted to rely on the DCFR's notes had CESL been implemented.

6.2.2.1 The Criteria of Application

As noted above, while CESL's drafters used the DCFR's provision on changed circumstances as a basis for article 89, they made certain changes to improve the text's readability. Based on my analysis in the previous Chapters, nonetheless, I argue that the criteria of application enumerated in both provisions may give rise to divergent interpretations—notably, Bulgarian and English jurists applying these provisions may reach different results in practice.

Paragraphs 3(b) and 3(c) of both provisions concern the question of foreseeability and risk allocation. However, they do not indicate how these factors should be assessed. In §3.4.2, we saw that this is an area in which English and Bulgarian law significantly diverge—Bulgarian judges determine foreseeability primarily from the standpoint of the objective duties of care while English judges prioritize the risk distribution in the agreement itself. Unfortunately, the notes in the DCFR are insufficient to harmonize interpretation between England and Bulgaria. For example, they state that '[even] if there was no actual assumption of risk the court will have no power if the circumstances are such that the debtor can reasonably be regarded as having assumed the risk of the

⁵⁶ Scholars have already deemed that some of the other commentaries are also vague; See Paula Giliker, 'Pre-contractual Good Faith and the Common European Sales Law: A Compromise Too Far?' (2013) ERPL 79, 101-103.

change.⁵⁷ Our discussion of how Bulgarian judges may use unforeseeability to cover the political motivation of their decisions in §3.4.2.3, for instance, illustrates some of the dangers associated with such formulation. The Bulgarian court excused the municipality for its own lack of research on the status of the property it tendered by imposing a duty on the investor to research the surrounding circumstances—an approach which English courts would be wary of taking.

It is also worth mentioning that the rules of contractual interpretation in II.–8:101 and II.–8:102 (DCFR) and Chapter 6 (CESL) could have also given rise to controversy. For example, they clarify how a contract should be interpreted but not when. We saw in §5.3.1 that unlike English judges who always interpret the contract, Bulgarian judges interpret only if the literal meaning is unclear.⁵⁸ Absent a concrete provision on hardship, it is unlikely that Bulgarian judges imply risk on the basis of other factors such as a fixed/high price—they would determine risk allocation from the perspective of the duties of care.

Paragraph 3(d) of the DCFR provision and article 89(1) of CESL oblige parties to enter into negotiations before petitioning the court.⁵⁹ As noted above, the key difference between the two provisions is that CESL only requires an attempt to reach an agreement within a reasonable time while the DCFR requires negotiations in good faith to achieve a reasonable and equitable adjustment. The DCFR provision is considerably more problematic to interpret considering the document does not contain a definition of ‘equitable.’ Moreover, the definition of reasonable is rather broad.⁶⁰ In both lease cases we examined in §3.5.2, the lessees were offered a 20% reduction in the rent which they did not accept. From an English perspective, considering the rate of inflation (6%

⁵⁷ *Principles, Definitions...*(n 31) 740.

⁵⁸ This seems to be the approach advised in DCFR’s comments. See *Principles, Definitions...*(n 31) 580.

⁵⁹ It is interesting, from a comparative perspective, that Bulgarian law does not impose such a requirement; In the lease cases examined in §3.5.2, the court decisions mentioned failed prior negotiations between the parties. One may wonder whether this requirement is not superfluous. Nonetheless, considering the particularity of economic onerosity not to bind the court with a timeframe to render a decision explained in §3.3, it is not surprising that aggrieved parties attempt negotiations first before petitioning the court.

⁶⁰ I. – 1:104 states: ‘Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.’

increase), this may seem reasonable. Yet, Bulgarian courts were not worried by the fact that the lessees did not accept the proposed modification.

Another contentious area is the type of change that should occur and the impact it should have to allow the aggrieved party to benefit from the protection of the provisions. Both the DCFR and CESL require an ‘exceptional change.’ Yet, as noted above, they diverge on the effect it should produce. The DCFR requires that performance becomes so onerous that it is ‘manifestly unjust’ to hold the debtor bound. DCFR’s comments clarify that ‘[when] this happens in a contractual situation there will be a major imbalance in the parties’ respective obligations.’⁶¹ It is also interesting that they use the closure of the Suez Canal as an example of such an event—a clarification, which may be a sign for English judges considering the outcome in *The Eugenia* discussed in §3.4.1.3.2. Bearing in mind, nonetheless, that an important factor in the case was the breach of the clause obliging the charterers to avoid dangerous waters, it should be noted that the distribution of risk in the agreement would be of key significance for English courts—thus, the DCFR provision may be deemed inapplicable on that ground even if the Suez Canal is closed. By contrast, as explained in §3.4.2.2, it is unlikely that Bulgarian judges interpret a clause in the contract as preventing a party to petition before the court—we emphasized that from a Bulgarian perspective claiming economic onerosity is a right.

Furthermore, based on our analysis in §3.5, it seems that despite the clarifications in the comments, Bulgarian and English judges may interpret the notion of imbalance differently. Notably, we saw the particular methodology Bulgarian courts used to identify the imbalance—instead of comparing the rent to the market price (an approach which may seem logical from an English perspective), they compared it to the lessee’s monthly expenses. The rather objectively unexceptional inflationary change of 6% was interpreted as an exceptional event—an outcome with which English judges may severely disagree based on our analysis of *Davis Contractors* in §5.2.2 and *Staffordshire* in §5.3.2.⁶²

Unlike the DCFR provision, the CESL provision refers to excessive onerosity. While more neutral, CESL’s formulation is also vaguer. It is unclear how this excessiveness should be evaluated. Bulgarian judges may be tempted to rely on the

⁶¹ *Principles, Definitions...*(n 31) 739.

⁶² Denning was worried about rampant inflation in the span of decades.

notes in the DCFR and apply their notion of equivalence of performance. English judges, however, may be tempted to use the ‘radically different’ test, which may lead to harsher outcomes.

Finally, as mentioned above, neither the CESL provision nor the DCFR provision explicitly refers to a ‘no fault’ requirement. As Bulgarian judges are used to reason by analogy regarding economic onerosity—we saw in Chapter 3 that many of its criteria of application were derived from those of ‘impossibility’—they may use the same approach. Both the DCFR and CESL contain provisions on impossibility.⁶³ The key similarity is that both mention that the event should be beyond the control of the relying party and that the party could not have avoided or overcome the impediment or its consequences.⁶⁴ Even if they do not reason by analogy to these provisions, English judges may derive a similar notion of fault on the basis of the common law.⁶⁵

However, it seems Bulgarian and English judges may apply this notion differently to the same facts. A source of concern is the reasoning in *Super Servant Two* discussed in §3.4.1.3.2. We saw that Wijsmuller’s election not to use the Super Servant One interrupted the causal link between the sinking of the Super Servant Two and Wijsmuller’s inability to perform—reasoning with which Bulgarian judges would disagree. If, hypothetically, there is a significant rise in the price of input goods but a party has entered several agreements and can perform only one unless the price in all agreements is adjusted, it is possible that if it starts performing under one of these agreements, the supervening onerosity in the other agreements may be declared self-induced by an English court.

It also seems relevant to remember that a key factor for Bulgarian courts to allow the application of economic onerosity discussed in §3.4.1.2 is that the aggrieved party did not delay performance prior to the supervening event. It is likely that Bulgarian courts would have implied such a requirement if faced with the DCFR or the CESL provision on changed circumstances notably because III.–1:103 (DCFR) and Article 2 (CESL) impose a duty to act in good faith on parties.⁶⁶

⁶³ III.–3:104 (DCFR) on excuse due to an impediment and Article 88 (CESL) on excused non-performance.

⁶⁴ From a Bulgarian perspective, this is interesting because as explained in §3.4.1.3.1, unforeseeability and unavoidability are *alternative* requirements for ‘impossibility.’

⁶⁵ See our discussion in §3.4.2.

⁶⁶ On the role of good faith in Bulgarian law, see §4.3.2.3.

6.2.2.2 The Effects

Bulgarian and English judges may also reach different results when interpreting the consequences of supervening onerousness prescribed in the DCFR and CESL. Before we explain why, it is worth observing that, from a comparative standpoint, one notes two key dissimilarities between the Bulgarian approach and the approach of the European instruments. Both the DCFR and CESL allow the court to terminate the contract/obligation on a date and on terms it considers just.⁶⁷ As we saw in §3.6.1, one of the difficulties Bulgarian courts faced was to determine the moment from which the effects of termination take place—the date the claim was filed or the day the court decision was rendered. Hence, one of the merits of these provisions is that they provide courts with flexibility. Moreover, it seems that under the DCFR and CESL, the court has discretion regarding the remedy—by contrast, in §3.6.1 we indicated that Bulgarian courts seem to award the remedy requested by the aggrieved party, which prioritizes its interests and may not necessarily be the most adequate solution.

Despite these advantages, both provisions have a troublesome weakness: they do not specify any rules on loss distribution, which should be applied in case of termination following part-performance. With regard to CESL, one is left with the rules on restitution in Chapter 17. Article 172(1) states: ‘Where a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party.’ This provision is rather vague and seems to blur the difference between rescission and termination: if the aggrieved party has received payment and has started performance, should it return the entire payment?

Article 175 allows some flexibility as it permits a party to be compensated for expenditures for ‘goods and digital content’ if they are of benefit to the other party. Yet this provision is overly narrow, which may lead to unjust results since a party can incur expenses for hiring labor, renting premises or buying materials. In light of this, Bulgarian judges may consider applying the general rules on unjust enrichment we discussed in §3.6.2 to prevent injustice. By contrast, as we explained in the same section, the rules of unjust enrichment in the common law do not allow restitution for

⁶⁷ III.–1:110(2)(b) and article 89(2)(b).

partial failure of consideration. It is also doubtful whether English judges would be able to rely on the 1943 Act: they would have to declare that change of circumstances is a frustrating event first. This, however, could have proven difficult as this event would have to satisfy the ‘radically different’ test, the no fault requirement, etc.

For the DCFR, one may rely either on the rules on restitution following termination⁶⁸ or the rules on unjustified enrichment in Book VII. The former option may give rise to interpretational difficulties as the essence of the rule on changed circumstances is that there is no breach. It is unclear whether one should reason by analogy and attribute the same effects to termination due to changed circumstances especially because the comments do not mention termination due to changed circumstances.⁶⁹ One, however, finds a reference to the 1943 Act in the brief note on England.⁷⁰ If one assumes this is the drafters’ intent, then the applicable provision would be III.–3:510(1) which states that ‘a party...who has received any benefit by the other’s performance of obligations under the terminated contractual relationship or terminated part of the contractual relationship is obliged to return it.’ The provision seems broad enough to cover instances of partial failure of consideration. However, both Bulgarian and English judges would struggle to value the benefit, as demonstrated by our analysis in §3.6.2.2, and may reach different results.

Alternatively, judges may use Book VII on unjustified enrichment. Notably, VII.–1:101(1) states the general rule that ‘[a] person who obtains an unjustified enrichment which is attributable to another’s disadvantage is obliged to that other to reverse the enrichment.’ However, both Bulgarian and English judges may run into difficulties when applying VII.–2:101 which defines the circumstances in which an enrichment is unjust.⁷¹ It seems difficult to rely on the general principle stipulated in VII.–2:101(1) as, technically, at the time the advantage was incurred the benefiting party was entitled to it and there is a validly formed contract. This leaves judges with paragraph VII.–2:101(4) which sets an alternative 3-stage test. While 4(b) and 4(c) seem easier to satisfy because of the contractual arrangement between the parties, 4(a) may be challenging. It specifies that the disadvantaged person conferred the benefit either for a purpose which is not achieved or expectation which is not realized. If one adopts a

⁶⁸ III.–3:510 to 514.

⁶⁹ *Principles, Definitions...*(n 31) 912-914.

⁷⁰ *ibid* 916.

⁷¹ See the provision’s full text in Appendix C.

narrow approach, this requirement is not met if the purpose is partially achieved/expectation partially satisfied. Also, both Bulgarian and English judges may struggle with the valuation as VII.–5:103 on monetary value and VII.–5:104 on fruits are set in broader terms.⁷²

Finally, both the DCFR and CESL are unclear regarding the ‘mechanisms’ courts should use to modify agreements if they deem this is the more appropriate remedy. Article 89(2)(a) of CESL specifies that the court may ‘adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account.’ In deciding what is reasonable, it is likely that English judges will take the history of the contractual relation of the parties involved in the dispute and reasonableness standard as starting points of their analysis, as discussed in §5.3. By contrast, since the legal term ‘reasonable’ does not exist in Bulgarian law, it is possible that Bulgarian judges will approximate it to good faith or even ‘good morals’ depending on the context. Consequently, they may adhere to the requirement for equivalence of obligations or consider third-party effects, as discussed in §4.3.2.2, §4.3.2.3 and §5.3, which may result in a more thorough modification.

Article III.–1:110(2)(a) may confuse both Bulgarian and English judges with the use of the terms ‘reasonable’ and ‘equitable.’ Bulgarian judges would have difficulties to interpret these terms and may approximate both to the doctrines of good faith, equivalence, etc. English judges may be perplexed by the fact that the term ‘equitable’ is used regarding modification but not regarding termination: this may suggest that modification is an equitable remedy while termination is the remedy in law.

6.2.3 The Implications

I recognize that the above discussion is purely of theoretical value as the DCFR is an academic instrument and CESL is now abandoned. I also recognize that while the

⁷² Hypothetically, unjust results may also be reached because Chapter 6 (Book VII) provides the promisor with defenses. VII.–6:102 prevents restitution in case in good faith ‘in exchange for that enrichment the enriched person confers another enrichment on a third person.’ If the promisor has received pre-payment to produce something, yet has not started performance but has used the pre-payment under said contract in good faith to pre-pay some of his supplies under another contract, the promisee may not be able to recover his pre-payment.

principle of changed circumstances may affect some stakeholders' willingness to trade across borders, it is not necessary to promote trade on a daily basis, so the drafters of the instruments may have spent little time on it. Yet, I believe that the discussion is relevant in showcasing some of the risks associated with harmonization.

Regarding the DCFR, we saw that despite the fact that the document has the scope of a civil code and is thus self-sufficient and despite its comments and comparative notes, it still has gaps and unclear formulations which may confuse national judges who would be tempted to refer to what they already know best—their national law—to interpret it. I also believe that the provision on changed circumstances in the DCFR is of limited value as a 'toolbox' for Bulgaria. As we saw in §3.6, one of the areas in which the Bulgarian approach to economic onerosity is rather unclear is what happens in case the contract is terminated following part-performance. As discussed above, the DCFR provides little guidance on that aspect.

Regarding CESL, we saw that it would have given rise to difficulties as it does not cover all aspects of contract: judges would have had to juxtapose it to national law and interpret it from the perspective of their legal system. Moreover, while the CESL provision is worded more neutrally, it has similar weaknesses to the DCFR provision. Consequently, in case a Bulgarian and an English company had opted for CESL for their agreement, they might have obtained different judgments in case of litigation depending on whether they brought their claim in England or Bulgaria.

Certainly, EU's motto is 'United in Diversity': on a conceptual level, divergent interpretation is not problematic because of the Union's multi-level structure. Nonetheless, it is difficult to reconcile the above discussion with what seems to be the fundamental goal of the Commission: eliminate barriers to trade. The press release announcing CESL promised 'one common (yet optional) regime of contract law that is identical for all...[MS] so that traders no longer need to wrestle with the uncertainties that arise from having to deal with multiple national contract systems.'⁷³ What about the uncertainty arising from not knowing how foreign judges would interpret a new and incomplete piece of legislation? One of the advantages of national contract laws is that they are relatively predictable: legal counsel can inform their clients about the past and present interpretation of existing principles. Had CESL been implemented, parties

⁷³ See footnote 17.

would have incurred expenses for legal counsel that would have only been able to provide an *educated guess* about CESL's interpretation.

Currently, the main mechanism to achieve uniform interpretation across the EU is CJEU's preliminary rulings. It has already been stated that 'references to the CJEU are notoriously slow, cumbersome, and costly.'⁷⁴ It is also obvious that it would have taken a while to accumulate case law on all CESL provisions. A further source of concern is that MS could deliberately avoid such references. English cases like *DG of Fair Trading v First National Bank*⁷⁵ and *OFT v Abbey National*⁷⁶ illustrate that policy choices may trump consumer protection. Considering the commercial sensibility of English courts discussed in §4.3.1, one may argue that they would have been even more reluctant to use the mechanism regarding provisions applicable to B2B contracts.

In that light, if additional mechanisms aimed at achieving a more consistent application of EU law are not developed,⁷⁷ the recently proposed directives may not achieve their purpose of harmonizing consumer protection. One may identify two further sources of concern in addition to the fact that the directives would force some MS to lower their protection for consumers.⁷⁸ Firstly, the directives would still need to be transposed, so national legislators may limit their impact.⁷⁹ Secondly, while more limited because of the scope of the rules, the danger of divergent national interpretations exists. Both directives, for instance, use the term 'reasonable.'⁸⁰ Item 18 from OSD's preamble explicitly stipulates: 'The standard of reasonableness should be objectively ascertained,

⁷⁴ See Bar Council of England & Wales Summary Position on CESL <http://www.barcouncil.org.uk/media/166880/bar_council_of_england_and_wales_summary_position_on_cesl_june_2012.pdf>.

⁷⁵ [2001] UKHL 52; The HL concluded that a term which allowed a lender to charge interest on the sum outstanding until payment and after the entry of any judgment was not unfair pursuant to Regulation 4 of the UTCCR 1994 (now S62 of the CRA 2015) and did not make a reference to the ECJ.

⁷⁶ [2010] 1 AC 696; In the said case, the UKSC declared that overdraft charges by banks form part of the core terms of a contract to avoid subjecting them to fairness review under Regulation 5 of the UTCCR 1999 (now S62 of the CRA 2015). It also refused to make a reference to the CJEU.

⁷⁷ See §6.5.

⁷⁸ See §6.1.

⁷⁹ The CRD, for instance, has been characterized as 'a fascinating example whereby even a maximum harmonization directive will be vulnerable to measures at a national level which seek to minimize its impact and segregate it from mainstream private law,' Paula Giliker, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 1 ERPL 5, 28.

⁸⁰ See article 9 (OSD) and articles 12, 13, 16 (SDC).

having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the parties involved.’ Considering the different values of Bulgarian and English law, and in particular the different role of the English standard of ‘reasonableness’ and the Bulgarian notion of good faith,⁸¹ it is possible that the two jurisdictions will reach different results in similar circumstances.

6.3 Lesson 2. The Principle of Change of Circumstances as an Emanation of the Social Contract: The Ignored Liberal Individualist/ Organic Divide

In §1.2.2, I stressed that historically the rule on impracticability has served as a barometer for the differences between the values of national contract laws. In §1.2.1, I emphasized that the range of responses to changed economic circumstances no longer corresponds to the classical dichotomy of Romanistic, Germanic, and common law traditions, which in turn signifies that it can also function as an indicator of the evolution of values within a given legal system.

Indeed, Chapter 3 demonstrated that Bulgarian and English law approach supervening onerousness in different ways. More importantly, the thesis showed that this divergence has come about for a variety of reasons intimately related to the two jurisdictions’ pronouncedly dissimilar historical paths. Economic onerosity was not simply introduced to Bulgarian law in 1996 as a pragmatic measure to curtail the social implications of draconian inflation.⁸² Had this been the legislators’ objective, they could have passed a temporary statute similar to the *Loi Faillot* mentioned in §1.2.1. As explained in §2.3.3, the principle’s enactment completed a long process that had started as early as the 1920s when Bulgarian academics rebelled against the *Code civil*. Furthermore, as highlighted in Chapters 4 and 5, in contrast to English law, Bulgarian contract law had gradually developed an ‘infrastructure’ in which the doctrine could fit.

Unlike English law, which remained committed to freedom of contract and constrained intervention in agreements, Bulgarian law not only progressively embraced various

⁸¹ See §4.3.2.3 and §5.3.1.2.2.

⁸² See §1.1.

interventionist principles in its legislation, but also transformed seemingly benign doctrines into powerful tools to combat substantive injustice in contracts.⁸³ This important transition had its ideological justification—as argued in §5.4.2, unlike English law which develops in a liberal-individualist framework, contemporary Bulgarian law operates in a semi-organic framework which tolerates higher levels of interference with the individuals’ private spheres. As further explained in §5.4.2, the underlying ‘social contracts’ of English and Bulgarian law also inform the legislative process and the approach to law development and interpretation in the two jurisdictions. These ideological divergences between Bulgaria and England may serve as grounds to challenge the Commission’s technocratic rhetoric and rule-based approach in developing harmonizing legislation.⁸⁴

6.3.1 Which ‘Common’ and ‘Better’ Principles of Contract?

The Commission persistently portrays harmonization as a technical issue involving two decisions: 1) selection of the common, better, balanced and simple principles of contract⁸⁵ 2) selection of the proper instrument⁸⁶ in which they have to be included to better promote cross-border trade—a toolbox, a regulation, etc. Indeed, research groups have surveyed the European legal landscape to identify the common core of European

⁸³ See §4.3.2, §5.2, and §5.3.

⁸⁴ In the past, the Study Group on Social Justice has also warned that the Commission’s technocratic approach to drafting the rules conceals ‘the profound questions that need to be addressed when promoting the goal of harmonization of private law’ and may be usurped by powerful interest groups behind the curtain, ‘Social Justice in European Contract Law: A Manifesto’ (2004) 10 ELJ 653, 655 and 658.

⁸⁵ In its 2003 Communication, the Commission emphasizes with regard to the then future Common Frame of Reference: ‘Advantage should be taken of existing national legal orders in order to find possible common denominators, to develop common principles and, where appropriate, to identify best solutions,’ COM(2003) 68 final, page 17; In the Common European Sales Law (CESL) proposal, the Commission also maintains that CESL ‘should identify well-balanced solutions,’ COM(2011) 635 final, page 21; In the recent proposals, the Commission emphasizes the necessity of ‘simple and modern rules,’ COM(2015) 634 final, page 6 and COM(2015) 635 final, page 8.

⁸⁶ See footnote 11 (Chapter 1); See also the ‘Contract Law and the Digital Single Market’ report by Rafał Mańko of the European Parliamentary Research Service <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/568322/EPRS_IDA%282015%29568322_EN.pdf>.

private law.⁸⁷ It has also been emphasized that the ‘common historical basis’⁸⁸ of the civil and the common law should not be ignored and that the study of Roman law is important to ‘devise solutions for the present day.’⁸⁹

However, scholars have also argued that the fact that a common core of European private law exists does not imply the superiority of that solution: the choice of rules depends on whether one adopts efficiency or morality as a guiding principle.⁹⁰ Others have underlined that selecting principles of contract law for the EU involves political choices.⁹¹ Moreover, it has been asserted that the rule-based approach to drafting harmonization instruments lies on the assumption that ‘common rules equate with common solutions to legal problems,’ thus ignoring context and the values these rules incarnate.⁹²

As explained above, both the DCFR and the abandoned proposal on CESL contain provisions on impracticability. Nonetheless, the principle cannot be considered a common denominator between the various EU jurisdictions. As explained in §1.2 and §2.3.3, the concept of impracticability does not exist in English law and is not universal for all continental jurisdictions. In the same sections, I underscored that the *rebus sic stantibus* rule (the idea that contracts should be preserved as long as circumstances remain the same) regarded as the forerunner of impracticability did not exist in Roman law. While it first appeared in the writings of Seneca and Thomas Aquinas, *rebus sic stantibus* was recognized and applied as a principle of canon law as late as the 17th century.⁹³ I also explained that the first jurisdiction to allow the modification or

⁸⁷ The Trento Common Core Project, for instance, has resulted into in-depth comparative studies identifying common denominators between the various EU jurisdictions: Simon Whittaker and Reinhard Zimmermann (eds), *Good Faith in European Contract Law* (CUP 2000), John Cartwright and Martijn Hesselink (eds), *Precontractual Liability in European Private Law* (CUP 2011), Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Law* (CUP 2011), etc.

⁸⁸ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta 1990) x-xi.

⁸⁹ Reinhard Zimmermann, ‘Roman Law and the Harmonization of Private Law in Europe’ in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer 2004) 42.

⁹⁰ Jan Smits, ‘European Private Law and the Comparative Method’ in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (CUP 2010) 36.

⁹¹ Martijn Hesselink, ‘The Politics of a European Civil Code’ (2004) 10 ELJ 675; Martijn Hesselink, ‘Five Political Ideas of European Contract Law’ (2011) 2 ERCL 295.

⁹² Lucinda Miller, ‘Specific Performance in the Common and Civil Law’ in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment* (Nijhoff 2007) 285.

⁹³ See §1.2.1.

termination of contracts due to impracticability in modern times was Germany following WWI.⁹⁴

Since it is clear that impracticability is not and historically has not been a common denominator between the various jurisdictions in Europe, it seems that it was selected as a ‘better’ and more ‘balanced’ solution for the purposes of EU harmonization in the language of the Commission. The problem, however, is that the use of value-charged adjectives like ‘good’ and ‘balanced’ to characterize legal principles implies that other principles, which were not selected, were ‘bad’ and ‘not well-balanced.’ Nonetheless, what is ‘good’ or ‘balanced’ depends on the subjective viewpoint.

Many scholars, for example, evaluate contractual principles with reference to the ‘competing’ values underlying contract law⁹⁵—fairness, legal certainty, freedom of contract, etc. From this perspective, when endorsing a rule like impracticability, we have to choose a value to the detriment of rival values—in this case, prioritize substantive fairness over freedom of contract and legal certainty. In this line of thought, however, impracticability is a ‘better’ principle leading to a ‘balanced’ solution only if the legislators’ purpose is to prioritize substantive fairness and social justice. My study demonstrated that this was the aim of Bulgarian legislators in embracing a principle on supervening onerousness. By contrast, if promoting substantive fairness and social justice is not the purpose of legislators/judges, impracticability is not a ‘good’ principle because it jeopardizes freedom of contract and legal certainty. Indeed, this was one of the main lines of reasoning of English judges when rejecting the extension of frustration to impracticability.⁹⁶ How do we choose then which values to prioritize and how do we determine if the principle of impracticability is balanced?

It is interesting, for instance, that the EP asked Professor Hesselink to examine DCFR’s interim version and establish

if an appropriate balance has been struck among conflicting values and in particular between...individual private autonomy as expressed in the idea of freedom of contract, and...principles of protection of weaker contracting parties

⁹⁴ *ibid.*

⁹⁵ On the competing values of the common law, see Mindy Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 11-18.

⁹⁶ See §2.3.3.1, §3.5.1, §5.2.2.

*responding to demands for social solidarity, or if instead certain principles still hold a paramount position.*⁹⁷

Hesselink suggested that one of the tests the DCFR had pass was to ‘strike a proper balance between the two competing ideologies that dominated the political scene during the 20th century...liberalism and socialism, with individual autonomy and social solidarity as their respective paradigmatic values.’⁹⁸ In his prior work, he had argued that contractual principles could be ‘leftist’ if they promoted solidarity and ‘rightist’ if they promoted autonomy.⁹⁹

While it is commendable that he recognizes that contractual principles are linked to the State’s political model, his approach of qualifying principles as ‘leftist’ or ‘rightist’ based on whether they promote solidarity or autonomy is questionable. As explained in §2.3.3.2, the communist LOC borrowed a partial principle on economic onerosity (article 266, para 2) from the Fascist *Codice civile*. The same principle was found equally acceptable from the perspective of both leftist and rightist legislators—essentially, economic onerosity is as leftist as it is rightist. Besides, similar principles exist both in established market economies (the USA), in post-transition East European economies like Bulgaria and in countries that experienced radical transformations of their political system like Greece.¹⁰⁰

I argue that interventionism, as illustrated by a principle like economic onerosity, has no political color, but is a symptom of ‘organicization’ and departure from liberal individualism, which once dominated legal reasoning. It is a sign of conscious choice and perceived need for State regulation, which are conditioned by socioeconomic and complex historical factors, including the personal preferences of lawmakers and academics. It is interesting, for instance, that most jurisdictions mentioned in §1.2.1, which have embraced a rule on impracticability have either experienced Fascism or communism (Germany, Italy, Greece, Bulgaria, Poland).¹⁰¹ The diverse principles on

⁹⁷ Martijn Hesselink, ‘The Values Underlying the Draft Common Frame of Reference: What Role for Fairness and “Social Justice?”’ (2008) PE 408 312 - IP/A/IMCO/ST/2008-11; IP/C/JURI/FWC/2006-211/Lot3/C1/SC2, page 6.

⁹⁸ *ibid* 21.

⁹⁹ Hesselink, ‘The Politics of a European Civil Code’ (n 91) 676.

¹⁰⁰ See §1.2.1.

¹⁰¹ It is also interesting that UCC’s principal author, Karl Llewellyn, was heavily inspired by German Romanticism when drafting it and was a visiting professor in Germany in the 1930s, James Whitman, ‘Commercial Law and the American *Volk*: A Note on Llewellyn's German

changed circumstances these jurisdictions have embraced may be explained with the degree of organicization of the legal system in which they were developed.

In that light, Dikov's typology of contracts discussed in §5.4 could be helpful in resolving the 'good/bad/balanced' principle debate and in drawing attention to a question that has been ignored because of the discussion's rule-based orientation—what 'social contract' underlies or should underlie EU contract law?

6.3.2 What Notion of Contract/Social Contract for the EU?

My analysis of the notions of contract and social contract embedded in English and Bulgarian contract law in §5.4.2 demonstrated that the value and necessity of a legal principle can be established from the perspective of the socio-philosophical system framing a given contract law. The real question is not whether a principle is good or bad, but whether it is *compatible* with the socio-philosophical framework in which it is supposed to operate. Since for the moment EU institutions have opted for partial harmonization, the common principles they create and impose on MS have to function within the diverse socio-philosophical frameworks existing in the EU.

As noted in §6.2, CESL's article 89 allows a party to demand modification or termination before the judge unless parties have explicitly agreed who to bear the risk of the change. Essentially, the article allows the judge, in particular circumstances, to rewrite the contract for the parties *without their consent*. The spirit of the article is certainly familiar to Bulgarian lawyers and can still be accommodated within the Bulgarian hybrid liberal-organic framework. For English lawyers, however, article 89 is unusual because contract modification is a duty which English judges have deliberately refused to assume, as explained in Chapters 3, 4, and 5.

One may argue that despite its limited scope, the abandoned CESL proposal not only attempted to introduce unusual principles to English law, but could result into an intrusion and modification of the *terms of the social contract* embedded in it. It could lead to an invasion of the individuals' private spheres without their mutual consent and introduce incoherence from a doctrinal perspective in a system which has consistently

Sources for the Uniform Commercial Code' (1987) 97 YLJ 156-167; It may be the case that the UCC contains a rule on impracticability due to the influence of organic theory.

aimed to and has managed to preserve its internal legal logic unlike jurisdictions like Bulgaria. Moreover, it is likely that such an intrusion would not be well-received. As English judges (still) reason from a liberal individualist perspective, they may try to limit the impact of provisions which are incompatible with English law's underlying framework.

The status of complex harmonization instruments like the DCFR raises further questions about the role such documents attribute to contract law. As noted above, the Commission once considered that the DCFR could be implemented as a civil code of the EU. Stakeholders advocate that the DCFR could remain a valuable toolbox for national legislators.¹⁰² Complete harmonization implies that all MS have to share the same notion of contract and the same view of the socio-philosophical platform embedded in it. Essentially, it unifies the socio-legal models of the MS. The use of the DCFR as a toolbox, by contrast, entails a rapprochement of some national contract laws with the idealized model of the social contract embedded in the document. It is unclear, however, why a jurisdiction like England which has preserved its liberal individualist model for so long would consider seeking inspiration in an instrument promoting interventionism.¹⁰³

The inclusion of principles like changed circumstances in both CESL and the DCFR illustrates a desire for a greater degree of State regulation of contracts and an enlargement of the scope of judicial powers—features that are typical of an organic approach to contracts. These principles are neither 'better' nor 'well-balanced': they are indicative of a different social model. The question that remains is whether the MS were ready to make such a compromise and whether it was ethical to ask them to do so without adequate discussion of the political implications of this change. While for Bulgaria the 'organic' social model has been a reality for decades, other MS like

¹⁰² In 2015, the Bar Council of England & Wales reiterated its position that there is no proven need of CESL and argued that the Commission's 'original idea' of promoting a non-binding toolbox like the DCFR is the proper measure to pursue. See 'Common European Sales Law—What Next?'

<http://www.barcouncil.org.uk/media/342826/bar_council_of_e_w_-_alternatives_to_cesl_march_2015.pdf>.

¹⁰³ In addition to changed circumstances, the DCFR contains other provisions allowing intervention. For instance, II.–7:203 allows judicial adaptation of contract in case of mistake. II.–9:405 and II.–9:408 permit judges to strike out unfair terms in B2B contracts.

England¹⁰⁴ will need to make adjustments. Nonetheless, their motivation may be limited because nobody is easily persuaded to fix things which are not broken—the popularity of English law and courts among parties having no affiliation to England¹⁰⁵ seems to imply that there is nothing in urgent need of fixing.

6.4 Lesson 3. The Necessity to Reconsider the Traditional Taxonomies of Comparative Law

As explained in §1.2, much of the harmonization debate has been informed by the traditional taxonomy of comparative law, which divides European law into Romanistic, Germanic, and common law. Many scholars worry about the significant cultural ‘divide’ between the common law and continental law, which may impact harmonization negatively. I referred to Legrand’s claim that the two legal traditions have different *mentalités* and represent ‘two different ways of thinking about the law, about what it is to have knowledge of law and about the role of law in society.’¹⁰⁶ I also noted that other commentators maintain that the divergences between the common law and continental law are exaggerated because there are important differences between French and German law.

Without underestimating the implications of these divergences between leading jurisdictions, it is relevant to underscore that the juxtaposition of the intricate development of economic onerosity in Bulgaria¹⁰⁷ to English judges’ persistent refusal to grant relief to parties experiencing burdensome performance unless they have contracted to that effect¹⁰⁸ exposes a significant divergence between the *mentalités* of the two jurisdictions regarding law development. Furthermore, if one embraces that angle of analysis, one sees that the *mentalités* of leading jurisdictions regarding legal change (Germany, France, and England) are much more similar to one another than to the *mentalités* of East European jurisdictions like Bulgaria.

¹⁰⁴ Even if future harmonization initiatives do not involve the UK, these considerations would be valid for other MS like Spain and Belgium whose laws incarnate liberal individualist values. These countries generally refuse to grant relief in case of hardship. See §1.2.1.

¹⁰⁵ See footnote 16.

¹⁰⁶ Pierre Legrand, ‘Against a European Civil Code’ (1997) 60 MLR 53, 45.

¹⁰⁷ See §2.3.3 and §3.5.

¹⁰⁸ See §3.4.2, §3.5, §4.3.2.1, §5.3.

Neither the classical theory of legal families nor its modern versions capture this rift between East and West European laws. Moreover, these theories fail to explain the differences between East European jurisdictions themselves. The main reason for that, as discussed below, is that they focus on form (the law's structure and geography) rather than substance (the underlying values and dynamics of a given system).

Denouncing the biases of the theory of legal families is important to ensure the integrity of future comparative research. More importantly, nonetheless, it provides further footing to the argument in favor of legal pluralism in Europe—East European systems also have to make cultural sacrifices for the harmonization project.

6.4.1 The Unbearable Simplicity of Stereotyping

Recently, the classical theory of legal families has been under attack for failure to recognize the complexity of non-European legal systems. Various suggestions for improvement of the existing Eurocentric taxonomy have been made. For instance, van Hoecke and Warrington proposed classifying legal systems into 'cultural families'—Western and non-Western (African, Asian, and Islamic).¹⁰⁹ Smits has embraced the notion of 'mixed systems' which 'transcend the traditional legal families.'¹¹⁰ He explains that '[in] characterizing a system as mixed, ideally all the characteristics of the civil law and common law traditions should be taken into account.'¹¹¹ Peculiarly, under van Hoecke and Warrington's theory and Smits' definition of a mixed system both the Bulgarian and the English tradition would fall under the same categories—Western and non-mixed. This outcome, however, fails to explain the conceptual differences between English and Bulgarian law established in Chapters 3, 4 and 5 as well as the dissimilar tolerance to legal change the two systems have acquired¹¹²—as

¹⁰⁹ Mark van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: A New Model for Comparative Law' (1998) 47 ICLQ 495-536.

¹¹⁰ Jan Smits, *The Making of Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (tr Nicole Kornet, Intersentia 2002) 110.

¹¹¹ *ibid*; Palmer, nevertheless, suggests that mixed systems bear three characteristics: dual common law/civil law foundation (1), which is obvious to an ordinary observer (2) and which has structural implications for the private/public divide (3), Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (CUP 2001) 7-10.

¹¹² Smits has gone as far as claiming that the common law and the civil law 'remain as the only significant legal traditions, as a result of the disappearance of the socialist legal family,' Smits (n 110) 74. Considering that, as explained in §2.3.2, the LOC, which still operates in Bulgaria,

highlighted in Chapter 2, unlike English law, Bulgarian law is volatile and uses comparative law as a primary tool of legal development.

While others have attempted to accommodate East European jurisdictions in their analysis, their proposals for classification seem equally unsatisfactory. Özücü, for example, has suggested classifying legal systems based on the degree of ‘mixedness.’ She contends that ‘all legal systems are mixed’ and that ‘[only] the ways of mixing and the character of ensuing mixtures are different.’¹¹³ Yet, she argues that ‘some legal systems have come to be regarded as the mother legal systems of their families.’¹¹⁴ Thus she focuses her efforts on improving the classification of non-mother systems. She insists that ‘mixed systems can be visualized as lying along a spectrum’ depending on the ingredients used and the success of the transposition.¹¹⁵ Some systems are the ‘mixing bowl type with only a limited number of ingredients’¹¹⁶ whereas others are ‘complex mixed systems, where the elements are both socio-culturally and legal-culturally different.’¹¹⁷

In this framework of analysis, England would fall under the mother-system category. Bulgaria, nonetheless, would be characterized as a ‘complex mixed system’ because of the patchwork approach it uses to develop its laws.¹¹⁸ Özücü herself recognizes Hungary as a complex mixed system because it had a ‘civilian tradition with no civil code,’ ‘a socialist era,’ and a subsequent period of transformation.¹¹⁹ One can observe the same elements in Bulgaria, as demonstrated by my discussion in §2.3.

While Özücü’s typology provides a more sophisticated lens through which one can appreciate the ‘ingredients’ of East European jurisdictions, it seems to blur the differences between the various East European jurisdictions themselves. Essentially, the East European systems that are now part of the EU share the same experience of endorsing ‘socialist law’ and subsequently transitioning to democracy. All of them

was drafted during communism and that, as emphasized in §4.3.2.2, Bulgarian judges still cite communist theory when interpreting legislation, such declarations seem premature.

¹¹³ Esin Özücü, ‘A General View of “Legal Families” and of “Mixing Systems”’ in Esin Özücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 177.

¹¹⁴ Esin Özücü, ‘Mixed and Mixing Systems: A Conceptual Search’ in Esin Özücü and others (eds), *Studies in Legal Systems: Mixed and Mixing* (Kluwer 1996) 342.

¹¹⁵ Özücü, ‘A General View’ (n 113) 180.

¹¹⁶ *ibid* 179.

¹¹⁷ *ibid* 180.

¹¹⁸ See §2.3.2.

¹¹⁹ Özücü, ‘A General View’ (n 113) 181.

would be classified as ‘complex mixed systems.’ However, as explained in §2.3.2, the various European former-communist countries had *different* communist laws.¹²⁰ Moreover, as highlighted below, they pursued dissimilar paths of law reform following communism.

In her prior work, Öricü had suggested dividing former-communist systems into Central European which ‘had considerable civilian characteristics before they were subject of massive impositions and imposed receptions from the socialist socio-cultural and legal cultural tradition’ and East European which either ‘had no substantial previous legal contact with the civilian or common law systems’ or are ‘similar in many ways to the Central European legal systems.’¹²¹ She asserts that Central European jurisdictions can ‘now be thought of as returning to the Western legal tradition.’¹²² Under this taxonomy, Bulgaria would fall under East European countries which are ‘similar in many ways to the Central European legal systems’ which, at the same time, are ‘returning to the Western legal tradition.’ This rather vague definition does not capture the complexity of Bulgarian law reform and, similarly to the classification based on ‘mixedness,’ fails to explain the differences between Bulgaria and other East/Central European jurisdictions.

While, as explained in Chapter 2, Bulgaria is incredibly fond of change, it opted to amend its LOC rather than to develop and enact a new one from scratch.¹²³ This experience should be contrasted with the paths chosen by the Baltic States which abrogated the Soviet Civil Code.¹²⁴ Furthermore, each Baltic State pursued a different strategy for reform. Estonia based its Law of Obligations on the CISG, the PECL and the UNIDROIT Principles.¹²⁵ Lithuania, which modernized its code for the second time following communism in 2000, sought inspiration in Dutch, Italian, Quebec, German

¹²⁰ Prior to communism, they also had distinct paths of development.

¹²¹ Esin Öricü, ‘Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition’ (2000) 4 EJCL <<http://www.ejcl.org/41/art41-1.html>>.

¹²² *ibid.*

¹²³ Unlike other East European jurisdictions, Bulgaria never enacted a civil code either, as explained in §2.2.1.

¹²⁴ §See 2.3.2.

¹²⁵ Paul Varul, ‘CISG: A Source of Inspiration for the Estonian Law of Obligations’ (2003) 8 Rev Dr Uniforme 209.

and French law.¹²⁶ Latvia re-enacted the code it had prior to communism and subsequently amended it.¹²⁷

Former-communist countries, which were not part of the Soviet Union, also adopted diverse strategies. Hungary, for instance, initially amended its 1959 Hungarian Act no IV but enacted a new civil code in 2013.¹²⁸ In the drafting process, it considered both international instruments, such as the UNIDROIT Principles and the CISG, and national legislation like the Dutch Civil Code.¹²⁹ Poland, similarly to Bulgaria, has preserved its socialist civil code with minor amendments.¹³⁰ While there is an ongoing Polish initiative to develop a new civil code,¹³¹ its chances of success are questionable due to the opposition it has faced.¹³²

Essentially, the various East European jurisdictions have different laws, seek inspiration at different places, and implement reform at different times. While they are certainly ‘complex mixed systems’ in Örucü’s terminology and they share both a communist and a transition experience, they mix in ostensibly different ways. This phenomenon cannot simply be dubbed ‘returning to the Western tradition.’

Firstly, the Western tradition itself is not homogenous. The traditional exporters of law (England, France, and Germany) have different principles. Furthermore, Western jurisdictions which import law not only do not blindly copy the laws of the exporting countries, but also pursue their own identity.¹³³ Secondly, if we take the example of Bulgaria, even before communism, Bulgarian scholars had criticized the rigidity of the *Code civil*, which inspired the 1892 LOC, as explained in §2.3.3.1. We have not observed a ‘return’ to French law in modern times.

¹²⁶ Péter Cserne, ‘Drafting Civil Codes in Central and Eastern Europe: A Case Study on the Role of Legal Scholarship in Law-Making’ [2011] Pro Publico Bono <<http://www.propublicobono.hu/pdf/Cserne%20P%20Tamop%201.pdf>>.

¹²⁷ Kalvis Torgans, ‘European Initiatives (PECL, DCFR) and Modernization of Latvian Civil Law’ (2008) XIV *Juridica International* 137; As noted in §2.3.2.3, while Bulgaria considered its former LOC while amending the communist LOC, it did not re-enact it.

¹²⁸ Act V of 2013 on the Civil Code.

¹²⁹ Cserne (n 126).

¹³⁰ See Fryderyk Zoll, ‘The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, with Some References to Other Central and Eastern European Countries’ (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 81-98.

¹³¹ Zbigniew Radwański, ‘Green Book: An Optimal Vision of the Civil Code of the Republic of Poland’ (2006) <<http://www.ejcl.org/112/greenbookfinal-2.pdf>>.

¹³² Cserne (n 126).

¹³³ For example, while Italian law is heavily influenced by both French and German law, it also developed its own organic philosophy, as explained in §5.4.2.

Thirdly, it is questionable whether all East European jurisdictions in fact abandoned the Western tradition during communism.¹³⁴ It is widely known that communist law was a mixture of continental principles and Marxist-Leninist ideology. However, as noted above, the diverse East European jurisdictions embraced dissimilar mixtures for various historical reasons, which cannot be ignored. While the Soviet Union imposed its laws on the Baltic States as they were part of it, Soviet satellites like Bulgaria, Poland, and Hungary developed their own mixtures at different times.¹³⁵ The choice of Western and communist principles which were integrated in communist legislation was conscious and, at least for the case of Bulgaria, which we discussed in Chapter 2, influenced by diverse contextual factors.

6.4.2 Porous v Hermetic European Legal Cultures

The above discussion is important because it implies a major rift between West and East European legal systems, which merits more attention—unlike West European jurisdictions, and especially leading jurisdictions like England, France, and Germany, East European jurisdictions are extremely *tolerant* to legal change. They are not systems that simply ‘mix-and-match’ Western principles. They are *chameleons*—they have demonstrated an immense capacity to absorb and mold diverse foreign law to their liking, to revamp their legislation in a very short time or to even re-enact prior legislation when they deem necessary.

To clarify, there are certainly substantial differences between the structure of the civil laws of the leading jurisdictions¹³⁶ in the EU as well as the role they have bestowed upon judges.¹³⁷ Nonetheless, when developing their laws or looking for solutions to

¹³⁴ Some Western scholars considered communist law as a sub-branch of continental law during the Cold War, Katalin Kelemen and Balazs Fekete, ‘How Should the Legal Systems of Eastern Europe be Classified Today?’ (International Conference for the 10th Anniversary of the Institute of Comparative Law, Potsdam, 2014).

¹³⁵ Bulgaria enacted its communist LOC in 1950, Hungary enacted its communist code in 1959 and Poland—in 1964.

¹³⁶ The German civil code has a Pandectist structure while the *Code civil* has adopted an institutionalist approach. For a discussion of the differences, see §2.2.1; The English law of obligations is judge-made for the most part, with the exception of statutes adopted by Parliament, such as the Law Reform (Frustrated Contracts) Act 1943, the CRA 2015, etc.

¹³⁷ English judges are traditionally described as law-seekers while continental judges—as law appliers, Patrick Glenn, *Legal Traditions of the World* (3rd edn, OUP 2007) 245; However, in

new challenges, England, France, and Germany traditionally seek inspiration primarily in their historical roots, doctrine, and case law—this is a key similarity. Although there are examples of doctrines and principles these jurisdictions have borrowed from others,¹³⁸ the principal tool of development remains the examination of their own legal heritage. This approach allows for the preservation of the internal consistency and legal logic of the respective legal system, which in turn sustains legal certainty and predictability. Thus, from the perspective of jurisdictions like Bulgaria, these legal cultures appear hermetic—they allow legal transfers only if they are necessary to achieve particular outcomes. For example, as mentioned in Chapter 3, in *Taylor v Caldwell*, Blackburn J relied on Pothier’s writings to alleviate the position that contracts had an absolute force.¹³⁹ At the same time, legal transfers may ‘irritate’ these systems and may be difficult to reconcile with the rest of the corpus of law.

By contrast, because of diverse contextual factors, Bulgaria developed a highly porous legal system. As clarified in §2.3, the first Bulgarian lawyers established legal transfers as a primary tool of legal development and comparative law as a staple for legal analysis—a feature that remained prominent to a lesser extent even during communism. The specificity of the Bulgarian approach lies in the fact that Bulgarian legislators and scholarship never displayed particular fidelity towards any foreign jurisdiction.¹⁴⁰

While the choice of inspiration was and continues to be subjective, it is linked to the country’s quest for a viable model to govern the relationships between its citizens. In §2.3, we saw that Bulgarian jurists initially imported the French model of the law of obligations in 1892 only to reject it three decades later, as they discovered that it did not lead to just results from their perspective. They scrutinized developments in many jurisdictions in the hope of finding a way to fix the model only to be forced to dismantle it completely during communism. After the rise of democracy and despite having surveyed both West and East European legislation, Bulgarian legislators decided to make cosmetic changes to the Bulgarian communist law of obligations based on law

some continental jurisdictions like Germany judges have earned their right to make law to reach just outcomes. See footnote 40 (Chapter 2).

¹³⁸ See footnote 79 (Chapter 1).

¹³⁹ See footnote 4 (Chapter 3).

¹⁴⁰ Many Western jurisdictions which import law borrow directly from ‘parent’ jurisdictions. For instance, Italian law is heavily influenced by both French and German law. Spanish and Portuguese law also sought inspiration in the *Code civil*; When English judges borrow law from abroad or consider other legal solutions, they discuss the laws of other common law countries or of the ‘big ones’—France and Germany.

prior to communism, thus essentially creating a hybrid model. In other words, Bulgaria has been experimenting with its legal identity since it has learned that blindly copying a single foreign model does not address its legal needs.¹⁴¹

Because of its persistent quest for identity, Bulgarian law is naturally ‘impure’ and is not easily irritated by borrowed principles. Doctrines like economic onerosity are not perceived as a threat to the internal logic of Bulgarian law, but as another piece of fabric integrated in the patchwork—foreign knowledge which is beneficial. Essentially, the Bulgarian *mentalité* regarding legal development is distinct from the *mentalités* of England, Germany, or France which try to resist radical modifications of their contractual values.¹⁴² Thus the argument in favor of legal pluralism has a different footing in Bulgaria. While the leading jurisdictions have their unique principles and ideologies to protect, Bulgaria has to defend its right to choose *when* to change and to continue its quest, and so do other East European States.¹⁴³

¹⁴¹ Or, as Dikov put it: ‘...States that blindly copy foreign models of government believing that this approach ensures their future existence should be mourned,’ Lyuben Dikov, *Morality and Law* (Sofia 1934) 8.

¹⁴² While the recent *ordonnance* mentioned in §1.2.1 has made substantive changes to the French law of obligations, it has been asserted that ‘the project is quite moderate and does not present a revolution of ideas,’ Mustapha Mekki, ‘The General Principles of Contract Law in the "Ordonnance" on the Reform of Contract Law’ (2016) 76 *La. L. Rev.* 1193, 1194; Also note that the reform’s major innovation—article 1195—is rather safely worded. It encourages parties to agree on judicial intervention before petitioning the court. Moreover, the historical contrast between France and Bulgaria is striking—as this thesis demonstrated, Bulgaria was open to innovation as early as the 1920s and embraced a partial principle on economic onerosity (article 266, para 2) in 1950.

¹⁴³ It is interesting that Mańko argues that ‘there do not seem to be any cultural barriers to the unification of private law across the EU in form of a national, indigenous or original Polish culture of private law which would require to be protected at any price due to its unique character,’ Rafał Mańko, ‘The Unification of Private Law in Europe from the Perspective of the Polish Legal Culture’ (2007-2008) 11 *Yearbook of Polish European Studies* 109, 125; I do not share his view neither in relation to Poland nor to Bulgaria. The uniqueness of both cultures lies in their ability to synthesize principles from diverse traditions and to pursue their own path—neither Bulgaria nor Poland surrendered completely to Soviet law, for instance; Additionally, as explained in §2.3.2.1, the 1933 Polish Civil Code was recognized as a successful synthesis of Romano-Germanic principles, which others could follow.

6.5 Lesson 4. Learning from a Newcomer: What Strategies to Manage Legal Change?

Any decision regarding harmonization—no matter whether the goal is uniformization through the enforcement of a complex instrument like the DCFR or partial harmonization through directives as the current agenda suggests—is political. However, as explained above, such endeavors entail both risks and compromises. MS may diverge in their interpretation of harmonizing instruments due to contextual factors. Moreover, they have to make concessions regarding their contractual values and legal cultural identity.

In order not to end the Chapter on a minor note, I remind the reader that unlike Western States, Bulgaria has survived *drastic* legal change several times in its recent history. Hence, it has something important to teach Western Europe—radical change is less disruptive when strategies ensuring a more uniform interpretation are adopted.

Western scholars have already emphasized the necessity of less formal mechanisms ensuring consistent application of EU law. Miller, for example, notes that embracing legal pluralism as a model for private law in the EU requires the development of strategies to identify when diversity leads to undesired outcomes and to devise mechanisms for governance of contract law in a multi-level context.¹⁴⁴ She argues in favor of establishing processes of mutual learning through which experience and best practices can be exchanged.¹⁴⁵ Two of the suggestions she discusses are the establishment of a European Law Institute (ELI) to enhance discussion in a European context, which was established in 2011, and the encouragement of horizontal coordination among national courts.¹⁴⁶ Giliker emphasizes how important it is to encourage openness and education about European legal development on a national level as well as dialogue between national and European judiciary.¹⁴⁷

While both authors refer to differences in interpretation between MS, which, as seen in §6.2 may be palpable, it should be clarified that there may be divergences even within the same legal system. Firstly, what judges do may differ from what they say they do.

¹⁴⁴ See Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (OUP 2012) 218.

¹⁴⁵ *ibid* 202.

¹⁴⁶ *ibid* 207-215.

¹⁴⁷ Paula Giliker, *Europeanization of English Tort Law* (Hart 2014) 203-208.

Many of them do what they believe is right in a particular case and only then seek the legal means to rationalize their decision. One can find examples of judicial activism in many jurisdictions, including England and Bulgaria. For instance, §5.3.2.1 highlighted that in *Staffordshire* Lord Denning relied on the rules of construction to terminate a long-term agreement for the supply of water although the contract explicitly said that water needed to be supplied ‘at all times hereafter.’ In §5.2.3, we underlined that Bulgarian judges nullify liquidated damages clauses in contracts between merchants despite the fact that the LC explicitly forbids them to do so.

Secondly, even in the same jurisdiction judges may have very different backgrounds, which may inform their decisions on what is right to do. For example, senior Bulgarian judges have confronted radical socio-political upheavals in their lifetime. They earned their education during communism. Then they had to adapt to the brisk changes in legislation discussed in §2.3.1.3. Following Bulgaria’s entry in the EU, they had to catch up quickly on more than 50 years of European legal development—a process that is still continuing. By contrast, judges who have recently joined the judiciary¹⁴⁸ have not experienced the full spectrum of changes¹⁴⁹ and may have notions of EU law which has become part of the university curriculum. Similar generational gaps exist in old MS too.¹⁵⁰

It thus seems indispensable to devise strategies aimed at confining judicial activism and discrepancies of interpretation within reasonable limits both on a national and a pan-European level. This is where the Bulgarian experience may be informative. The following sections examine how scholars can contribute to the adjudicative process (§6.4.1) and how European legislators can help judges reach more consistent outcomes (§6.4.2).

¹⁴⁸ Unlike English judges, Bulgarian judges are State servants. To become a judge in Bulgaria, one needs to pass an exam after earning a law degree and then complete a 9-month training at the National Institute of Justice.

¹⁴⁹ In the years when they studied law, legislation was more stable as the transition to democracy had advanced.

¹⁵⁰ Juan Mayoral and others, ‘Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges’ Assessment Regarding EU Law Knowledge’ (2014) 21 JEPP 1120.

6.5.1 *Adjudication and the Scholar*

In §2.2.2 I clarified that Bulgarian scholars have more means to influence the adjudicative process compared to English scholars. This has been possible because of the openness of the judiciary to exchange and dialogue which has historical roots. As discussed in §2.3.1, because of the volatility of Bulgarian legal development which results in gaps and deficiencies, scholars and judges formed a natural ‘alliance’ aimed at achieving just results and uniform interpretation. Assuming willingness by national judges, some of the strategies of the Bulgarian ‘alliance’ may prove useful to achieve more uniform interpretation on a pan-European level.¹⁵¹

6.5.1.1 **Educating Judges**

In §1.2, I cited Lando’s position that opponents of harmonization are primarily motivated by the fact that they do not want to forget what they already know and go back to school.¹⁵² In that light, Giliker has already stressed the importance of educating lawyers and law students about European law.¹⁵³ She asserts that while measures have been taken in the UK by introducing EU law as part of the university curriculum, there will be a ‘time lag’ before these students join the judiciary.¹⁵⁴

The Bulgarian experience may be helpful in reducing the lag. In 2005, for example, Sofia University established the first Master’s degree in European law in Bulgaria. From an English perspective, it is striking that by 2012, 230 of the 430 students who earned the degree were actually magistrates who enrolled voluntarily—judges from Bulgaria’s Supreme Courts as well as Presidents of Courts of Appeal and District Courts.¹⁵⁵ Moreover, when Bulgaria joined the EU in 2007, it was quickly discovered

¹⁵¹ This also seems like a natural step considering the harmonization initiative was conceived by scholars, as explained in §1.2; It has been contended that scholarship is ‘the source of European legal thinking’ and ‘the driving force for its future development,’ Lucinda Miller, ‘The Notion of European Private Law and a Softer Side to Harmonization’ in Michael Lobban and Julia Moses (eds), *The Impact of Ideas on Legal Development* (CUP 2012) 275.

¹⁵² Ole Lando, ‘Culture and Contract Laws’ (2007) 3 ERCL 17.

¹⁵³ Giliker (n 147) 205.

¹⁵⁴ *ibid.*

¹⁵⁵ Presentation on European law activities of Sofia University’s Law Faculty 2002-2012 <<http://eubg.eu/?show=about&lang=bg>>.

that access to decisions of the ECJ in Bulgarian was insufficient to help judges from the lower courts to understand European law. Thus courts themselves started organizing less formal conferences at which judges could hear presentations by scholars and fellow judges who were more knowledgeable in the field and engage in discussion.¹⁵⁶

Undoubtedly an important step towards encouraging judicial dialogue and education on a pan-European level has been taken with the establishment of the European Judicial Training Network (EJTN). Examining their 2015 report, however, reveals that while participation in their activities increases, the cornerstone of their program remains the short-term (2-week) exchanges.¹⁵⁷ Without denying the benefits of these activities, one should be realistic about their actual impact—little knowledge is a dangerous thing. Most senior national judges have never taken classes and do not hold degrees in EU law. It is questionable whether short-term seminars can fill in this gap in knowledge or introduce judges to EU law's complexity—before specializing in any specific EU legal issue, one needs an in-depth understanding of the corpus of EU law.

While there is a stigma about sending national judges back to school for a longer period of time, it seems indispensable to do so if the goal is to achieve uniform understanding and application of EU law, including more complex harmonizing instruments in contract. The fact that senior Bulgarian judges have voluntarily enrolled in a Master's program in EU law may serve as inspiration for others to follow their example or for national courts to cooperate with universities and organize specially designed long-term diploma programs (or even Master's degrees) for the judiciary. The Bulgarian example to organize local seminars with judges and scholars can also inspire other national courts to take the initiative themselves rather than to rely primarily on programs endorsed by European institutions. These conferences could be the right venue to engage in further 'mutual learning,' in the words of Miller.¹⁵⁸

¹⁵⁶ See 'Training Administrative Judges in European Law' Darik Radio (Sofia, 4 June 2012) <http://dariknews.bg/view_article.php?article_id=912376>.

¹⁵⁷ EJTN 2015 Annual Report, page 33

< http://www.ejtn.eu/PageFiles/14790/EJTN_Annual_Report_2015_approved.pdf>.

¹⁵⁸ Miller (n 144) 202.

6.5.1.2 Informing Interpretation

Watson has asserted that while conformity of interpretation may be a problem if a European Civil Code is adopted, one must be careful not to exaggerate since legal scholars will ‘scrutinize decisions in all of the countries in the EU.’¹⁵⁹ While his claim pertains to uniformization of the law of obligations, it is questionable both in relation to uniformization (which is currently unlikely) and to partial harmonization. The Bulgarian example clearly shows that scholars’ fundamental work begins *before* a court decision is rendered.

As explained in §2.2, one of the significant ways in which Bulgarian scholars have assisted judges in implementing new laws is by helping them to draft decisions on interpretation, which are a primary source of law in Bulgaria. It seems conceivable for national courts to invite both local and international scholars to advise them when drafting decisions related to EU law, including EU contract law. More structured consultation mechanisms, involving partnerships between courts and universities, can also be envisaged.

Moreover, as underscored in §2.3, all major reforms of the Bulgarian law of obligations were accompanied by the publishing of comprehensive treatises which were not only used for teaching purposes but also as sources to which judges could refer. While treatises/textbooks are not a primary source of law and their authors often disagree on many substantive issues, they arm practitioners with helpful tools, constructs, and explanations with which the law itself cannot. When one examines case law from Bulgaria, one often finds either direct¹⁶⁰ or indirect¹⁶¹ references to treatises along with case law which judges use to support their legal reasoning and to derive their conclusions. Furthermore, in §2.3.3 and Chapter 3, we emphasized that Bulgarian scholars also played a major role in integrating the doctrine of economic onerosity and developing its criteria of application.

¹⁵⁹ Alan Watson, ‘Legal Transplants and European Private Law’ (2000) EJCL <<http://www.ejcl.org/44/art44-2.html>>.

¹⁶⁰ The SCC has recently drawn upon Kozuharov’s reasoning regarding buy-back options in contracts, Decision 82/1999 on cr.c.35/99; The Kavarna Regional Court has cited Tadjer’s textbook to explain the conditions for voiding an agreement, Decision 18/2014 on civ.c.485/2012; The Kazanluk Regional Court has used both Kalaidjiev’s and Kozuharov’s textbooks to derive the standard of assignment, Decision 161/2014 on civ.c.1909/2013.

¹⁶¹ See our discussion on Decision on interpretation 1/2000 in §4.3.2.2.

One can find similar examples in other jurisdictions, including in England where judges have recently started to cite the work of contemporary scholars. However, the specificity of the Bulgarian case lies in the extent of scholarly involvement and the fact that this strategy has been successful in instances of *radical change* of legislation rather than in instances of mere consolidation, improvement or harmonization of existing law in the context of a continuous tradition. Essentially, through their involvement, Bulgarian scholars have helped judges to forget what they have learned and to begin reasoning in a different framework of legal logic.

In that light, while it is not cost/time efficient, it may be worth bringing together Western and Eastern scholars in smaller, more manageable groups either under ELI's umbrella or in independent collaborations to write critical evaluations of proposed harmonizing legislation in contract law or even textbooks on European contract to facilitate both students and national judges in understanding the purpose of the provisions. Such writings may help fill the initial gap of lack of case law by the CJEU.

Some may say this is already being done—comparative treatises have been published¹⁶² and the DCFR contains comments and comparative notes. These documents, nonetheless, may be useful to a limited audience. As explained above, the DCFR's notes are insufficient to help Bulgarian and English judges reach the same outcome. They are brief and do not capture subtle nuances which appear in case law. Moreover, they are not written having an East European audience in mind. If severe discrepancies of interpretation are to be prevented on a pan-European scale, we need more exhaustive commentaries taking into account the particularities of all MS.

6.5.2 The Judge and the General Principles of Civil Law

Recently, scholars have drawn attention to the role of the general principles of civil law in interpreting European legislation. Since the EU does not have a constitution, a civil code or drafted general principles of civil law, European judges have to infer the principles from regulations, directives or MS' national legislation. Reich, for instance, has attempted identifying the general principles of EU civil law as set forth in CJEU's

¹⁶² See Basil Markensius and others, *The German Law of Contract: A Comparative Treatise* (Hart 2006); Unfortunately, East European jurisdictions are ignored.

decisions pertaining to contract law and civil liability.¹⁶³ Weatherill has questioned CJEU's very approach because the reference to general principles of civil law 'involves an assumption of homogeneity in content and method in the field of law which is highly contestable.'¹⁶⁴ Hesselink, nonetheless, believes that these principles may contribute to the coherence of EU legislation and may result in interpretation of EU texts that is friendlier to MS.¹⁶⁵

As EU institutions remain committed to the harmonization initiative, it seems relevant to evaluate which the better option to pursue is—enact the general principles of European civil law or allow European and national judges to continue identifying and developing them by themselves. It should be stressed that most continental jurisdictions, which have embraced a Pandectist structure for their civil law, have indeed codified these principles as part of the general part of their civil law. As a document with a Pandectist structure, the DCFR stipulates its four underlying principles in Book I—freedom, security, justice, and efficiency.¹⁶⁶ Hesselink has criticized this choice because in his opinion freedom, security, justice, and efficiency are values rather than principles.¹⁶⁷ Furthermore, he raises concern that the system of values is 'closed' as I.-1:102 on interpretation and development of the DCFR obliges judges to rely only on these principles when interpreting its provisions,¹⁶⁸ thus ignoring other core European values like social solidarity and equality. He also emphasizes: '...it is not clear that European private law needs a limited set of officially recognized private law principles or values or even a more flexible and open-ended canon.'¹⁶⁹

Once again, the Bulgarian experience can be helpful in showcasing some of the benefits and risks associated with not having codified general principles of civil law. In §2.2, I explained that unlike other continental jurisdictions with a Pandectist model, Bulgaria has not codified the general part of its civil law. In Bulgaria, it is argued that the general

¹⁶³ Norbert Reich, *General Principles of EU Civil Law* (Intersentia 2014).

¹⁶⁴ Stephen Weatherill, 'The "Principles of Civil Law" as a Basis for Interpreting the Legislative Acquis' (2010) 6 ERCL 74.

¹⁶⁵ Martijn Hesselink, 'The General Principles of Civil Law: Their Nature, Roles and Legitimacy' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013) 131-80.

¹⁶⁶ *Principles, Definitions...* (n 31) 47.

¹⁶⁷ Martijn Hesselink, 'If you don't like our principles, we have others. On core values and underlying principles in European private law: a critical discussion of the new 'Principles' section in the draft CFR' (2009) Page 2 <<http://ssrn.com/abstract=1514449>>.

¹⁶⁸ See I.-1:102(1) and (4).

¹⁶⁹ Hesselink, 'If you don't like our principles' (n 167) 7.

part can be derived from the law's spirit and from scholarly writing. In practice, this approach permits evolution of the law and adaptation to changing social needs—it provides judges with the flexibility to address the diverse issues they confront. Notably, the general principles of Bulgarian civil law play a number of functions, including guiding legislators when drafting Bills, helping judges to fill in gaps in legislation, but most importantly—they aid judges in interpreting legislation and in reaching just outcomes (from their perspective).

Moreover, as explained in §4.3.2.2, Bulgarian doctrine prior to communism distinguished between static and dynamic legal certainty. While the former entails the security of keeping the content of agreements untouched, the latter implies the security that judges would achieve socially acceptable outcomes. Essentially, not codifying the general principles of civil law allows judges to promote both static and dynamic legal certainty as they have a margin to mold the principles if they feel this is necessary. The main advantage is that such an approach ensures the law's longevity. Inevitably certain provisions become outdated or are not well-conceived to begin with¹⁷⁰—hence they may result in unjust consequences if followed unconditionally by judges. In that regard, it has been contended that common lawyers are skeptical of codification because 'under a codified system, legal reasoning has a tendency to adopt an obsessive emphasis on the meaning of words in the rules rather than to concentrate on the outcomes required by the law and to achieve justice between the parties to a dispute.'¹⁷¹ Fluid general principles mitigate this issue.

The main disadvantage, to illustrate and further Weatherill's argument cited above, is that views on what is socially acceptable may not only diverge between jurisdictions, but also in the same jurisdiction. Chapter 4 clarified that Bulgarian and English judges entertain different notions of what justice in contract law entails. In §3.5, we also saw that Bulgarian judges from the same appellate court disagreed on what equivalence of performance meant, so the SCC had to intervene. In §4.3.2, we emphasized that fairness and good faith have been molded to such an extent that it is difficult to distinguish between the two: both principles have become instruments allowing judges to neglect existing law or to make law.

¹⁷⁰ See our discussion on article 309 in §5.2.3.

¹⁷¹ Hugh Collins, 'Why Europe Needs a Civil Code' (2013) 21 ERPL 907, 908.

Consequently, it seems that if European legislators do not provide guidance¹⁷² on what the general principles of European civil law/contract law are, national judges will interpret EU legislation with national assumptions. Besides, as visible from Reich's research,¹⁷³ CJEU's conception of general principles is rather broad and cannot provide clear guidance to national courts. Currently, scholars are the main actors who systematize and critically evaluate such general principles. Hence there may be an important lag in flagging up instances when judges have gone too far in their creativity, which may jeopardize the very idea of harmonization.

6.6 Conclusion

This Chapter put forward four lessons for the harmonization initiative on the basis of my study. Firstly, I examined the provisions on changed circumstances in the DCFR and CESL to demonstrate that they would have been interpreted differently in England and Bulgaria had they been implemented. Both provisions have gaps. Moreover, they do not provide judges with sufficient clarity on how the criteria of application should be assessed and how remedies should be awarded. Consequently, both English and Bulgarian judges would have been forced to rely on their national laws to interpret them. The discussion is important as the underlying purpose of harmonization is to reduce parties' costs in researching foreign law. It seems, nonetheless, parties would have had to research 'foreign' interpretation instead.

Secondly, I criticized the Commission's overly pragmatic approach towards the harmonization initiative. I argued that Dikov's typology of contracts, which I used as a tool to showcase the extent of the differences between English and Bulgarian contract law in Chapter 5, can be equally helpful in identifying the true implications of the project. I emphasized that the 'good/bad/balanced' principle debate is superficial and instead there needs to be a more exhaustive discussion about the underlying framework of existing EU contract law before harmonization continues.

¹⁷² This guidance can have different forms: from naming the general principles in a regulation and allowing judges to develop them, through enacting legislation to correct the effects of judicial activism similarly to Parliament in the UK, to publishing 'toolboxes' which national judges can use.

¹⁷³ See Reich (n 163).

Thirdly, I stressed that the traditional taxonomies of comparative law should be reconsidered because they are culturally biased against Eastern Europe. Even the modern versions of the theory of legal families put East European jurisdictions in the same ‘box’ and do not recognize the important differences between them. Furthermore, they do not identify key divergences between West and East European systems. Exposing the biases also provides further footing to the argument in favor of legal pluralism—East European States have legal identities worth preserving.

Finally, harmonization, as currently conceived, involves both political and cultural compromises and risks of new divergences. Bulgaria’s experience can be helpful in mitigating the latter. As Bulgaria has survived radical changes of its legal system, it has developed strategies for achieving uniform interpretation, which can be beneficial on a pan-European level. The first mechanism concerns scholars’ indirect involvement in adjudication by educating judges and helping them interpret European instruments via consultations or treatises on contract. The second mechanism is allowing judges to develop and redefine the general principles of civil law themselves to ensure just outcomes. However, since despite its advantages, the mechanism also permits judges to go too far in their creativity, it seems necessary that European legislators provide more guidance to national and European judges to ensure they are on the same page when innovating.

Chapter 7

Conclusion: Opening Pandora's Box(es)

7.1 The Need for Mutual and Self-Understanding

While the Cold War ended more than two decades ago, it continues to have lasting repercussions in legal science. On the one hand, communism *interrupted* the dynamic intellectual exchange between Bulgaria and the rest of Europe. On the other hand, it *disrupted* the natural evolution of Bulgarian law and attempted to detach it from its roots through purges, censorship, and propaganda.

The 'interruption' has resulted into a lack of mutual understanding between Bulgaria and other Western States like England. To this day, little is known about Bulgarian law abroad—an issue which predisposes generalizations, or worse, indifference to its existence. Sadly, contemporary comparative research in the West, including fundamental research on the harmonization of contract law in the EU, does not show much interest in Eastern European law, including Bulgarian law. Bulgarian academics, in turn, have only begun to revive the Bulgarian school of comparative law, which has a rich and unique tradition, as demonstrated in this thesis. Contemporary comparisons, nonetheless, rarely go beyond analysis of wordings of foreign provisions—Bulgarian doctrine still has a long way to go to catch up on the achievements of its predecessors and to engage in meaningful dialogue with the West.

The 'disruption,' by contrast, has caused an illusion of self-understanding. Bulgarian scholars have yet to denounce many of the convenient myths propagated during communism to paint a more honest picture about the origin and development of

Bulgarian law and legal philosophy. The diverse methodologies of comparative law as well as further archival research may indeed hold the key to opening Pandora's 'Bulgarian' box. As explained in my study, Bulgarian law has a peculiar path of development and a capacity to combine elements that seem incompatible at first glance. Hence for the sake of historical accuracy and better understanding of current principles of contract, it is indispensable to explore in further detail the diverse processes and factors that shaped the law.

One of the main purposes of this study was to take a step in addressing both the problem of interruption and the issue of disruption. I relied on the example of changed economic circumstances as a gateway to illustrating the important differences between the values of English and Bulgarian law and to elucidating the complexity and volatility of Bulgarian (contract) law. While impracticability remains a question of law with limited practical significance for stable economies,¹ it is a litmus test for conceptual differences, which are interesting not only from a theoretical comparative perspective, but which can also have implications for the harmonization initiative.

Furthermore, the approach to impracticability is a barometer of evolution of a given contract law, including of modifications in its underlying socio-philosophical framework. It does not seem accidental that the current jurisdictional response to impracticability no longer matches the classical division of contract law into Romanistic, Germanic and common law. As highlighted in §6.3.2, it is also interesting that most jurisdictions that have embraced such a rule not only have experienced drastic economic turbulence in the past, but have also been favorable to radically changing their political regime.

Hence, from a theoretical perspective, the future challenge of comparative law in the EU lies in going beyond traditional functional analyses and beyond comfort zones regarding the choice of jurisdictions or, in other words, *opening the 'Pandora's box(es)'* of the EU and its MS. Exploring less obvious contextual factors and links showing the true rather than the mythical patterns of legal development will enhance both mutual and self-understanding. It will also spark a more sophisticated substantive comparative dialogue, which can be beneficial regarding the process of harmonization. A more in-depth knowledge of the particularities and legal achievements of others

¹ The 2015 Greek crisis, nonetheless, is a reminder that the principle yet has a role to play.

could be the answer to overcoming the culturally insensitive and simplistic good/bad rule analysis we referred to in §6.3, which has permeated the harmonization debate.

Furthermore, exploring jurisdictions, which are very different from our own, can serve as a mirror helping us to notice aspects of our own legal system that we took for granted before. For instance, we demonstrated that although Bulgarian scholars are convinced that Bulgarian contract law is timeless and can operate in any political regime, a juxtaposition with English law reveals fundamental differences between Bulgarian law and the law of a jurisdiction which has been uninterruptedly committed to a free market. We also showed that while Western scholars are contemplating the profound divides between the contract laws of England, France, and Germany, they have been oblivious of other rifts in the EU. We further underscored that although contemporary common law writers argue that market individualism and fairness share the stage in current English law, a comparison with jurisdictions like Bulgaria reveals that fairness has been given a smaller part to play on the English stage than on the Bulgarian stage.

Going beyond traditional pathways of analysis can also have important practical implications—identifying unanticipated issues that may arise if harmonization continues or strategies that have worked in the past to achieve uniformization of outcome in case of radical change of legislation, as explained in §6.5. Certainly, former-communist countries like Bulgaria have more experience in that regard compared to Western States. Furthermore, because of the considerable differences between their historical paths, experiences differ—these are surely opportunities for future research that are worth undertaking.

Alternatively, understanding what has not worked in the past, including the hidden ways of ‘rebellion’ against or ‘support’ for legal change, can also be valuable if harmonization is to be further pursued. We explained, for instance, that the Bulgarian communist government had requested the drafting committee of the 1950 LOC to develop communist law and we underlined that it had stigmatized Dikov who promoted an organic approach to contract law and the merits of Italian law. However, the drafters paid hidden tribute to him both by seeking inspiration in a country of rival ideology at the time (Italy) and by ‘organicizing’ Bulgarian contract law. We also highlighted that the contemporary SCC has sought inspiration in communist doctrine rather than in modern doctrine to enforce substantive fairness in contract. Moreover,

we showed how English judges have avoided settling unequivocally on a philosophical justification of frustration, thus perhaps leaving the door open to innovation in the future. We also underscored how the modern contextual approach to interpretation has indeed brought English law closer to jurisdictions promoting a greater degree of social justice in contract law.

Essentially, ‘the devil is in the detail.’ Making assumptions about self and others without extensive research, including comparative contextual analysis, not only propagates legends rather than the objective truth, but may also jeopardize the chance of success of the harmonization project. In addition to being symbolic of unification of values, contract law is one of the most severely guarded branches of law by the judiciary who are willing to go a long way to defend the principles they deem important.

7.2 Variable Geometry as a Solution?

In these politically tumultuous times following the referendum on ‘Brexit,’ it is likely that the harmonization project takes a back seat. Not only there is a possibility that the UK leaves the Union, but also the Visegrad Group demands a major reform of the EU²—a statement which reflects the growing Euroscepticism in Eastern Europe.³ In an attempt to gain political dividends from the crisis, right-wing forces in some Western MS are also calling for national referenda on membership.⁴ Clearly, EU’s

² ‘Visegrad Calls for Complete Change of EU-27’ Euractiv.com (29 June 2016) <<http://www.euractiv.com/section/global-europe/news/visegrad-calls-for-complete-change-of-eu-27/>>; Slovakia, which assumed presidency of the Council on 1 July 2016, will host an informal European summit to discuss EU’s future in September. Its Prime Minister recently declared: ‘There are policies of the EU which need to be clearly labeled as failed,’ ‘Slovakia Advocates Returning EU Power to Capitals’ Euractiv.com (1 July 2016) <<http://www.euractiv.com/section/global-europe/news/slovakia-advocates-returning-eu-power-to-capitals/>>.

³ See José Magone, ‘Divided Europe? Euroscepticism in Central, Eastern and Southern Europe’ in Kyriakos Demetriou (ed), *The European Union in Crisis* (Springer 2015) 33-56.

⁴ For instance, the French far-right leader has promised to organize a referendum on French membership if she wins the 2017 presidential elections, ‘Marine Le Pen célèbre le «Brexit»’ *Le Monde* (30 June 2016) <http://www.lemonde.fr/politique/article/2016/06/30/marine-le-pen-celebre-le-brexit_4961139_823448.html#27Kq4oKYsKYYKuQq.99>.

policy of progressive integration is put to a test and it is difficult to predict the consequences.

In that light, it seems relevant to remember that the idea of ‘integration at different speeds’ is not new. Since 1974 various ideas designating differential integration within the EU have been proposed—Brandt’s ‘two-speed Europe,’ Lamers and Schauble’s ‘Kerneuropa,’ Delors’ ‘avant-garde,’ and Balladur’s ‘concentric circles’ and ‘variable geometry.’⁵ Whereas most of these concepts propose a division between States that want to advance their integration and States that would follow in their steps, Balladur’s idea does not involve dividing Europe in two. It groups States based on their interests in specific issues. While not ideal and certainly disappointing for the fervent supporters of the European project, this approach may hold the key to finding a compromise solution in a number of areas in the short and medium run.

It is worth remembering that while significantly less sensitive compared to the issue of migration which seems to trouble Eurosceptics most, harmonization of contract has always been undermined for political reasons. As explained in Chapter 6, CESL which itself was a compromise following the frosty reception of the DCFR, was withdrawn by the Commission due to pressure by six governments although it received EP’s support. The Commission was forced to narrow down its ambition and to propose the directives on distance sales and digital content mentioned in Chapter 6, which are also facing criticism similar in spirit to the rhetoric against CESL.

At the same time, as my study shows, harmonization entails significant concessions by both England and Bulgaria. From a cultural perspective, broader harmonization would force England to depart from its liberal individualist tradition and embrace inconsistencies in its legal system. Bulgaria, in turn, would have to sacrifice doctrines which form part of its legal heritage as well as the spontaneity of its legal creativity. Moreover, from an economic perspective, England has a lot to lose because its contract law is an important export.

While Chapter 6 showed that broader harmonization seems conceivable if strategies aimed at ensuring uniform interpretation are adopted, an important question that remains is whether the ‘one size fits all’ approach is the best *policy option* to pursue

⁵ For background on these concepts, see Marlene Wind, ‘The European Union as a Polycentric Polity’ in JHH Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 108-111.

regarding contract. As the granddaughter of a tailor, I know that not every design can fit comfortably all shapes and sizes no matter what alterations are made or how skilled the tailor is. Considering the intellectual and financial resources invested in the harmonization project, it seems a pity to settle for less when stakeholders throughout Europe may benefit from broader harmonization. Thus, maybe, there is room to consider opening yet another of Pandora's boxes—allow MS which want to harmonize certain aspects of their contract law to do so in the form of open method of coordination, as Miller has suggested,⁶ or, with a little bit of a stretch—enhanced cooperation.⁷

Ultimately, the underlying logic of the harmonization project is the enhancement of the internal market. Differential harmonization may seem dangerous as it can lead to market distortions.⁸ That is why, it is relevant to be reminded of a speech by Jacques Delors, former President of the Commission who played a key role⁹ in shaping the single market: '...without enhanced cooperation, without differentiation we are not going to progress, to benefit from innovation, to go further ahead without bothering others. Because enhanced cooperations remain open to all if they want and they can.'¹⁰

If the MS, which are interested in the development of a more coherent European contract law, combine efforts and implement more sophisticated harmonizing

⁶ See Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (OUP 2012) 202-204.

⁷ The process of establishing a reinforced cooperation is rather complex pursuant to articles 326-334 (TFEU); European institutions have already permitted enhanced cooperations for sensitive issues like the financial transaction tax on which universal consensus could not be reached.

⁸ Note, however, that one can find examples of legal pluralism, which does not necessarily hamper trade, within MS. Despite differences between Scots and English law, 64% of Scottish exports are for the rest of the UK. See Export Statistics by the Scottish Government <<http://www.gov.scot/Topics/Statistics/Browse/Economy/Exports/ESSPublication>>; Also, Spain's provinces have autonomous civil laws, which are substantively different. See Aniceto Masferrer, 'Plurality of Laws, Legal Traditions, and Codification in Spain' (2011) 4 J.Civ.L.Stud. 419; For instance, while as mentioned in §1.2.1 Spanish law has a restrictive approach to onerous performance, the 1973 Civil Code of Navarre contains an explicit provision allowing judicial intervention in such instances. See Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP 2014) 133.

⁹ See Helen Drake, *Jacques Delors: Perspectives on a European Leader* (Routledge 2000) 78-113.

¹⁰ Exposé de Jacques Delors prononçant la Lectio Magistralis ouvrant la session académique 2005/2006 du Collège européen de Parme <<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=1GrdM6QBtg1jyccZmdpkK5GRJtB9qY2BTrJgLTt1S2j1B1QwrBsd!-1259128955?docId=277075&cardId=277075>>.

instruments like, for instance, CESL, they can show skeptics that harmonization of contract is feasible and beneficial. The initiation of broader harmonization in a 'pilot group' may make the process more manageable and less controversial as there would *a priori* be commitment to the project. Moreover, such an initiative may provide an opportunity to measure the actual economic impact of harmonization in the participating MS and to set at rest any doubts about whether there is a proven necessity of harmonization with concrete data on how harmonization enhanced cross-border trade among the participating MS. Maybe then the non-believers will be converted and would join the enhanced cooperation in the long-run.

I believe that this is a 'better than nothing' option. The alternative, if the Commission remains committed to its goal of progressive harmonization in all MS, seems to be to think smaller in the short-run and to confine the project to piecemeal consumer directives until all MS are ready for a change which, based on the development of the debate in the last fifteen years and in light of the current political turmoil, may take a while.

Bibliography

Attributed Works

Andreev M, *History of the Bulgarian Bourgeois State and Law 1878-1917* (Sofi-R 1993)

Angelov S, 'Economic Onerosity' (1922-1923) 4-5 *Yuridicheska misul* 233

— — 'Economic Onerosity' (1922-1923) 5-6 *Yuridicheska misul* 313

Anson's Law of Contract (29th edn, OUP 2010)

Apostolov I, *Evolution of the Continental Theory of Interpretation* (Imprimerie de l'Université 1946)

— — *The Law of Obligations: General Part* (first published 1947, 3rd edn, BAN 1990)

Ascheri M, 'Turning Point in the Civil-Law Tradition: From *lus Commune* to Code Napoléon' (1996) 70 *Tul.L.Rev* 1041

Austen-Baker R, *Implied Terms in English Contract Law* (Edward Elgar 2011)

Barak A, *Purposive Interpretation in Law* (Sari Bashi tr, PUP 2005)

Beale H, 'The European Civil Code Movement and the European Union's Common Frame of Reference' (2006) 6 *LIM* 4

— — 'Scope of Application and General Approach of the New Rules for Contracts in the Digital Environment'

<<https://polcms.secure.europarl.europa.eu/cmsdata/upload/12df1896-c8eb-4e91-9cf8-fbf711578bb8/new%20rules%20for%20contracts%20in%20the%20digital%20environment.pdf>>

Beatson J and Friedmann D (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995)

— — and Schrage E, *Unjustified Enrichment* (Hart 2003)

Benati L, 'Long Run Evidence on Money Growth and Inflation' (Bank of England Quarterly Bulletin, Autumn 2005)

<<http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/qb050302.pdf>> accessed 30 November 2012

Birks P, *An Introduction to the Law of Restitution* (Clarendon 1985)

— — 'Failure of Consideration' in Francis Rose (ed), *Consensus Ad Idem: Essays on the Law of Contract in Honor of Guenter Treitel* (Sweet & Maxwell 1996)

Blanc-Jouvan X, 'Centennial World Congress on Comparative Law: Opening Remarks' (2001) 75 Tul.L.Rev. 859

Bobatinov M, *Private Law Considerations in Commercial Transactions* (Feneya 2007)

— — and Vlahov K, *Property Law: Practical Problems* (Sibi 2007)

Brice C, 'Roman Aequitas and English Equity' (1913-14) 2 Geo.L.J 16

Bridge M, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 CBLJ 385

Brodecki Z, *Polish Business Law* (Kluwer 2003)

Brownsword R and others (eds), *Good Faith in Contract: Concept and Context* (Dartmouth 1999)

— — *Contract Law: Themes for the Twenty-First Century* (2nd edn, OUP 2006)

Burrows A, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart 1998)

— — 'Construction and Rectification' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009)

— — 'The Influence of Comparative Law on the English Law of Obligations' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart 2015)

Calnan R, 'Construction of Commercial Contracts: A Practitioner's Perspective' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009)

Cartwright J, *Unequal Bargaining* (Clarendon 1991)

— — and Vogenauer S and Whittaker S, *Regards comparatistes sur l'avant-projet de réforme du droit des obligations et de la prescription* (Société de législation comparée 2009)

— — and Martijn Hesselink (eds), *Precontractual Liability in European Private Law* (CUP 2011)

Carty A, 'Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law' (1995) 6 EJIL 78

Cédras J, 'Le solidarisme contractuel en doctrine et devant la Cour de cassation' in *Rapport 2003 de la Cour de cassation* (la Documentation française 2004)

Chen-Wishart M, 'Consideration: Practical Benefit and the Emperor's New Clothes' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995) 139.

— — *Contract Law* (5th edn, OUP 2015)

Chitty on Contracts (31st edn, 2012) vol I

Chowla S, Quaglietti L and Rachel L, 'How Have World Shocks Affected the UK Economy?' [2014] Q2 Bank of England Quarterly Bulletin 167

Clive E, 'The Proposed New Digital Single Market Contract Law Directives' (*European Private Law News*, 19 January 2016)
<<http://www.epln.law.ed.ac.uk/2016/01/19/the-proposed-new-digital-single-market-contract-law-directives/>> accessed 10 May 2016

Coleman B, 'Lord Denning & Justice Cardozo: The Judge as Poet-Philosopher' (2001) 32 Rutgers LJ 485

Collins H, *The Law of Contract* (4th edn, LexisNexis UK 2003)

— — 'Introduction: The Research Agenda of Implicit Dimensions of Contract' in David Campbell and others (eds), *Implicit Dimensions of Contract* (Hart 2003)

— — 'Why Europe Needs a Civil Code' (2013) 21 ERPL 907

Cotterrell R, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997)

Cserne P, 'Drafting Civil Codes in Central and Eastern Europe: A Case Study on the Role of Legal Scholarship in Law-Making' [2011] Pro Publico Bono
<<http://www.propublicobono.hu/pdf/Cserne%20P%20Tamop%201.pdf>> accessed 6 November 2015

Curran V, 'Cultural Immersion, Difference and Categories in US Comparative Law' (1998) AJCL 43

Dannemann G, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 384.

— and Vogenauer S (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013)

Dawson J, 'Effects of Inflation on Private Contracts: Germany, 1914-1924' (1934) 33 *Mich.L.Rev.* 171

de Moor A, 'Contract and Agreement in English and French Law' (1986) 6 *OJLS* 275

Dickson B, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54 *CLJ* 100

Dikov L, *Das Institut des Strohmannes (die vorgeschobene Person) im bürgerlichen Rechte* (Doctoral Thesis, Göttingen 1922)

— *Historical and Comparative Research on Mistake in the Law of Inheritance, Clausula Rebus Sic Stantibus in Private Law and the Essence of Adjudication* (Sofia 1923)

— 'Il Diritto civile dell'avvenire' (1931) XI *Rivista internazionale di filosofia del diritto*

— 'Norma giuridica e volontà privata' (1934) 14 *Rivista internazionale di filosofia del diritto* 681

— *Morality and Law* (Sofia 1934)

— 'The Evolution of Contract' (1938) 33 *Annuaire de l'Université de Sofia* 437

— 'Die Abänderung von Verträgen den Richter' in *Hedemann-Festschrift* (Jena 1938)

— 'L'évolution de la notion de contrat' in *Etudes de droit civil à la mémoire de Henri Capitant* (Daloz 1939)

— 'The New Italian Civil Code' (1942) 37 *Annuaire de l'Université de Sofia* 57

— *Course on Civil Law* (Sofia 1943)

— 'The Essence of Adjudication' in *The Modification of Contracts by the Judge* (Feneya 2010)

— *The Modification of Contracts by the Judge* (Feneya 2010)

DiMatteo L, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment' (1997) 48 *SCLR* 293

Dimitrov M, *The Contract for Construction* (Sibi 2012)

Dimitrova D, 'The Application of the Institute of Economic Onerosity in the Conditions of Economic Crisis' (The Global Crisis and Economic Development, Varna, May 2010)

Djambazov A, *Court System of Bulgaria 1878-1944* (NIZ 1990)

Drake H, *Jacques Delors: Perspectives on a European Leader* (Routledge 2000)

Ebke W and Steinhauer B, 'The Doctrine of Good Faith in German Law' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995)

Ehs T, 'The Other Austrians' (2011) 2 *Journal of European History of Law* 16

Eisenberg MA, 'The Bargain Principle and Its Limits' (1982) 95 *HLR* 741

Fadenhecht Y, 'Unification of Slavic Law of Obligations,' (1933) XIV (4) *Yuridicheska misul* 388

——— *A Comparative Analysis of the Law on Obligations* (Sofia 1936)

Fox D, 'The Case of Mixt Monies: Confirming Nominalism in the Common Law of Monetary Obligations' (2011) 70 *CLJ* 144

Fried C, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, OUP 2015)

Friedman L, 'The Concept of Legal Culture: A Reply' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 33

Friedmann D, 'Good Faith and Remedies for Breach of Contract' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995)

Furfaro F, 'The Connections between German Pandectist School and Italian Legal Culture at the End of XIX Century' in *Sources of Law and Legal Protection* (Edizioni Università di Trieste 2012)

Gabel P and Feinman J, 'Contract Law as Ideology' in David Kairys (ed), *The Politics of Law* (3rd edn, Basic Books 1998)

Gaydarov P, *Boundaries of Contractual and Delictual Liability* (Ciela 2011)

Geeroms S, 'Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated...' (2002) 50 *AJCL* 201

Georgiev A, 'The Insurmountable Force as Grounds for the Exclusion of Liability due to Non-Performance in a Commercial Transaction' [2001] 3 *Bulgarski zakonnik* 90

Georgiev E, 'The New Amendments to the LOC' [1993] 1 *Suvremenno pravo* 9

— — 'On Autonomy of Will and Freedom to Contract in the Transitional Period in Bulgaria to a Market Economy' in Natalia Gudjeva (ed), *Collection of Essays in Memory of Professor Vitali Tadjer* (Sibi 2003)

Gerdjikov O, *Commercial Transactions* (3rd edn, TIP 2008)

Giliker P, *Pre-contractual Liability in English and French Law* (Kluwer 2002)

— — '60 Years of Comparative Law Scholarship in the International and Comparative Law Quarterly' (2012) 61 *ICLQ* 15

— — 'Pre-contractual Good Faith and the Common European Sales Law: A Compromise Too Far?' (2013) *ERPL* 79

— — *Europeanization of English Tort Law* (Hart 2014)

— — 'The Influence of EU and European Human Rights Law on English Private Law' (2015) 64 *ICLQ* 237

— — 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 1 *ERPL* 5

Girsberger D and Zapolskis P, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' (2012) 19 *Jurisprudence* 121

Glenn P, 'Comparative Legal Families and Comparative Legal Traditions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)

— — *Legal Traditions of the World* (3rd edn, OUP 2007)

Goff and Jones: The Law of Restitution (Sweet & Maxwell 1966)

Goff and Jones: The Law of Unjust Enrichment (8th edn, Sweet & Maxwell 2015)

Goleminov C, *Unjust Enrichment* (3rd edn, Feneya 2011)

Goleva P, 'The Insurmountable Force and Its Application in Court and Arbitration Practice' [2004] 4 *Pazar i pravo* 18

Gordley J, 'Equality in Exchange' (1981) 69 *CLR* 1587

— — *The Philosophical Origins of Modern Contract Doctrine* (Clarendon 1991)

- ‘Good Faith in Contract Law in the Medieval *Ius Commune*’ in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000)
- Graziadei M, ‘The Functionalist Heritage’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 100
- ‘Comparative Law as the Study of Transplants and Receptions’ in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)
- ‘Legal Culture and Legal Transplants. Italian National Report’ (XVIII Congress of Comparative Law, Washington, July 2010)
- Grossfeld B, *The Strength and Weakness of Comparative Law* (Clarendon 1990)
- Gerner-Beuerle C, ‘United in Diversity: Maximum versus Minimum Harmonization in EU Securities Regulation’ (2012) 7 CMLJ 317
- Hausmaninger H, *The Austrian Legal System* (4th edn, Manz 2011)
- Hay P, ‘Frustration and Its Solution in German Law’ (1961) 10 AJCL 345
- Hellwege P and Miller L, ‘Control of Standard Contract Terms’ in Gerhard Dannemann and others (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013)
- Hellwig H, “‘English Spoken’ in German Commercial Court Litigations’ Paul Hastings March 2010
<<http://www.paulhastings.com/docs/default-source/pdfs/1528a922df6923346428811cff00004cbded.pdf>>
- Hesselink M, ‘The Politics of a European Civil Code’ (2004) 10 ELJ 675
- ‘The Values Underlying the Draft Common Frame of Reference: What Role for Fairness and “Social Justice?”’ (2008) PE 408 312 - IP/A/IMCO/ST/2008-11; IP/C/JURI/FWC/2006-211/Lot3/C1/SC2
- ‘If you don’t like our principles, we have others. On core values and underlying principles in European private law: a critical discussion of the new ‘Principles’ section in the draft CFR’ (2009) Page 2
<<http://ssrn.com/abstract=1514449>> accessed 28 November 2014
- ‘The Common Frame of Reference as a Source of European Private Law’ (2009) 83 Tulane LR 919
- ‘Five Political Ideas of European Contract Law’ (2011) 2 ERCL 295

- — ‘The Concept of Good Faith’ in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011)
- — ‘The General Principles of Civil Law: Their Nature, Roles and Legitimacy’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013)
- Hillman R, *The Richness of Contract Law* (Kluwer 1997)
- Hobbes T, *Leviathan* (first published 1651, Collier & Son 1910)
- Hondius and Grigoleit HS (eds), *Unexpected Circumstances in European Contract Law* (CUP 2014)
- Höpner M and Jurczyk B, ‘How the Eurobarometer Blurs the Line between Research and Propaganda,’ Max Planck Institute for the Study of Societies Discussion Paper 15/6 <http://www.mpifg.de/pu/mpifg_dp/dp15-6.pdf>
- Horwitz M, ‘Historical Foundations of Modern Contract Law’ (1974) 87 HLR 917
- Ibbetson DJ, *A Historical Introduction to the Law of Obligations* (OUP 1999)
- International Encyclopedia of Comparative Law* (1981) vol VIII, ch 2, para 167-70
- Janssen A and Schultze R, ‘Legal Cultures and Legal Transplants in Germany’ (2011) 2 ERPL 225
- Kalaidjiev A, ‘On the Autonomy of Will, Freedom of Contract, and Fairness in Contract’ in Atanas Shopov (ed), *Legal Research in Memory of Professor Ivan Apostolov* (Ulpian 2001)
- — *The Law of Obligations: General Part* (5th edn, Sibi 2010)
- Kant I, ‘Theory and Practice’ (1793)
- Karlov A, ‘The Advantages of a Clause on Negative Material Change’ [2010] 2 Turgovsko i konkurentno pravo 19
- Katzarov K, ‘Coordinating Civil and Commercial Law with Criminal and Procedural Law’ (1939) 1 Advokatski pregled 24
- Kelemen K and Fekete B, ‘How Should the Legal Systems of Eastern Europe be Classified Today?’ (International Conference for the 10th Anniversary of the Institute of Comparative Law, Potsdam, 2014)
- Kemp K, ‘Applying the Hardship Clause’ (1983) 1 *J Energy & Nat Resources* L 119
- Kemp Allen C, ‘Precedent and Logic’ (1925) 41 LQR 329

Kessedjian C, 'Competing Approaches to Force Majeure and Hardship' (2005) 25 IRLE 415

Knight WSM, 'Public Policy in English Law' (1922) 38 LQR 207

Konov T, *Grounds for Civil Liability* (first published 1994, 2nd edn, Reguli 2002)

— — *Selected Works* (Ciela 2010)

Koops E and WJ Zwolve (eds), *Law & Equity: Approaches in Roman Law and Common Law* (Martinus Nijhoff 2014)

Kozuharov A, *The Law of Obligations* (Sofia 1954)

— — *The Law of Obligations: General Part* (first published 1958, Petko Petkov ed, Jurispres 2002)

Lalkov M, *Bulgaria after the Liberation* (Polis 2001)

Landheer B, 'Othmar Spann's Social Theories' (1931) 39 J.Pol.Econ 239

Lando O, 'Culture and Contract Laws' (2007) 3 ERCL 17

Larsen LB, 'The Judicial Review of the Principle of Subsidiarity at the Court of Justice of the European Union' (6th Subsidiarity Conference, Berlin, December 2013)

Legrand P, 'Judicial Revision of Contracts in French Law: A Case-Study' (1988) 62 Tul.L.Rev 963

— — 'Against a European Civil Code' (1997) 60 MLR 53

— — 'The Impossibility of "Legal Transplants"' [1997] 4 MJECL 111

— — 'What "Legal Transplants?"' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2003)

— — 'Antivonbar' (2006) 13 JCL 13

Lequette Y, Terré F and Capitant H, *Les grands arrêts de la jurisprudence civile* (12 edn, Dalloz Bibliothèque 2008)

Léon H et Mazeaud J, 'La cause en droit français' (1956-1957) 3 McGill LJ 1

Levenstein M, *Maxims of Equity: A Juridical Critique of the Ethics of Chancery Law* (Algora Publishing 2014)

Locke J, *Second Treatise of Government* (1690)

- Lord Bingham of Cornhill, 'A New Thing under the Sun? The Interpretation of Contract and the *ICS* Decision' (2008) 12 *Edin.L.R* 375
- Lorenz W, 'Contract Modification as a Result of Change of Circumstances' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1995)
- Lorenzen E, 'Causa and Consideration in the Law of Contracts' (1919) 7 *YLJ* 621
- MacNeil I, 'Uncertainty in Commercial Law' (2009) 13 *Edin.L.R* 68
- Magone J, 'Divided Europe? Euroscepticism in Central, Eastern and Southern Europe' in Kyriakos Demetriou (ed), *The European Union in Crisis* (Springer 2015)
- Mańko R, 'The Unification of Private Law in Europe from the Perspective of the Polish Legal Culture' (2007-2008) 11 *Yearbook of Polish European Studies* 109
- — 'Contract Law and the Digital Single Market'
<http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/568322/EPRS_IDA%282015%29568322_EN.pdf> accessed 8 November 2015
- — 'Contracts for Supply of Digital Content to Consumers'
[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI\(2016\)581980_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI(2016)581980_EN.pdf) accessed 3 May 2016
- Markensius R and others, *The German Law of Contract: A Comparative Treatise* (Hart 2006)
- Masferrer A, 'Plurality of Laws, Legal Traditions, and Codification in Spain' (2011) 4 *J.Civ.L.Stud.* 419
- Mateeva E, 'Necessary Changes in the Principle of Economic Onerosity in Article 307 of the LC' in *Contemporary Law—Problems and Tendencies* (Sibi 2011)
- Mattei U and di Robilant A, 'Les longs adieux. La codification italienne et le code Napoléon dans le déclin du positivisme étatiste' (2004) 4 *RIDC* 847
- Mayoral J and others, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge' (2014) 21 *JEPP* 1120
- Mazeaud D, 'La révision du contrat. Rapport français' in *Le contrat : journées brésiliennes* (Société de la législation comparée 2008) 553
- Mazeaud H, 'Le Code civil français et son influence en Europe' (1950) 2 *Revue internationale de droit comparé* 757
- McKendrick E, 'Frustration, Restitution, and Loss Appointment' in A. Burrows (ed), *Essays on Restitution* (OUP 1991)

- — ‘Force Majeure and Frustration—Their Relationship and Comparative Assessment’ in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd’s Press 1995)
- — ‘Harmonization of European Contract Law: The State We are in’ in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonization of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Hart 2006)
- — ‘Force Majeure Clauses: The Gap between Doctrine and Practice’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009)
- — *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014)
- McLauchlan D, ‘Contract Interpretation: What is It about?’ (2009) 31 SLR 5
- McMeel G, *The Construction of Contracts: Interpretation, Implication, and Rectification* (OUP 2007)
- — ‘The Principles and Policies of Contractual Construction’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009)
- Mekki M and Kloepfer-Pelèse M, ‘Hardship and Modification (or “Revision”) of the Contract’ in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer 2011) 651
- Mekki M, ‘The General Principles of Contract Law in the "Ordonnance" on the Reform of Contract Law’ (2016) 76 La. L. Rev. 1193
- Merryman JH and Pérez-Perdomo R, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, SUP 2007)
- Meshkova P and Sharlanov D, *The Bulgarian Guillotine* (Democracy 1994)
- Mevorah N, ‘Vis Major’ (Legal Archive) [2002] 5 Turgovsko pravo 559
- Michaels R, ‘The Functional Method of Comparative Law’ in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 340
- Miller L, ‘Penalty Clauses in England and France: A Comparative Study’ (2004) 53 ICLQ 80
- — ‘After the Unfair Contract Terms Directive; Recent European Directives and English Law’ (2007) 3 ERCL 88
- — ‘Specific Performance in the Common and Civil Law’ in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment* (Nijhoff 2007)
- — *The Emergence of EU Contract Law: Exploring Europeanization* (OUP 2012)

- — ‘The Notion of European Private Law and a Softer Side to Harmonization’ in Michael Lobban and Julia Moses (eds), *The Impact of Ideas on Legal Development* (CUP 2012)
- Mitchell C, ‘Obligations in Commercial Contracts: A Matter of Law or Interpretation?’ (2012) 65 CLP 455
- Mitchell P, ‘*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Limited* (1942)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006)
- — ‘Artificiality in Failure of Consideration’ (2010) 29 UQLJ 191
- — ‘The Impact of Institutions and Professions on Fault Liability in England’ in Paul Mitchell (ed), *The Impact of Institutions and Professions on Legal Development* (CUP 2012)
- — ‘Patterns of Legal Change’ (2012) 65 CLP 177
- Monateri PG and Somma A, ‘The Fascist Theory of Contract: A Comparative and Historical Inquiry into the Darker Side of Contract Law’ (2009) *Cardozo Electronic Law Bulletin* 1, 10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1347692> accessed 10 November 2014.
- Morgan J, *Great Debates in Contract Law* (Palgrave Macmillan 2012)
- Mousourakis G, *The Historical and Institutional Context of Roman Law* (Ashgated Publishing 2003)
- — *Fundamentals of Roman Private Law* (Springer 2012)
- Mureşan Ş, *Social Market Economy: The Case of Germany* (Springer 2014)
- Murphy JB, ‘Equality in Exchange’ (2002) 47 *Am.J.Juris* 85
- Nelken D, ‘Defining and Using the Concept of Legal Culture’ in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007)
- Nenovski N, ‘The Political Philosophy of Giorgio del Vecchio’ [1999] 1 *Yuridicheski svyat* 226
- Niboyet J-P, ‘La révision des contrats par le juge. Rapport général’ in *Travaux de la Semaine Internationale du Droit* (Syrey 1937) 1-13
- Nichol B, ‘Force Majeure in French Law’ in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd’s Press 1995)
- Nicholas B, *French Law of Contract* (Butterworths 1982)

Nikolov Y, 'Economic Onerosity' [2011] 9 *Turgovsko i konkurentno pravo*, Addendum

O'Connor JF, *Good Faith in English Law* (Dartmouth 1990)

Örücü E, 'Mixed and Mixing Systems: A Conceptual Search' in Esin Örücü and others (eds), *Studies in Legal Systems: Mixed and Mixing* (Kluwer 1996)

— 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4 EJCL <<http://www.ejcl.org/41/art41-1.html>> accessed 15 October 2015

— 'Law as Transposition' (2002) 51 ICLQ 205

— 'Developing Comparative Law' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007)

— 'A General View of "Legal Families" and of "Mixing Systems"' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007)

Ostroukh A, 'Russian Society and its Civil Codes: A Long Way to Civilian Civil Law' (2013) 6 J.Civ.L.Studies 373

Palmer VV, *Mixed Jurisdictions Worldwide: The Third Legal Family* (CUP 2001)

Pattaro E (ed), *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law. Treatise of Legal Philosophy and General Jurisprudence: Volume 4* (Springer 2005)

Pavlova M, *Civil Law: General Part* (Sofi-R 2002)

Penner J, 'Voluntary Obligations and Scope of the Law of Contract' (1996) 2 LEG 325

Petrova G, *History of the Bulgarian State and Law (680-1878)* (Sibi 2009)

— — and Petrov P, *History of the Bulgarian State and Law: Sources 680-1944* (4th edn, Albatros 2010)

Phang A, 'Frustration in English Law—a Reappraisal' (1992) 21 Anglo-Am.L.R. 278

Planutis D, 'Le déséquilibre contractuel dû au changement imprévisible des circonstances et ses remèdes Étude de droit comparé: Espagne–Pologne–France' (Master's Thesis, Université Paris II 2013) <http://idc.u-paris2.fr/sites/default/files/memoire_dagmara_planutis.pdf>

Popova S, *Contractual Relations in the Construction Process* (Neofit Rilski 2012)

- Popoviliev M, *Du rapport à succession des Libéralités, en droit civil français et européen et au point de vue du droit international privé* (Paris 1897)
- Posner R and Rosenfield A, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 JLS 83
- Pothier RJ, *Traité des obligations* (Paris 1761)
- Pound R, 'Liberty of Contract' (1909) 18 YLJ 454
- — 'Law in the Books and Law in Action' (1910) 44 Am.L.Rev 12
- Puelinckx A, 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances' [1986] 3 J.Int.Arb 47
- Radwański Z, 'Green Book: An Optimal Vision of the Civil Code of the Republic of Poland' (2006) <<http://www.ejcl.org/112/greenbookfinal-2.pdf>> accessed 15 November 2015
- Ralchev P, 'Non-Performance in Commercial Transactions' [1998] 8 Bulgarski schetovoditel 18
- Rapsomanikis M, 'Frustration of Contract in International Trade Law and Comparative Law' (1980) 18 Duq.L.Rev. 551
- Rauh T, 'Legal Consequences of Force Majeure under German, Swiss, English and United States' Law' (1996) 25 Den.J.I.L.P. 151
- Reich N, 'Transformation of Contract Law and Civil Justice in the New EU Member Countries. The Example of the Baltic States, Hungary and Poland' (2005) 23 Penn St. Int'l L.Rev 587
- — *General Principles of EU Civil Law* (Intersentia 2014)
- Reimann, M, 'The Good, the Bad, and the Ugly: The Reform of the German Law of Obligations' (2009) 83 Tul.L.Rev. 877
- — and Halberstam D, 'Top-Down or Bottom-Up? A Look at the Unification of Private Law in Federal Systems' in Brownsword and others (eds), *The Foundations of European Private Law* (Hart 2011) 363
- Renner S, *Inflation and the Enforcement of Contracts* (Edward Elgar Publishing 1999)
- Riesenfeld S, 'The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples' (1989) 37 Am.J.Comp.L 1
- Riha T, 'Spann's Universalism—The Foundation of the Neoromantic Theory of Corporative State' (1985) 31 AJPH 255

Rivkin D, 'Lex Mercatoria and Force Majeure' in Emmanuel Gaillard (ed), *Transnational Rules in International Commercial Arbitration* (ILA 1993)
 Rosenberg S, 'Three Concepts in Nazi Political Theory' (1937) 1 *Science & Society* 229

Rotondi M, 'The Proposed Franco-Italian Code of Obligations' (1954) 3 *AJCL* 345

Rousseau JJ, *Discourse Upon the Origin and the Foundation of the Inequality among Mankind* (1754)

— — *Du contrat social* (1762)

Rudzinski A, 'New Communist Civil Codes of Czechoslovakia and Poland: A General Appraisal,' (1964) 41 *ILJ* 33

Sacco R, 'Legal Formants: A Dynamic Approach to Comparative Law. Installment I of II' (1991) 39 *AJCL* 1

— — 'Legal Formants: A Dynamic Approach to Comparative Law. Installment II of II' (1991) 39 *AJCL* 343

Salvati M, 'The Long History of Corporatism in Italy: A Question of Culture or Economics?' (2006) 15 *Contemporary European History* 223

Saprai P, 'In Defense of Consent in Contract Law' (2007) 18 *KLJ* 361

— — 'Against Equality in Exchange' (2010) 21 *KLJ* 71

— — 'Weinrib on Unjust Enrichment' (2011) 24 *CJLJ* 183

— — 'The Penalties Rule and the Promise Theory of Contract' (2013) 26 *CJLJ* 443

Sarafov P, 'The Right to Private Property as a Sacred Constitutional Right' [1996] 6 *Suvremenno pravo* 15

Shand J, 'Unblinking the Unruly Horse: Public Policy in the Law of Contract' (1972) 30 *CLJ* 144

Sharma KM, 'From "Sanctity" to "Fairness": An Uneasy Transition in the Law of Contracts?' (1999) 18 *N.Y.L.Sch.J.Int'l & Comp.L* 95

Simpson AWB, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press 1987)

Slavova et al, 'The Reform of the Judiciary. Is it Possible Here and Now?' (2011) 3 *Publichni politiki* 122

Smith S, 'In Defense of Substantive Fairness' (1996) 112 *LQR* 138

— — *Contract Theory* (OUP 2004)

Smits J, *The Making of Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (tr Nicole Kornet, Intersentia 2002)

— — ‘European Private Law and the Comparative Method’ in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (CUP 2010)

Soukareva Z, ‘Good Faith and the Presumption of Good Faith as Principles of the Law of Obligations’ in *Essays in Honor of Zhivko Stalev* (Sibi 2005)

Spinsante C, ‘Il corporativismo fascista: Il dibattito italiano sulla riforma corporativa dello Stato durante gli anni Venti e la sua recezione da parte del conservatorismo tedesco nella Repubblica di Weimar’ (Doctoral Thesis, University of Macerata 2012) < http://ecum.unicam.it/595/1/TESI_DOTTORATO_COMPLETAX.pdf>

Stannard J, ‘Frustrating Delay’ (1983) 46 MLR 738

Staykov I ‘Economic Onerosity of Performance of Business Transactions’ [1997] 5 Pazar i pravo 19

— — ‘The Clausula Rebus Sic Stantibus Institute in Current Bulgarian Commercial Law’ [1998] 1 Suvremenno pravo 71

Stevens R, ‘Damages and the Right to Performance: A Golden Victory or Not?’ in Jason Neyers and others (eds), *Exploring Contract Law* (Hart 2009)

Steyn J, ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 LQR 433

Stoychev K, ‘Modification of Contractual Obligations due to Change of Circumstances: Historical and Comparative Analysis’ [1997] Pravna misul 15

— — *Contract Negotiations and Precontractual Liability* (2nd edn, Sibi 2007)

Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: A Manifesto’ (2004) 10 ELJ 653

Sugarman D, ‘A Special Relationship? American Influences on English Legal Education, c 1870-1965’ (2011) 18 IJLE 7

Swalding W, ‘The Judicial Construction of Force Majeure Clauses’ in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd’s Press 1995)

Szaszy S, ‘The Duty to Conclude a Contract in East European Law’ (1964) 13 The International and Comparative Law Quarterly 1470

Tadger V, *Civil Law of People’s Republic of Bulgaria: General Part. Section 1* (Sofia 1972)

— — *Civil Law of People's Republic of Bulgaria: General Part. Section 2* (Sofia 1973)

Takoff C, 'Analysis of the Amendments to the LOC of *State Gazette* 12/1993' [1993] 2 *Turgovsko pravo* 1

— — and Popov P, 'About the Project for a Civil Code as of 1999' [2000] 1 *Turgovsko pravo* 3

— — 'Abstract Transactions in Light of the Notions of Abstractness and Causality' in *Legal Research in Memory of Professor Ivan Apostolov* (Ulpian 2001) 419

— — 'On the Question of the Reduction of Liquidated Damages' in *Collection of Essays in Honor of Professor Zhivko Stalev* (Sibi 2005)

— — 'The Present State of Harmonization of Bulgarian Private Law and Future Perspectives' (2008) 14 *Juridica International* 118

Tascher M, 'The Reversals of Case Law of the Court of Cassation' (Doctoral Thesis, Université de Franche-Comté 2011)

<https://tel.archives-ouvertes.fr/file/index/docid/790014/filename/these_A_TASCHER_Maiwenn_2011.pdf>

Tashev R, *Theory of Interpretation* (Sibi 2001)

— — *General Theory of Law* (Sofia 2010)

Teubner G, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *MLR* 11

Tichý L, 'Processes of Modernization of Private Law Compared, and the CFR's Influence' (2008) 15 *Juridica International* 36

Tochkov K and Nath H, 'Relative Inflation Dynamics in the EU Accession Countries of Central and Eastern Europe' (Bulgarian National Bank, May 2011)

<http://www.bnb.bg/bnbweb/groups/public/documents/bnb_publication/discussion_2011_84_en.pdf> accessed 29 May 2012

Todorov T, 'Constitutional Protection of Freedom to Contract' in Atanas Shopov (ed), *Legal Research in Memory of Professor Ivan Apostolov* (Ulpian 2001)

Tokushev D, *History of the New Bulgarian State and Law 1878-1944* (Sibi 2008)

Torbov T, *History and Theory of Law* (BAN 1992)

Torgans K, 'European Initiatives (PECL, DCFR) and Modernization of Latvian Civil Law' (2008) XIV *Juridica International* 137

- Tormanov Z, *Termination of the Contract* (Sibi 2013)
- Trakman L, 'Frustrated Contracts and Legal Fictions' (1983) 46 MLR 39
- Treitel G, *Frustration and Force Majeure* (2nd edn, Sweet & Maxwell 2004)
- — *An Outline of the Law of Contract* (OUP 2004)
- Tsoneva S, 'Hardship in Bulgarian Law' [2011] 1 Acta Universitatis Danubius. Juridica 126
- — 'Short Notes on Economic Onerosity' in Ekaterina Mateeva and others (eds), *Law Development in a Globalizing World* (Feneya 2013)
- Tzonchev K, *The Improvements* (Sofi-R 2001)
- Valcke C, 'On Comparing French and English Contract Law: Insights from Social Contract Theory' (2009) IV JCL 69
- van Hoecke M and Warrington M, 'Legal Cultures, Legal Paradigms and Legal Doctrine: A New Model for Comparative Law' (1998) 47 ICLQ 495
- Varul P, 'CISG: A Source of Inspiration for the Estonian Law of Obligations' (2003) 8 Rev Dr Uniforme 209
- Vassalli F, *Studi Giuridici. Volume III* (Giuffrè 1960)
- Vassilev L, *Civil Law: General Part* (Sofia 1951)
- — *The Law of Obligations* (Sofia 1954)
- — *Civil Law* (TedIna 1993)
- Venedikov P, *Memories* (PV 2003)
- Verkerk R, 'Comparative Aspects of Expert Evidence in Civil Litigation' (2009) 13 IJEP 167
- Vesey-FitzGerald SG, 'The Franco-Italian Draft Code of Obligations, 1927' (1934) 14 J.Comp.Leg 1
- Virgo G, 'Failure of Consideration: Myth and Meaning in the English Law of Restitution' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 202)
- Vogenauer S and Weatherill S (eds), *The Harmonization of European Contract Law* (Hart 2006)
- — 'Interpretation of Contracts: Concluding Comparative Observations' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (2nd edn, OUP 2009)

Vogenauer S, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) 20 ERPL 30

von Jhering R, *The Struggle for Law* (John Lalor tr, 2nd edn, Lawbook Exchange 1997)

— — *Law as a Means to an End* (Isaak Husik tr, Boston Book Company 1913)

Vouchkov V, 'On Assessors and Evidence in Civil Proceedings' (2009) 3 Bulgarski zakonnik <<http://zakonnik.bg/document/view/qanda/140775/242842>> accessed 18 April 2014

Watson A, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974)

— — 'Legal Transplants and European Private Law' (2000) EJCL <<http://www.ejcl.org/44/art44-2.html>> accessed 20 May 2012

— — 'Legal Culture v Legal Tradition' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004)

Weatherill S, 'The "Principles of Civil Law" as a Basis for Interpreting the Legislative Acquis' (2010) 6 ERCL 74

— — 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market' in Niamh Nic Shuibhne and Laurence Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (OUP 2012)

Weinrib E, *The Idea of Private Law* (HUP 1995)

Whitman J, 'Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code' (1987) 97 YLJ 156

Whittaker S and Riesenhuber K, 'Conceptions of Contract' in Gerhard Dannemann and others (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013)

Wightman J, 'Good Faith and Pluralism in the Law of Contract' in Roger Brownsword and others (eds), *Good Faith in Contract: Concept and Context* (Dartmouth 1999)

Williston S, 'Freedom of Contract' (1921) 6 CLQ 365

Wind M, 'The European Union as a Polycentric Polity' in JHH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003)

Wladis J, 'Impracticability as Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods' (1988) 2 Ga.L.Rev. 503

Zaccaria E, 'The Effects of Changed Circumstances in International Commercial Trade' (2005) 9 ITBLR 135

Zepos P, 'Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946 (Article 388)' (1948) 11 MLR 36

Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta 1990)

— — and Whittaker S (eds), *Good Faith in European Contract Law* (CUP 2000)

— — and Whittaker S, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000)

— — *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (OUP 2001)

— — 'Roman Law and the Harmonization of Private Law in Europe' in Hartkamp and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer 2004)

Zlatarev E and Hristoforov V, *Commercial Law* (Ciela 2008)

Zoll F, 'The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, with Some References to Other Central and Eastern European Countries' (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 81

Zweigert K and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon 1998)

Unattributed Works

'Centenary of Lyuben Vassilev' (2011) 4 *Pravna misul* 88

Interview

Interview with Pavel Sarafov, Professor of Law, Law Faculty, Sofia University (Sofia, Bulgaria, 12 November 2013)

EU Documents

Communications, Reports and Proposals by the European Commission

COM(2001) 398 final

COM(2003) 68 final

COM(2010)348 final

COM(2011) 635 final

SEC(2011) 1166 final

Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)

‘SME Panel Survey on the Impacts of European Contract Law’

<http://ec.europa.eu/justice/contract/files/report_sme_panel_survey_en.pdf>

accessed 31 October 2014

COM(2014) 910 final

COM(2015) 634 final

COM(2015) 635 final

Resolutions of the European Parliament

Resolution A2-157/89

Resolution A3-0329/94

Resolution B5-0228, 0229–0230/2000

Resolution P5_TA(2003)0143

Resolution P7_TA(2014)0159

Reports of the European Parliament

A7-0301/2013

Press Releases and Opinion Polls

‘European Commission Proposes an Optional Common European Sales Law to Boost Trade and Expand Consumer Choice’ Press Release <http://europa.eu/rapid/press-release_IP-11-1175_en.htm>

‘Flash Eurobarometer on European Contract Law in Consumer Transactions’ <http://ec.europa.eu/public_opinion/flash/fl_321_en.pdf>

Government Documents

Bulgaria

Motivation of the Bill Amending and Supplementing the Law on Commerce of 1996

Opinion of the Economic Committee of 22 March 1996 on the Bill Amending and Supplementing the Law on Commerce of 1996

Opinion of the Committee on Structure and Activity of State Authorities of 21 May 1996 on the Bill Amending and Supplementing the Law on Commerce of 1996

Position of the Bulgarian Parliament on CESL
<<http://parliament.bg/bg/parliamentarycommittees/members/226/reports/ID/3232>>
accessed 10 June 2015

Stenographical Diary of the Plenary Sitting of the Bulgarian Parliament of 3 November 1950

Verbatim Report of the Sitting of the Bulgarian Parliament of 2 June 1993

Verbatim Report of the Sitting of the Bulgarian Parliament of 4 September 1996

UK

‘A Common European Sales Law for the European Union—a Proposal for a Regulation by the European Commission. The Government Response’
<<https://consult.justice.gov.uk/digital-communications/common-european-sales-law/results/cesl-government-response.pdf>> accessed 31 October 2014

European Union Committee, European Contract Law: The Draft Common Frame of Reference (HL 2008-09, 95)

Reasoned Opinion of the House of Commons concerning CESL
<<http://www.parliament.uk/documents/commons-committees/european-scrutiny/Reasoned-Opinion-Common-EU-Sales-law.pdf>> accessed 31 October 2014

The UK Response to the Commission's Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Business
<http://ec.europa.eu/justice/news/consulting_public/0052/contributions/310_en.pdf> accessed 10 August 2015

Other

Opinion of the Austrian Federal Council on the Recent Proposals
<<http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20150287/atbun.do>> accessed 14 May 2016

Reasoned Opinion by the Bundestag on the CESL Proposal
<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/887/887301/887301en.pdf> accessed 31 October 2014

Reasoned Opinion by the French Senate on the Recent Proposals
<<http://www.senat.fr/leg/tas15-103.pdf>> accessed 20 April 2016

Reasoned Opinion by the French Senate on Directive on Consumer Rights 2011/83/EC
<http://ec.europa.eu/dgs/secretariat_general/reactions/reactions_other/npo/docs/france/2008/com20080614/com20080614_senat_opinion_fr.pdf>

Brochures, Presentations, and Reports of Organizations

2012 Arbitration Survey by White & Case
<http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf> accessed 13 September 2013

Bar Council of England & Wales Position 'Common European Sales Law—What Next?'
<http://www.barcouncil.org.uk/media/342826/bar_council_of_e_w_-_alternatives_to_cesl_march_2015.pdf> accessed 5 November 2015

CCBE Position on Contract Rules for Online Purchases of Digital Content
 <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/20150914_EN_CCBE_Pos1_1442909360.pdf>

EJTN 2015 Annual Report
 <http://www.ejtn.eu/PageFiles/14790/EJTN_Annual_Report_2015_approved.pdf>

Export Statistics by the Scottish Government
 <<http://www.gov.scot/Topics/Statistics/Browse/Economy/Exports/ESSPublication>>

‘Main Trade Partners’ section on the website of Bulgaria’s National Statistical Institute
 <<http://www.nsi.bg/en/content/7991/main-trade-partners>>

Position Paper by the Association of German Chambers of Industry and Commerce on the package proposal
 <www.dihk.de/ressourcen/downloads/dihk-statement-online-trade.pdf>

Presentation on European law activities of Sofia University’s Law Faculty 2002-2012
 <<http://eubg.eu/?show=about&lang=bg>> accessed 20 July 2015

Statistics on Bulgarian Exports on the site of Bulgaria’s National Statistical Institute
 <<http://www.nsi.bg/otrasal.php?otr=60&a1=992&a2=993&a3=998&a4=1000#cont>>

Statistics on Bulgarian inflation in a press release by Bulgaria’s National Statistical Institute
 <http://www.nsi.bg/sites/default/files/files/pressreleases/Inflation_god2011.pdf>
 accessed 1 June 2014

UEAPME’s Response to Public Consultation on Contract Rules for Online Purchases of Digital Content and Tangible Goods
 <http://www.ueapme.com/IMG/pdf/UEAPME_reply_tangiblegoods.pdf>

Media Reporting and Public Speeches

‘Bulgaria Tops EU Software Piracy Rate’ Novinite (Sofia, 12 May 2011)
 <<http://www.novinite.com/articles/128170/Bulgaria+Tops+EU+Software+Piracy+Rate>>

Exposé de Jacques Delors prononçant la Lectio Magistralis ouvrant la session académique 2005/2006 du Collège européen de Parme
 <<http://ec.europa.eu/dorie/fileDownload.do;jsessionid=1GrdM6QBtg1jyccZmdpkK5GRJtB9qY2BTrJgLt1S2j1B1QwrBsd!-1259128955?docId=277075&cardId=277075>> accessed 30 November 2014

‘Marine Le Pen célèbre le «Brexit»’ Le Monde (30 June 2016)

<http://www.lemonde.fr/politique/article/2016/06/30/marine-le-pen-celebre-le-brexit_4961139_823448.html#27Kq4oKYsKYYKuQq.99>

‘Slovakia Advocates Returning EU Power to Capitals’ Euractiv.com (1 July 2016)
<<http://www.euractiv.com/section/global-europe/news/slovakia-advocates-returning-eu-power-to-capitals/>>

‘Training Administrative Judges in European Law’ Darik Radio (Sofia, 4 June 2012) <http://dariknews.bg/view_article.php?article_id=912376> accessed 20 November 2014

‘Visegrad Calls for Complete Change of EU-27’ Euractiv.com (29 June 2016)
<<http://www.euractiv.com/section/global-europe/news/visegrad-calls-for-complete-change-of-eu-27/>>

Websites

Apis Legal Database <<http://www.apis.bg/bg/>>

BAILII <www.bailii.org>

Bulgaria’s Supreme Court of Cassation <http://www.vks.bg/vks_p01_05.htm>

Fondation pour le droit continental <http://www.fondation-droitcontinental.org/jcms/c_5659/la-fondation>

Appendix A

III.-1:110 (DCFR)

Variation or termination by court on a change of circumstances

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred,

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

Appendix B

Article 89 (CESL) Change of circumstances

1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract.

2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:

(a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or

(b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.

3. Paragraphs 1 and 2 apply only if:

(a) the change of circumstances occurred after the time when the contract was concluded;

(b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and

(c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.

4. For the purpose of paragraphs 2 and 3 a 'court' includes an arbitral tribunal.

Appendix C

VII.-2:101 (DCFR) Circumstances in which an enrichment is unjustified

- (1) An enrichment is unjustified unless:
 - (a) the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law; or
 - (b) the disadvantaged person consented freely and without error to the disadvantage.
- (2) If the contract or other juridical act, court order or rule of law referred to in paragraph (1)(a) is void or avoided or otherwise rendered ineffective retrospectively, the enriched person is not entitled to the enrichment on that basis.
- (3) However, the enriched person is to be regarded as entitled to an enrichment by virtue of a rule of law only if the policy of that rule is that the enriched person is to retain the value of the enrichment.
- (4) An enrichment is also unjustified if:
 - (a) the disadvantaged person conferred it:
 - (i) for a purpose which is not achieved; or
 - (ii) with an expectation which is not realised;
 - (b) the enriched person knew of, or could reasonably be expected to know of, the purpose or expectation; and
 - (c) the enriched person accepted or could reasonably be assumed to have accepted that the enrichment must be reversed in such circumstances.