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The French Contract Law Reform

A Source of Inspiration?

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INTRODUCING *IMPRÉVISION* INTO FRENCH CONTRACT LAW – A PARADIGM SHIFT IN COMPARATIVE PERSPECTIVE

1. Introduction

1. 'Agreements lawfully entered into have the force of law for those who have made them.' The principle of *pacta sunt servanda* so famously enshrined in Article 1134, al 1, of the *Code civil* is regularly considered a cornerstone of French contract law – which has been repeatedly upheld by the *Cour de cassation* in the most uncompromising terms. Its decision to refuse any judicial intervention for *imprévision* to account for supervening circumstances, however severely they may have disturbed the contractual balance, is a particularly well-known example,[1] which has made the *Canal de Craponne* by far the best-known waterway amongst French law students.[2]

2. One of the reasons for the decision's notoriety stems from the fact that its rigour is almost unheard of in other European legal systems (arguably with the exception of Belgium).[3] It is therefore hardly surprising that it has not only instigated a seemingly endless stream of scholarly publications and academic discussion[4] – while also leaving room for the occasional decision to cast doubts on the court's otherwise strict adherence to the principle[5] – but has also been addressed in all recent reform projects as well as in

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1 Cass civ, 6 March 1876, *Canal de Craponne*, D 1876 I, 193; for the details, see below, 3.1.

2 Cf similar remarks by Fauvarque-Cosson, 'Le changement de circonstances', *RDC* 2004, 67, para 1; Stoffel-Munck, 'La réforme en pratique – La résiliation pour imprévision', *AJCA* 2015, 262.

3 See below, n 51.

4 See below, 2.1.

5 See below, n 60 and 64.

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loi n° 2015–177 du 16 février 2015, the respective *projet d'ordonnance*, and *ordonnance n° 2016–131 du 10 février 2016*.[6]

3. Reforming this area of law required the French legislator (who, in this case, was actually the French government) to strike a new balance between, on the one hand, the principle of *pacta sunt servanda* and the legal certainty that is usually ascribed to it and, on the other hand, the idea of contractual solidarity and fairness that lies at the foundation of every exception for *imprévision* admitted elsewhere. The controversial comments to which the proposed provision has given raise bear testimony to the difficulty of that task.

4. Yet, many other European systems have faced this challenge before, coming to a variety of different solutions, which has been described as 'revealing all the difficulties of the construction of a *ius commune* of contract'.[7] But the diversity of approaches does not only make *imprévision* one of the most interesting aspects of the French reform, especially for the present conference, the viable balance that has been found in many legal systems also seems to have provided useful guidance during the French reform process and will continue to enrich its academic discussion. This is particularly true for a comparitivist look at German law, which does not only offer a rich and relatively coherent body of case law but also the experience of its codification in a provision that is conceptually similar to what is about to become the new Article 1195 of the *Code civil*.

5. To provide a framework for such a comparison, the problem of *imprévision* will be described as a (potential) exception to the principle of *pacta sunt servanda* (2.). It will be shown that the respective solutions (currently) applied in French, English, and German law are the result of three fundamentally different approaches to such an exception (3.). The French reform, constituting a shift from one of these approaches to another, will then be critically assessed (4.), followed by some concluding remarks (5.).

2. *Imprévision* as an exception to *pacta sunt servanda*

6. Although it is widely regarded as a cornerstone of virtually all European systems of contract law, the principle of *pacta sunt servanda* has never been admitted without exceptions (1.). In order to discuss the French reform with regard to supervening circumstances, it will be useful to understand *imprévision* as one of these exceptions (2.).

2.1. The principle of pacta sunt servanda and its exceptions

7. Marking the transition from Roman law, where only some forms of promises (*contractus*) were actionable while others (*pacta nuda*) were not,[8] to the medieval

6 See below, 4.

7 Mekki, 'Hardship et révision des contrats 1. Quelle méthode au service d'une harmonisation entre les droits?', *JCP* 2010, 2291.

8 *D.* 2.14.7.4: '*nuda pactio obligationem non parit*'.

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canonists who claimed that (nonetheless) all promises must be kept,[9] the principle of *pacta sunt servanda* is rightly considered as an essential ingredient to private autonomy and a cornerstone of virtually all European systems of contract law.[10] It is enshrined in Article 1134, al 1, of the French Civil Code, §241 of the German *Bürgerliches Gesetzbuch (BGB)*, and was authoritatively stated for English law in 1647.[11] *Pufendorf* described it as 'a most Sacred Command of the Law of Nature and what guides and governs not only the whole Method and Order but the whole Grace and Ornament of Human Life, that every Man keeps his Faith, or which amounts to the same that he fulfils his Contracts, and discharges his Promises'.[12]

8. Yet, despite its omnipresence in modern contract law, the principle of *pacta sunt servanda* has always been subject to exceptions, many of which are concessions to contractual fairness. While some of these exceptions go to the formation of the contract – absence of contractual requirements like a legal *cause* or a certain form,[13] vitiating factors like mistake or duress, or consumer rights to redress –, others concern its performance – such as, most importantly, the exception for impossibility.

9. In many legal systems, the contract is void or unenforceable if performance has been impossible before the contract was concluded – be it for lack of object,[14] common mistake,[15] or under a separate doctrine.[16] But the debtor[17] is also regularly discharged

9 Cf Landau, 'Pacta sunt servanda. Zu den kanonistischen Grundlagen der Privatautonomie', in Ascheri et al. (eds), *Ins Wasser geworfen und Ozeane durchquert. Festschrift für Knut Wolfgang Nörr* (Böhlau 2003), 457; Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Clarendon 1990), 542–44.

10 Maskow, 'Hardship and Force Majeure' (1992) 40 *AmJCompL* 657, 658; Hyland, 'Pacta Sunt Servanda: A Meditation' (1994) 34 *VJIL* 405, 406, 427–28; Weller, *Die Vertragstreue* (Mohr Siebeck 2009), 153–65, 274–75.

11 *Paradine v Jane* (1647) Aleyn 26; see generally Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014), paras 2–001 to 2–009; McKendrick, *Contract Law – Text, Cases, and Materials* (6th edn, OUP 2014), 697–98.

12 Pufendorf, *De iure natura et gentium* (1672), III, ch IV, §§2, translation by Kennett (Lichfield 1703).

13 Although some of these requirements have historically evolved to counter-balance the principle of binding force of a contract, one may argue that they do not constitute exceptions but rather define what constitutes a *pactum* that is *servandum* (see also Thier in Hondius/Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP 2011), 19).

14 Cf, e.g., Cass com, 26 May 2009, pourvoi n° 08–12.691, Bull civ IV, no. 71 for French law.

15 Cf *Sheikh Brothers Ltd v Arnold Julius Ochsner* [1957] AC 136 and *Great Peace Shipping Ltd v Tsavliris Salvage (Int) Ltd (The Great Peace)* [2002] EWCA Civ 1407, paras 50–61, for English law.

16 Cf §311a BGB for German law. Note that the German doctrine of the disappearance (or disturbance) of the basis of the transaction, which will be discussed in the following, also covers cases of initial mistakes as to the basis of the transaction, now codified in §313(2) BGB; they lie beyond the scope of this paper.

17 In civil law systems, the provisions on impossibility only discharge the party whose performance has become impossible, while the other party to a contract is discharged as a consequence of the contractual synallagma (§326(1) BGB; Art. 1463 Codice civile; in French law, this results from Art. 1131 Code civil, the contract being devoid of a valid cause. In English law, however, frustration automatically discharges both parties (*Taylor v Caldwell* (1863) 3 B & S 826, 840; cf s 1(1) Law Reform (Frustrated Contracts) Act 1943)).

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if performance becomes subsequently impossible, provided that the circumstances were unforeseeable and the debtor was not responsible for them or has contractually undertaken the risk.[18] In most legal systems, this results from a separate doctrine which can take a number of different forms[19] but is regularly formulated as an exception to *pacta sunt servanda*.[20]

10. The English doctrine of frustration, for instance, was expressly developed as an exception to the principle of absolute liability,[21] based on an implied condition that 'in contracts in which the performance depends on the continued existence of a given person or thing […] the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.'[22] And while the juristic basis of the doctrine seems to have shifted towards the 'true construction of the contract' in later cases,[23] its character as an exception to *pacta sunt servanda* has not changed.[24] By the same token, the French doctrine of *force majeure*[25] is codified in Article 1148 of the *Code civil*, which posits an exception to contractual liability set out in Article 1147; it has been developed by the courts, which have traditionally applied a remarkably high standard,

18 Most legal systems impose at least some of these requirements for a contract to be discharged; yet, they differ as to how these work in practice. For instance, frustration does not discharge the contract under English law if one party has undertaken the risk (cf *Taylor v Caldwell* (n 17), 833) or if frustration was self-imposed (cf *J Lauritzen A/S v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1, 10), but is not excluded if the event was foreseeable (cf *Edwinton Commercial Corp & Anor v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, paras 127–28); for French law, see n 27 below.

19 Cf Beale et al, *Cases, Materials and Text on Contract Law – Ius Commune Casebook for the Common Law of Europe* (2nd edn, Hart 2010), 1094–126. In addition to the examples given in the next paragraph, see §275 BGB for German law (which only excludes the 'primary' obligation, but leaves the contract otherwise intact).

20 Cf already *D.* 50.17.185: *impossibilium nulla obligatio*.

21 Cf McKendrick (n 11), 697–98. While it was not referred to in the judgment itself, the plaintiff in *Taylor v Caldwell* (n 17), 831 had expressly invoked the rule from *Paradine v Jane* (n 11) and Blackburn J (as he then was) had started his speech by stating that '[t]here seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible.'

22 Blackburn J (as he then was) in *Taylor v Caldwell* (n 17), 839.

23 See *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL), 720–21; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL), 688 (including a discussion of the alternative theories that have been advanced).

24 See Bingham LJ in *The Super Servant Two* [1990] 1 *Lloyd's Rep* 1, 8: 'The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.'

25 It has inspired a number of model laws and harmonization projects, which sometimes use the term 'impediment' to describe the concept, cf Art. 79 CISG, Art. 7.1.7 UNIDROIT PICC, Art. 8:108 PECL, and Art. III.–3:104 DCFR.

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requiring the supervening event to have been irresistible, unforeseeable, and external,[26] but seem to have abolished the third requirement since two decisions of the *Cour de cassation*'s *Assemblée plénière* in 2006.[27]

2.2. The exception for imprévision

11. Legal systems tend to differ more strongly when it comes to circumstances that render performance more onerous rather than impossible. These are sometimes discussed under the descriptive, and therefore relatively neutral, headline of 'supervening' or 'unexpected circumstances',[28] even though this term technically covers cases of both mere hardship and (supervening) impossibility. Most French authors, however, refer to the particular situation where performance has been rendered more onerous as the problem, or theory, of *imprévision*.[29]

12. It has been argued that this terminology is imprecise since it is not the parties' failure to foresee (*prévoir*) the supervening circumstances but the effect these circumstances have on the contractual balance that gives rise to a potential judicial intervention.[30] Yet, legal systems tend to agree that there is no room for such an intervention if the circumstances have been foreseeable (let alone foreseen) at the conclusion of the contract. Therefore, and in view of the name of a similar doctrine in French administrative law,[31] to which the French government expressly referred in their *rapport* accompanying *ordonnance n° 2016–131 du 10 février 2016*,[32] the term *imprévision* will be used throughout this paper to describe the problem of unforeseeable supervening circumstances rendering performance considerably more onerous (but not impossible) for one party.

13. Whether the different remedies that legal systems provide in such cases should be understood as exceptions to *pacta sunt servanda* has also been subject to some discussion. It has been argued that remedies which are conceptually based on the construction of the contract or the parties' obligation to perform their obligations in good faith do not constitute such an exception as they only reduce (or transform) the ostensibly owed

26 Bénabent, *Droit civil – Les obligations* (13th edn, Montchrestien 2013), para 332.

27 As Plén, 14 April 2006, pourvoi n° 02–11.168, Bull civ AP n° 4; reaffirming, at the same time, that the conditions of irresistibility and unforeseeability need to be satisfied cumulatively.

28 Hondius/Grigoleit (n 13) ('Unexpected Circumstances'); Beale et al (n 19), 1091 ('Supervening Events'); Rodière (ed), *Les modifications du contrat aux cours de son execution en raison de circonstances nouvelles* (Pedone 1986).

29 Cf Bénabent (n 26), para 292; Souchon, in Rodière (n 28), 13, 14–18; Ghestin/Jamin/Billiau, *Les effets du contrat* (3rd edn, LGDJ 2001) para 290, however limiting it to monetary obligations.

30 Fauvarque-Cosson (n 2), para 2.

31 See below, 3.1.

32 See *Rapport au Président de la République relatif à l'ordonnance n° 2016–131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* (2016), 14: *'L'article 1195 constitue quant à lui l'une des innovations importantes de l'ordonnance, puisqu'il introduit l'imprévision dans le droit des contrats français, notion bien connue en jurisprudence administrative.'*

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performance (in)to what has actually been promised.[33] But such an understanding fails to reflect the considerable impact these remedies have on the legal certainty that the principle of *pacta sunt servanda* is considered to promote.[34] Consequently, most authors rightly consider them as exceptions to the principle.[35] With regard to its practical effects, the question whether a judge may modify a contract in light of supervening circumstances that have drastically altered the initial contractual balance is as much a question of the scope of *pacta sunt servanda*[36] as the question whether the owner of a concert hall that has burned down is still under an obligation to lease it to the other party[37] or whether a manufacturer who became terminally ill and thus could not finish a machine only he was able to build was still under an obligation to deliver it when he died.[38] In all these cases, one party does not get what they initially expected to get, even if the reason for this may be dogmatically found in the initial contract itself.

3. Current approaches to *imprévision*

14. Conceptually, legal systems that already allow an exception to *pacta sunt servanda* for cases of impossibility may take one of three different approaches to cases of *imprévision*: they may not discharge the parties unless performance has become actually impossible; they may extend the existing exception for impossibility to (some of) these cases; or they may develop a separate exception.[39] These different approaches have been taken in French (1.), English (2.), and German law (3.), respectively.

3.1. The French approach: no exception for imprévision

15. The traditional French approach to *imprévision* is notorious for its uncompromising adherence to *pacta sunt servanda*. It is perfectly illustrated by the *Cour de cassation*'s

33 Medicus, 'Vertragsauslegung und Geschäftsgrundlage' in Jakobs et al (eds), *Festschrift für Werner Flume zum 70. Geburtstag* (Otto Schmidt 1978), 629, 631–32; Finkenauer, in *Münchener Kommentar zum BGB* (6th edn, Beck 2012), §313, paras 3–4; in the same direction Mekki (n 7), 1.A.2°.

34 Moreover, it would arguably even deny the English doctrine of frustration the status of an exception to *pacta sunt servanda* since it is regularly explained as the consequence of the 'true construction of the contract'.

35 Cf McKendrick (n 11) 697–98; Treitel (n 11), para 1–001; Hondius/Grigoleit, in Hondius/Grigoleit (n 13), 6; Markensis/Unberath/Johnston, *The German Law of Contract* (Hart 2006), 320; Grüneberg, in *Palandt* (4th edn, Beck 2015), §313, para 1; Weller (n 10), 297; Zimmermann (n 9): 'one of the most (…) dangerous inroads into *pacta sunt servanda*.' A similar approach is taken in contemporary literature on international treaties, cf Binder, *Die Grenzen der Vertragstreue im Völkerrecht am Beispiel der nachträglichen Änderung der Umstände* (Springer 2013).

36 Thus, the German *Bundesgerichtshof* requires 'very particular circumstances that justify to make an exception to the principle of *pacta sunt servanda*' before it modifies a contract based on the doctrine of the basis of the transaction (see BGH, 11 July 1958, *NJW* 1958, 1772; 25 May 1977, *NJW* 1977, 2262). Cf also Weller (n 10), 298.

37 Cf *Taylor v Caldwell* (n 17).

38 Cf As Plén, 14 April 2006 (n 27).

39 For a different classification of 'open' and 'closed' legal systems see Hondius/Grigoleit in Hondius/Grigoleit (n 13), 10–12; 643–44.

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leading decision in *Canal de Craponne*,[40] where the owner of a channel asked the courts to increase the charges that were due to them by the adjoining owners in exchange for their obligation to maintain the channel under contracts concluded in 1560 and 1567, which had become entirely derisory in 1876. While the lower courts[41] allowed the claim and modified the contract, expressly admitting an exception to the principle of *pacta sunt servanda* for contracts that are executed over a certain period of time,[42] the *Cour de cassation* overruled the decision, pointing out that Article 1134 reproduces a general and *absolute* principle that applies to *all* contracts, including those entered into before the *Code civil* was enacted.[43] Thus, it was not the task of the courts, however fair they thought their decision to be, to modify a contract and replace freely negotiated terms.[44]

16. It is evident from this decision that the court understood Article 1134 *Code civil* in a way that its first two paragraphs, i.e. the principle of *pacta sunt servanda*, always[45] take precedent over the third paragraph, i.e. the principle of good faith. Freely stipulated contract terms become 'the law' for both the parties and the judge,[46] and *only* the parties themselves may alter it.

17. This understanding of Article 1134 had been repeatedly confirmed in subsequent decisions.[47] French authors who defend it regularly invoke the importance of legal certainty as well as the fact that it encourages parties to make provisions for supervening circumstances[48]). Moreover, they argue that the courts were not well placed to amend a

40 Cass civ, 6 March 1876 (n 1).

41 Tribunal civil d'Aix, 18 March 1841; Cour d'appel d'Aix, 31 December 1873.

42 Cour d'appel d'Aix, 31 December 1873: '*Attendu que si les conventions légalement formées tiennent lieu de loi aux parties et si elles ne peuvent être modifiées que du consentement commun, il n'en est pas de même pour les contrats qui ont un caractère successif.*'

43 Cass civ 6 March 1876 (n 1): '*[L]a disposition de cet article n'[est] que la reproduction des anciens principes constamment suivis en matière d'obligations conventionnelles, la circonstance que les contrats dont "exécution donne lieu au litige sont antérieurs à la promulgation du Code civil ne saurait être, dans l'espèce, un obstacle à l'application dudit article; [L]a règle qu'il consacre est générale, absolue, et régit les contrats dont l'exécution s'étend à des époques successives de même qu'à ceux de toute autre nature.*'

44 Ibid.: '*[D]ans aucun cas, il n'appartient aux tribunaux, quelque équitable que puisse leur paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants.*'

45 For the different provisions that allow for judicial interventions in particular types of contract see Hondius/Grigoleit (n 13), 146; Souchon, in Rodière (n 28), 18–21; Bénabent (n 26), para 294.

46 Capitant/Terré/Lequette, *Les grands arrêts de la jurisprudence civile* (12th edn, Dalloz 2008), 183, para 2.

47 Cass civ, 6 June 1921, Bull civ, n° 95; Cass com, 18 January 1950, D 1950, 227; 18 December 1979, pourvoi n° 78–10.763, Bull civ IV, n° 339; civ 3, 30 May 1996, pourvoi n° 94–15.828, Contrats, conc, consom 1996, n° 185; com 18 Mar 2009, pourvoi n° 07–21.260, Bull civ III, n° 64.

48 Terré/Simler/Lequette, *Droit civil. Les obligations* (10th edn, Dalloz 2009), para 470; Fauvarque-Cosson (n 2), para 25; see also Souchon, in Rodière (n 28), 17; Mekki (n 7), 1.B.1°. The argument can also be found in many English decisions (see, e.g., *Paradine v Jane* (1647) Aleyn 26, [1558–1774] All ER Rep 172, 173: '[W]hen 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 his contract*.' (emphasis added); see also McKendrick, 'Force Majeure and Frustration – Their Relationship and a Comparative Assessment', in McKendrick (ed), *Force Majeure and Frustration*

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contract.[49] Interestingly, the same arguments seem to have prevailed in Belgian law, where the problem is however often discussed (much like in English law)[50] as one of the scope of the *force majeure* exception.[51]

18. The French administrative courts have nevertheless refused to follow the decision in *Canal de Craponne* and repeatedly allowed a party for which the execution of a contract has become unexpectedly more onerous to demand a temporary[52] surcharge, which is to be fixed either by the parties or by the judge.[53] This divergence from the civil courts is usually attributed to the particular importance of a continued execution of contracts of a public law character,[54] but it should be noted that it considerably undermined the alleged increase in legal certainty gained from the civil courts' refusal to interfere with a contract where the nature of this contract is unclear or even in dispute.[55]

19. Moreover, a doctrinal current promoting the idea of 'contractual solidarism' (*solidarisme contractuel*) has gained considerable importance over the last decades.[56] It argues in favour of a new understanding of Article 1134 *Code civil* that gives the same weight to its third paragraph as is usually given to its first paragraph.[57] But although such an understanding would have provided a solid basis for a new approach to

(2nd edn, Routledge 2013), 43). One may of course question whether a default rule should be designed in a way to encourage the parties to prevent its application.

49 Capitant/Terré/Lequette (n 46), para 4; Fauvarque-Cosson (n 2), para 7; Stoffel-Munck (n 2), 263.

50 See below, 3.2.

51 See Herbots, *Contract Law in Belgium* (Kluwer/Bruylant 1995), paras 352 and 355; Hondius/Grigoleit (n 13), 158; Fouques-Duparc, in Rodière (n 28), 49–52; Cousin et al, 'Regards comparatistes sur l'avant-projet de réforme du droit des obligations', D 2015, 1115, II.B.2.

52 This '*théorie de l'imprévision*' only applies to temporary obstacles to the performance of the contract; if the obstacle is permanent, the contract will simply be discharged for *force majeure* (cf CE, 9 December 1932, *Compagnie des tramways de Cherbourg*, Rec 1050; 14 June 2000, *Commune de Staffelden*, Rec 227).

53 CE, 3 February 1905, *Ville de Paris*, Rec 105; 30 March 1916, *Compagnie générale d'éclairage de Bordeaux*, Rec 125; see also 30 October 1925, *Mas-Gayet*, Rec 836; 22 February 1963, *Ville d'Avignon*, Rec 115; Sect 12 Mar 1976, *Département des Hautes-Pyrenées*, Rec 155.

54 *'La continuité du service public'*; cf Nicholas, *The French Law of Contract* (2nd edn, Clarendon 1992), 209–10; Beale et al (n 19), 1130; Long et al, *Les grands arrêts de la jurisprudence administrative* (16th edn, Dalloz 2007), n° 31, paras 1 and 5–6. One may argue that this can hardly be the sole reason given that an indemnity can be awarded even after the contract has come to an end (CE 27 July 1951, *Commune de Montagnac*, Rec 439; Sect 12 March 1976, *Département des Hautes-Pyrenées* (n 53)).

55 This is illustrated by the facts of Cass civ 1, 16 March 2004, pourvoi n° 01–15.804, Bull civ I, n° 86, where the operation of a municipality's cafeteria was conceded to a private entity, which invoked the economic imbalance of the contract in front of the administrative courts; after the municipality (and another party) had seized the civil courts, the *Tribunal des conflits* authoritatively qualified the agreement as a private law contract.

56 Cf the important essay by Jamin, 'Révision ou intangibilité du contrat ou la double philosophie de l'article 1134 du Code civil', *Droit et Patrimoine* 1998, 46; see also Cédras, 'Le solidarisme contractuel en doctrine et devant la Cour de cassation', in *Rapport Cour de cassation 2003*; Mazeaud, D 2004, 1754, para 8.

57 Jamin (n 56), 49 and 54–57.

imprévision[58] – as the development of the German approach demonstrates[59] – it seems to have inspired only one very limited attenuation of the traditional approach. According to two decisions of the commercial chamber of the *Cour de cassation*, the refusal of one party to renegotiate the contract in light of supervening circumstances that have considerably altered the initial contractual balance may constitute a breach of its obligation to perform the contract in good faith.[60] Yet, a number of authors have argued that these decisions can be explained by the particular circumstances of the two cases and do not testify to a larger change of paradigm.[61] The fact that the consequence of a breach of the obligation to renegotiate is a damage award, and not the modification of the contract, seems to indicate that they are right. Besides, the approach of the commercial chamber is yet to be confirmed by other chambers of the *Cour de cassation*.[62]

20. Meanwhile, the commercial chamber had hinted towards a second device that could potentially accommodate cases of *imprévision*. In a decision from 2010, rendered via the so-called *procédure de référé* and inexplicably[63] not published in the *bulletin*, it quashed a decision for 'not having researched whether the evolution of economic circumstances […] did not have the effect […] of disequilibrating the general economy of the contract […] and of depriving the obligation [of the defendant] of every counterpart',[64] possibly leaving it without a valid *cause*. But although a number of authors had already proposed to use the concept of *cause* in these cases,[65] the decision has been met mostly with criticism[66] and remained isolated.[67] Given that the concept of *cause* has finally been abolished by *ordonnance n° 2016–131*,[68] it is very likely to remain that way.

58 Cf Jamin (n 56), 49 and 54–57; Fauvarque-Cosson (n 2), para 19; Tallon, 'La révision du contrat pour imprévision au regard des enseignements récents du droit comparé', in *Études à la mémoire d'Alain Sayag* (Litec 1997), 403, 413.

59 See below, 3.3.1.

60 Cass com, 3 November 1992, *Huard*, pourvoi n° 90–18.547, Bull civ IV, n° 338; 24 November 1998, pourvoi n° 96–18.357, Bull civ IV, n° 277.

61 Renaud-Payen, JCP E 2004, 737.

62 While the language of the decision in Cass civ 1, 16 March 2004 (n 55) seemed to indicate that the first civil chamber adhered to the same approach, the appeal was dismissed because it was based on an initial imbalance of the contract rather than on supervening circumstances; thus, the part in question is nothing more than an *obiter dictum* (see Renaud-Payen, JCP E 2004, 737; Fages, *Droit des obligations* (2nd edn, LGDJ 2009), para 423, fn 26).

63 See the criticism by Le Gac-Pech, 'L'équilibre du contrat au travers de la cause: un substitut à la théorie de l'imprévision?', *La Semaine Juridique – Entreprise et affaires*, 2010, 2108.

64 Cass com, 29 June 2010, *Soffimat*, pourvoi n° 09–67.369, D 2010, 2481.

65 See, e.g., Fauvarque-Cosson (n 2), para 20; Capitant/Terré/Lequette (n 46), para 3; Souchon, in Rodière (n 28), 18.

66 Cf Le Gac-Pech (n 7); Fages, 'Le déséquilibre résultant d'une évolution des circonstances économiques peut-il rendre sérieusement contestable, au sens de l'article 873, alinéa 2, du code de procédure civile, l'obligation dont une partie sollicite l'exécution devant le juge des référés?', *RTD Civ* 2010, 782; Genicon, 'Théorie de l'imprévision… ou de l'imprévoyance?', D 2010, 2485; more welcoming Mekki (n 7); Savaux, 'Frémentissement en matière d'imprévision', *RDC* 2011, 34.

67 Cf Cass com, 18 March 2014, pourvoi n° 12–29.453, and the commentary by Laithier, 'La cause n'est pas un remède aux contrats non rentables', *RDC* 2014, 345.

68 Cf *ordonnance n° 2016–131 du 10 février 2016*, Art. 1128.

21. In practice, parties to a long-term contract were thus only protected if they entered specific provisions for the event of supervening circumstances into their contract – which is most usually done in the form of a hardship clause.[69] Otherwise, they risked to be stuck with 300-year-old contract terms stipulating prices in a currency that had long ceased to exist.

3.2. The English approach: extension of the impossibility exception

22. While the English doctrine of frustration was developed in a case involving impossibility,[70] which would presumably also have fallen under the exception for *force majeure* in French law, English judges did not see much of a problem to extend it to cases where performance had not become literally impossible[71] but would not serve the intended purpose or otherwise be something entirely different from what the parties had in mind when concluding the contract.[72] In the first such case,[73] Vaughan Williams LJ concluded that 'it is not essential to the application of the principle of *Taylor v Caldwell* that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time.'[74]

23. Based on that reasoning, the English courts have applied the doctrine of frustration where supervening circumstances had rendered performance more burdensome to a degree that it would be fundamentally different from what was originally agreed.[75] And while the threshold for frustration in these cases is certainly very high as the courts do not want to allow the parties to escape from a bad bargain,[76] the decision in *Staffordshire Area Health Authority*[77], which was made in circumstances very similar to the French

69 Cf Beale et al (n 19), 1165–69. It has even been argued that the omnipresence of such clauses in international commerce supports the traditional French approach (as both ultimately exclude judicial interventions; Fauvarque-Cosson (n 2), paras 28–9). Note that these clauses can also be found in many administrative contracts, where they aim, but do not always succeed, to replace the *théorie de l'imprévision* (cf CE Sect, 5 November 1937, *Département des Côtes-du-Nord*, Rec 900 and *Ducos*, Rec 902).

70 *Taylor v Caldwell* (1863) 3 B & S 826.

71 It could be argued that performance had not become literally impossible in *Taylor v Caldwell* either since it would probably have been possible, in theory, to rebuild the concert hall (cf Treitel (n 11), para 6–001).

72 In addition, hardship also plays a role as a defence to a claim for certain remedies (see Peel, *Treitel. The Law of Contract* (14th edn, Sweet & Maxwell 2015), paras 3–146, 21–015, and 21–030).

73 *Krell v Henry* [1903] 2 KB 740 (CA).

74 ibid., 754.

75 Cf *Metropolitan Water Board v Dick Kerr* [1918] AC 119 (HL); see also *Bank Line v Arthur Capel & Co* [1919] AC 435 (HL).

76 Cf *Davis Contractors* [1956] AC 696 (HL); *Amalgamated Investments & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 (CA); *Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226 (CA).

77 *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387 (CA).

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decision in *Canal de Craponne*, illustrates how the slightly wider doctrine of frustration can be used to come to a different result than the one French courts would find.[78]

24. Still, although impossibility and frustration of purpose are usually treated as two different types of frustration,[79] they are applications of the same doctrine.[80] As a consequence, none of the English decisions seems to be understood as an application of the *clausula rebus sic stantibus* doctrine,[81] even though the doctrine of frustration was originally also based on an implied term.[82] More importantly, as cases of impossibility and hardship fall under the same doctrine, the remedy is exactly the same in both situations: if the high threshold for frustration is fulfilled, both parties are automatically discharged, without any intervention of the parties or the courts,[83] and the Law Reform (Frustrated Contracts Act) 1943 applies to the respective liabilities of the parties.[84]

25. This approach has the advantage of not requiring a distinction between circumstances that render performance impossible and those that render performance more difficult.[85] But it may also be seen as one of the main reasons why English courts have been particularly reluctant to admit that a contract has been frustrated, which would extinguish it in its entirety without leaving any room for contractual modification.[86] Such an all-or-nothing approach may be justified for the all-or-nothing question of whether performance is still possible – but one may argue that it fails to accommodate the more subtle question of whether performance in the way originally agreed is still fair.

3.3. The German approach: development of a separate exception

26. The German approach to *imprévision* is radically different from both the English and the traditional French approach in that it is based on a doctrine which is entirely separate from the doctrine of impossibility (a.). It has inspired similar approaches in a number of other European legal systems and found its way into most harmonization

78 While the majority construed the contract as being concluded for an indefinite period of time and thus open to termination upon reasonable notice, Lord Denning considered it to have ceased to bind because 'the situation has changed so radically since the contract was made.' (ibid., 1398). See also Hondius/Grigoleit (n 13), 212–14.

79 Cf McKendrick (n 21), 723. Cases of illegality are usually distinguished as a third type.

80 Cf *Krell v Henry* (n 73), 749, where Vaughan Williams LJ even considered the contract to have become 'impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract'.

81 Cf Weir, 'Review of "Frustration of contract and clausula rebus sic stantibus"', (1988) 37(2) ICLQ 452.

82 See n 22 above.

83 McKendrick (n 48), 44–45; Treitel (n 11), para 15–002.

84 Treitel (n 11), paras 15–053 to 15–058.

85 For the problems this has caused in German law see below, 4.2.

86 While the Law Reform (Frustrated Contracts Act) 1943 gives the courts some flexibility with regard to the consequences of the discharge (cf Peel (n 72), paras 19–092 to 19–108), it should be noted that it has only been applied in a very limited number of reported cases.

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projects and international instruments on contract law (b.). In 2002, the German legislator finally codified the doctrine (c.).

3.3.1. The doctrine of the basis of the transaction

27. Although they were aware of the concept of the *clausula rebus sic stantibus*,[87] as well as *Windscheid*'s theory of the 'precondition' (*Voraussetzung*),[88] the legislator of the *Bürgerliches Gesetzbuch* decided not to incorporate a general provision dealing with changing circumstances[89] in an effort not to undermine the principle of *pacta sunt servanda*.[90] As the German *Reichsgericht* (which was established 20 years earlier than the BGB entered into force) had never ascribed to the *clausula* theory anyway,[91] the court initially had little difficulty to honour the legislator's decision.[92]

28. However, in light of the hyperinflation that followed World War I, the German court – unlike the French *Cour de cassation*[93] – started to make exceptions. Interestingly, the court initially extended the already existing exception for impossibility to cases of 'economic impossibility'.[94] But it quickly put its reasoning on a different footing and invoked the principle of good faith (§§157, 242 BGB); first to allow parties to terminate contracts that they could not perform without a serious risk of bankruptcy,[95] then also to judicially modify such contracts.[96] In 1922, the court finally adopted the so-called doctrine of *Wegfall der Geschäftsgrundlage* (disappearance of the basis of the transaction),[97] which had been developed by *Oertmann*.[98]

87 Cf *Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das Deutsche Reich* (Guttentag 1888), Vol II, 199; *Protokolle der Kommission für die zweite Lesung des Entwurfs des BGB* (Guttentag 1897–79), Vol II, 1264–65.

88 Cf *Motive* (n 87), Vol I, 249.

89 *Motive* (n 87), Vol I, 249; Vol II, 199. Exceptions were however admitted for loan agreements (§610 BGB; see Vol II, 314–15) and contracts where one party is obliged to perform in advance (§321 BGB; see *Protokolle* (n 87) II, 1264). Moreover, §812(1)(2) Alt 2 still contains a reminiscence to *Windscheid's* theory.

90 Wieacker, *Privatrechtsgeschichte der Neuzeit* (2nd edn, Vandenhoeck & Ruprecht 1967), 520; Finkenauer (n 33), para 21.

91 Cf RG 13 May 1889, *RGZ* 24, 169, 170.

92 Cf RG 11 April 1902, *RGZ* 50, 255, 257; 4 May 1915, *RGZ* 86, 397, 398.

93 Cf Cass civ, 6 June 1921 (n 47); 30 May 1922, D 1922, I, 69. These decisions may well be understood as a conscious rejection of the German approach, cf Fauvarque-Cosson (n 2), para 5.

94 RG 4 February 1916, *RGZ* 88, 71, 74; 15 October 1918, *RGZ* 94, 45, 47; 2 December 1919, *RGZ* 98, 18, 20–21. This approach is evidently very similar to the extension of the English doctrine of frustration to cases of hardship; just as the House of Lords in *Metropolitan Water Board v Dick Kerr* (n 75), the Reichsgericht limited the category of 'economic impossibility' to cases where performance had become completely different from what was promised.

95 RG 19 May 1920, *RGZ* 99, 115, 116; 8 July 1920, *RGZ* 99, 258, 259.

96 RG 21 September 1920, *RGZ* 100, 129, 131. The decision expressly invokes the *clausula* doctrine; according to the court, the interpretation given to the provisions on impossibility and good faith in the aforementioned decisions demonstrated that this doctrine could indeed be found in the BGB.

97 RG 3 February 1922, *RGZ* 103, 328.

98 Oertmann, *Die Geschäftsgrundlage. Ein neuer Rechtsbegriff* (Deichert 1921).

29. Aware of the risk for legal certainty,[99] the court initially defined the 'contractual foundation' narrowly as 'a belief as to the existence of certain essential circumstances held by the parties and apparent at the moment of the conclusion of the contract'.[100] Its disappearance discharged the party for which performance had become more onerous from its obligation unless the other party agreed to amend the contract.[101]

30. Over the following decades, the *Reichsgericht* and, subsequently, the *Bundesgerichtshof (BGH)* had numerous opportunities to uphold and develop the doctrine[102] and to clarify its ingredients.[103] Some of these decisions had to deal with very substantial changes of circumstances similar to the hyperinflation of the 1920s, such as the end of the Third Reich,[104] the 1948 Berlin blockade[105] and the German reunification[106], while others addressed relatively trivial situations. Thus, the court has considered the acquisition of a building licence as the 'basis' of a sales contract for a prefabricate house,[107] certain soil conditions as the 'basis' of a construction contract,[108] and the (non-)involvement of a professional football player in a match-fixing scandal as the 'basis' of a transfer contract between two football clubs.[109]

31. These decisions have been conceptualised into a three-prong test, requiring a factual element (i.e. a change of circumstances),[110] a hypothetical element (i.e. the parties would not have concluded the contract if they had been aware of this change),[111] and an equitable element (i.e. it would not be equitable for one party to deny the other party any amendment of the contract).[112] When these elements had been established, one party could demand from the other what the parties would have agreed if they had been aware of the risk and the contract had been amended accordingly;[113] (only) if the other party

99 Cf RG 3 February 1922 (n 97), 331.

100 ibid.

101 ibid., 333; unlike in RG 21 September 1920 (n 96), the court denied any judicial power to amend the contract.

102 In BGH 16 January 1953, *MDR* 53, 282, the court made clear that 'economic impossibility' is distinct from 'actual impossibility' and governed by §242 BGB, not §275 BGB. Cf also BGH 23 October 1957, *BGHZ* 25, 390, para 27.

103 For instance, the BGH immediately made clear that it might modify a contract, cf BGH 16 January 1953 (n 102).

104 BGH 29 May 1951, *BGHZ* 2, 237; 30 September 1952, *BGHZ* 7, 238.

105 BGH 16 January 1953 (n 96).

106 BGH 14 October 1992, *BGHZ* 120, 10.

107 BGH 23 March 1966, *JZ* 66, 409.

108 BGH 21 November 1968, *NJW* 69, 233.

109 BGH 13 November 1975, *NJW* 76, 565. In view of the court's decisive argument that the player had become useless for both parties (paras 23–24), the case would presumably be one of frustration of purpose in English law.

110 According to the BGH, this element needs to be construed narrowly (see next paragraph).

111 This element is missing if the parties have been aware of the risk, cf BGH 29 May 1951 (n 104), para 18; 30 September 1952 (n 104), para 11.

112 This element requires that the risk does not lie exclusively with one party, cf, e.g., BGH 10 March 1983, *BGHZ* 87, 112, para 13 (the risk not to obtain a credit lies with the debtor).

113 Cf BGH 23 March 1966 (n 107), paras 18–21; see BGH 14 October 1992 (n 106), para 40 for an exception.

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refused this or an amendment were not possible, the party for which performance had become more onerous could terminate the contract.[114]

32. Both the requirements and the effects of the disappearance of the basis of the transaction are a direct consequence of the doctrine being an application of the principle of good faith.[115] It is not only evident in the 'equitable element' of the aforementioned test, but also the reason for the preference given to the adaptation of the contract over its termination.[116] Moreover, the courts have always emphasised the need for a narrow construction of the doctrine, despite the wide range of situations it is supposed to cover, given that it is an exception to the principle of *pacta sunt servanda*.[117] And while some authors have argued that such a narrow construction is misplaced as the doctrine is ultimately nothing else than an instance of contractual interpretation,[118] the *Bundesgerichtshof* has repeatedly confirmed it.[119]

3.3.2. Reception in other legal systems and instruments

33. Even before *Oertmann* had developed the German doctrine, the idea of a 'basis' or 'foundation of the contract' featured in English decisions on the doctrine of frustration.[120] But rather than serving as the underlying concept, it appears to have mainly been used to restrict the scope of the doctrine,[121] the contractual 'foundation' being understood considerably more narrowly than in German case law.[122]

34. After the German courts had started to regularly apply the doctrine of disappearance of the basis of the transaction, it was however adopted in a number of other European[123] legal systems, some of which had formerly adhered to the French concept of an immutable

114 Cf BGH 21 November 1968 (n 108), paras 31–34; 13 November 1975 (n 109), paras 32–33; BGH 15 December 1983, *BGHZ* 89, 226, para 60.

115 For the historical development of this reasoning see Wieacker (n 90), 520.

116 Cf BGH 23 October 1957 (n 102), para 27; 31 Januar 1967, *BGHZ* 47, 48, paras 12, 14.

117 Cf Markensis/Unberath/Johnston (n 35), 325–26; in the context of the recent 'financial crisis', see KG Berlin 5 November 2012, *NJW* 2013, 478 and Tröger, 'Das Vertragsrecht der Krise: Vertragstheorie und -dogmatik im Lichte der Finanzkrise' in Tröger/Karampatzos (eds), *Gestaltung und Anpassung von Verträgen in Krisenzeiten* (Mohr Siebeck 2014), 49, 56.

118 Finkenauer (n 33), paras 41–46; Medicus (n 33), 631–33. Given the reference to good faith in §157 BGB, such an understanding is easily reconcilable with the principle of good faith as the foundation of the doctrine.

119 Cf BGH 13 November 1975 (n 109), para 22.

120 Cf *Krell v Henry* (n 73), 750–51; see also *National Carriers Ltd v Panalpina (Northern) Ltd* (n 23), 688.

121 Thus, the contract to hire a steamship was not frustrated in *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683 by the coronation of Edward VII being cancelled (which had however frustrated the contract for the hire of a room in *Krell v Henry* (n 73), decided by the same judges) because it was not the 'foundation of the contract' (ibid., 689). Cf also the example given by Vaughan Williams LJ in *Krell v Henry*, 750, of engaging a cabman to Epsom on Derby Day, which would not be frustrated even if the race would not take place because it would not be the 'foundation of the contract'.

122 Cf the decisions cited in n 107–09, none of which would amount to 'frustration' in English law.

123 A relatively similar doctrine also exists in US law, where a party can be discharged in cases of 'commercial impracticability' (cf Treitel (n 11), paras 6–002 to 6–020).

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principle of *pacta sunt servanda*.[124] Thus, both the Italian *Codice civile* and the Dutch *Burgerlijk Wetboek* contain provisions[125] that have been inspired by the German case law[126] and allow the judge to either amend or terminate a contract if an unforeseeable change of circumstances has made performance considerably more onerous. Austrian and Swiss courts seem to apply a similar rule, without the legislators having codified it.[127]

35. Moreover, the German approach has been adopted in many[128] harmonization projects and international instruments of contract law.[129] Artt. 6:111 PECL[130], III.–1:110 DCFR[131], 89 CESL[132], and 6.2.3. UNIDROIT Principles of International Commercial Contracts (2010)[133] all allow the courts to amend or terminate a contract if 'performance becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation',[134] with preference given towards the amendment of the contract.[135] Yet, unlike the German case law,[136] they all require an attempt to renegotiate the contract before the courts may intervene.

3.3.3. The codification of 2002

36. When the German legislator reformed the law of obligations in 2002, they also codified the doctrine of the disappearance of the basis of the transaction, in order to give it a textual basis without changing its content.[137] Thus, the following §313 was introduced into the BGB:[138]

124 For further examples see Rodière (n 28); Finkenauer (n 33), paras 29–39; von Bar/Clive/Schulte-Nölke, *Principles, definitions and model rules of European private law. Draft Common Frame of Reference (DCFR)* (OUP 2010), 741–44.

125 Art. 1467 and 1468 Codice civile; Art. 6:258 Burgerlijk Wetboek.

126 Cf Beale et al (n 19), 1146; Tallon 'Hardship', in Hartkamp et al (eds), *Towards a European Civil Code* (3rd edn, Nijhoff 2004), 502; von Bar/Clive/Schulte-Nölke (n 124), 742; Hondius/Grigoleit (n 13), 118–19.

127 Finkenauer (n 33), paras 33–34; Fauvarque-Cosson (n 2), para 13.

128 A notable exception is the CISG, which only contains an exception for *force majeure* in Art. 79 CISG.

129 See generally Brunner, *Force majeure and hardship under general contract principles. Exemption for non-performance in international arbitration* (Kluwer 2009), 397–535.

130 Principles of European Contract Law, published in Lando/Beale, *Principles of European Contract Law (PECL), Parts I and II* (Kluwer 2000).

131 Draft Common Frame of Reference, published in von Bar/Clive/Schulte-Nölke (n 124).

132 Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law, COM(2011), 635 final.

133 International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2010).

134 Art. III.–1:110 DCFR. Interestingly, all of these provisions start by restating the principle of *pacta sunt servanda* and formulate the case of *imprévision* as a restrictive exception.

135 Cf, e.g., von Bar/Clive/Schulte-Nölke (n 124), 741; McKendrick, in Vogenauer (ed), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) (2nd edn, OUP 2015), Art. 6.2.3., para 6.

136 See below, 3.3.3.

137 BT-Drucksache 14/6040, 93; 175, 176.

138 Translation provided by juris for the German Ministry of Justice <www.gesetze-im-internet.de/englisch_bgb/> last accessed 12 February 2016.

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(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.
(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.
(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

37. Although the new provision is formulated in very broad and open terms,[139] it is largely considered as an adequate restatement of the former case law.[140] It only differs from the latter insofar as it cannot be applied *ex officio*; instead, a party who wants the contract to be amended or terminated has to invoke the provision.[141] Of course, this digression may well be seen as an additional safeguard against judicial interventionism.

38. In general, there can be little doubt that the codification of the doctrine succeeded. Although §313 BGB seems to be more and more frequently invoked in litigation,[142] the courts seem to have largely respected the legislator's intention and refrained from applying the provision beyond the previous case law. The few cases where the §313 BGB has been applied although §242 had not[143] do not seem to be a consequence of the reform but rather appear to be instances of 'regular' change in the courts' jurisprudence. As a consequence, neither German[144] nor foreign[145] commentators consider the doctrine of the disappearance of the basis of the transaction as codified in §313 BGB as undermining legal certainty.

39. Uncertainties have however arisen out of the overlap with other newly modified provisions, most importantly with §275 BGB (governing impossibility). While it was clear, before 2002, that the doctrine of the disappearance of the basis of the transaction had no role to play where performance had become impossible,[146] many authors argue

139 Cf Markensis/Unberath/Johnston (n 35), 324; Finkenauer (n 33), para 7.
140 Cf Finkenauer (n 33), para 26; Grüneberg (n 35), para 1.
141 Cf Grüneberg (n 35), paras 1 and 41.
142 See, e.g., BGH 11 November 2010, NJW-RR 2011, 916, where a party invoked the provision in order to terminate a two-year internet provider contract after having moved away six months after its conclusion.
143 E.g. to gifts by parents-in-law to their son-in-law (BGH 3 December 2014, *NJW* 2015, 1014).
144 Cf Finkenauer (n 33), paras 3–6, 41–46, 52; surprisingly critical: Zweigert and Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998), 535, 536.
145 Cf Beale et al (n 19), 1146; Markensis/Unberath/Johnston (n 35), 325–6; Tallon (n 126), 504.
146 BGH 17 February 1995, *NJW-RR* 95, 854, para 13; see also BT-Drucksache 14/6040, 176.

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that it may be invoked in cases that fall under the new exception for 'factual impossibility' in §275(2) BGB, provided that the requirements of both provisions are met.[147]

40. Moreover, it may be seen as a downside to the legislator's otherwise strict adherence to the existing case law that they have not introduced an obligation to renegotiate,[148] which can be found in virtually all international model rules.[149] Thus, authors have remained divided as to whether an attempt to renegotiate is a requirement to modification or termination of the contract and what the consequences of the other party's refusal to negotiate are.[150] Meanwhile, the *Bundesgerichtshof* has held that §313 entails a duty to renegotiate, the breach of which may not only make termination available as a remedy even if the contract can be modified but also may itself be remedied by damages.[151]

4. The French reform

41. Under the impression of the international success of provisions on *imprévision*, many French authors[152] had argued for a long time that the decision in *Canal de Craponne* and the subsequent case law should be abolished – a position especially popular amongst those who generally advocated to give greater importance to the principle of good faith in contract law and more competences to the judge.[153] Yet, although Article 1134, al 3, of the *Code civil* would arguably have provided a solid textual basis for such a *revirement de jurisprudence*,[154] the impact of this movement seems to have been limited to the two decisions of the *Chambre de commerce* cited above.[155]

42. Still, it is hardly surprising that all projects for a reform of the *Code civil* contained some provisions that would overrule the decision in *Canal de Craponne*. While the *avant-projet Catala* allowed the courts to order renegotiation of a contract in case of supervening circumstances, failure of which would give both parties a right to terminate

147 Ernst (n 71), para 23; Finkenauer (n 33), para 164.

148 It was only stated in the reform materials that the parties 'should' renegotiate before seizing the courts (BT-Drucksache 14/6040, 176).

149 See above, 3.3.2.

150 Cf Finkenauer (n 33), para 122; for the same debate in Dutch law cf Busch, in Busch et al (eds), *The Principles of European Contract Law and Dutch Law. A Commentary* (Kluwer 2002), 289.

151 BGH 30 September 2011, *BGHZ* 191, 139, paras 27–28 and 33–34 (for critical comment see Teichmann, JZ 2012, 421). Concerning the availability of damages for a violation of the duty to renegotiate, the decision interestingly comes very close to the French judgment in *Huard* (n 60).

152 Cf, e.g., Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle* (Bruylant 1986), 620–59; Fauvarque-Cosson (n 2), paras 8–25; Souchon, in Rodière (n 28), 17–18. See also Bell/Boyron/Whittaker, *Principles of French Law* (2nd edn, OUP 2008), 346.

153 See above, n 56.

154 See above, n 58; Philippe (n 152), 621–24; see also Fauvarque-Cosson (n 2), para 20, Capitant/Terré/Lequette (n 46), para 3, and Souchon, in Rodière (n 28), 17–18, all also pointing to other potential bases.

155 Above, n 60.

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the contract,[156] both the *projet Terré*[157] and the Ministry of Justice's proposal[158] also gave the courts the power to amend the contract in such a situation.

43. Accordingly, *loi n° 2015–177 du 16 février 2015*, which authorised the government to 'modernise, simplify, and improve' *livre III* of the *Code civil*, also included a mandate 'to specify the rules concerning the effects of the contracts between the parties and for third persons by confirming their right to adapt their contract in the case of unforeseeable change of circumstances.'[159]

44. Thus, Article 1196[160] of the corresponding *projet d'ordonnance* stated that,[161]

> (1) If a change of circumstances unforeseeable at the conclusion of the contract renders its execution excessively onerous for one party that has not accepted to assume that risk, that party can demand a renegotiation of the contract. The party has to continue to perform their obligation during the renegotiation.
> (2) In the case of refusal or failure of the renegotiations, the parties may demand, by mutual agreement, a judge to proceed to adapt the contract. Failing this, a party may demand the judge to end the contract at the date and under the conditions that [the judge] fixes.

45. But although many authors seemed to welcome the general idea of codifying a provision for supervening circumstances,[162] the initial proposal was met with criticism:

156 Avant-projet de réforme du droit des obligations (2005), Art. 1135–1 to 1135–3.

157 Terré, *Pour une réforme du droit des contrats* (Dalloz 2008), Art. 92.

158 Ministère de la Justice, *Projet de réforme du droit des* contrats (2008), Art. 136; translations of all three texts can be found in Beale et al (n 19), 1134–35.

159 *Loi n° 2015–177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures*, Art. 8: '*[L]e Gouvernement est autorisé à prendre par voie d'ordonnance les mesures […] nécessaires pour modifier la structure et le contenu du livre III du code civil, afin de moderniser, de simplifier [et] d'améliorer la lisibilité […], et, à cette fin […] 6° Préciser les règles relatives aux effets du contrat entre les parties et à l'égard des tiers, en consacrant la possibilité pour celles-ci d'adapter leur contrat en cas de changement imprévisible de circonstances.*'

160 According to the official presentation of the *projet*, the provision is part of those seeking a better protection of the weaker party (cf Ministère de la Justice, *Presentation de l'avant-projet d'ordonnance en Conseil des ministres le 25 février 2015* <www.justice.gouv.fr/publication/j21_dp_projet_ord_reforme_contrats_2015.pdf> last accessed 12 February 2016.

161 *Projet d'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations* (2015), Art. 1196: '*(1) Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation. (2) En cas de refus ou d'échec de la renégociation, les parties peuvent demander d'un commun accord au juge de procéder à l'adaptation du contrat. A défaut, une partie peut demander au juge d'y mettre fin, à la date et aux conditions qu'il fixe.*'

162 Cf Alpa, 'Projet francais de réforme du droit des contrats', *Rev int de dr comp* 2015, 877, 893; Desaché/Dupichot/Dondero, 'Droit des contrats: la réforme (enfin) engagée', *Capital Finance*, 22 June 2015, 23; Stoffel-Munck (n 2), 263; Latina, 'L'imprévision', in *Dalloz Blog Réforme du droit des obligations*,

at the same time, it was criticised by practitioners for giving too much power to the judge[163] and by academics for not going quite far enough.[164]

46. In *ordonnance n° 2016–131*, paragraph (2) was changed to state that,[165]

> (2) In the case of refusal or failure of the renegotiations, the parties may agree to dissolve the contract at the date and under the conditions that they determine, or demand, by mutual agreement, a judge to proceed to adapt the contract. Failing an agreement within a reasonable delay, the judge can, at the request of a party, revise the contract or end it at the date and under the conditions that [the judge] fixes.

47. This amendment seems to be a reaction to (some of) the criticism that was levelled at the reform proposal. While the significance of the paradigm shift marked by the reform (1.) did arguably allow to put some of this criticism into perspective (2.), the provision that was finally adopted seems to be an even stronger reflection of these comparativist arguments (3.).

4.1. The doctrinal importance of the French reform

48. The importance of the French reform, which openly admits to be 'inspired by comparative law',[166] clearly lies in its doctrinal dimension. It puts the uncompromising adherence of French law to a sacrosanct principle of *pacta sunt servanda* to an end and finally provides an escape route for parties that have not, and could not, foresee a

23 March 2015 <http://reforme-obligations.dalloz.fr/2015/03/23/limprevision/> last accessed 12 February 2016.

163 Cf Cousin et al (n 51), II B 1; Rocher, 'La réforme du droit des contrats: quelles conséquences pour les contrats de construction?', Point de vue, moniteur.fr, 2 July 2015 <www.lemoniteur.fr/article/point-de-vue-la-reforme-du-droit-des-contrats-quelles-consequences-pour-les-contrats-de-construction-28959918> last accessed 12 February 2016; see also Sidier/Niel, 'Le contrat ne fera bientôt plus vraiment la loi des parties: introduction de l'imprévision dans le Code Civil', finyear.com, 8 June 2015 <www.finyear.com/Le-contrat-ne-fera-bientot-plus-vraiment-la-loi-des-parties-introduction-de-l-imprevision-dans-le-Code-Civil_a33204.html> last accessed 12 February 2016, criticising that the provision will allow parties to escape from the obligation to perform in good faith by simply refusing to renegotiate.

164 Chagny, 'Vent de réforme: du contrat à la concurrence et vice versa', AJ Contrats d'affaires, Concurrence, Distribution 2015, 145; see also Latina (n 162); Latina, 'L'attractivité du droit des contrats: l'efficacité économique du droit des contrats', in *Dalloz Blog Réforme du droit des obligations*, 8 September 2015 <http://reforme-obligations.dalloz.fr/2015/09/08/lattractivite-du-droit-des-contrats-lefficacite-economique-du-droit-des-contrats/> last accessed 12 February 2016.

165 *Ordonnance n° 2016–131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, Art. 1195: '*(2) En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe.*'

166 See above, n 150.

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particular change of circumstances. Following the example of other legal systems,[167] the French government opted against merely redefining an existing doctrine like *force majeure* or using one of the other existing devices that have been proposed for such a reform[168] and instead created a separate exception to *pacta sunt servanda*.

49. Within the conceptual framework established above, this puts French law very close to German law. Still, the reform proposal was not entirely clear on whether the new French provision would be rooted in the principle of good faith as much as the German §313 BGB. While the latter emerged from case law explicitly based on §242 BGB, giving preference to amending the contract over terminating it, the proposed French provision, to be introduced without indication of its conceptual basis, would be a bit more ambivalent. Its first paragraph could certainly be linked to the aforementioned decisions of the commercial chamber[169] establishing a duty to renegotiate based on Article 1134, al 3, *Code civil*.[170] According to its second paragraph, however, the usual remedy in cases of *imprévision* would have been the termination of the contract, a judicial modification being only possible where both parties had agreed on it, putting the proposed provision conceptually closer to the reasoning underlying the *force majeure* exception. Making adaptation available to each party under the same conditions as termination, *ordonnance n° 2016–131* has however clarified that the new provision will indeed be rooted in the principle of good faith.[171]

50. But even in the form that was originally proposed, the introduction of the new exception for *imprévision* would have had undeniable benefits for French law. First, it would have put an end to the confusing plurality of exceptions to the principle expressed in *Canal de Craponne*,[172] which include the positions of the administrative courts as well as the commercial chamber's ambiguous decisions in *Huard* and *Soffimat*.[173] This should have been considered as an important contribution to legal certainty in itself.

51. Second, the introduction of an exception that is distinct from the doctrine of *force majeure* would have nuanced the approach French law applied to supervening circumstances and allowed the courts to award a much more adequate remedy than the automatic discharge of the parties.[174] The fact that English courts do not enjoy this liberty has been shown to be one of the reasons for their very restrictive approach to the doctrine of frustration of purpose.[175]

167 Cf Fages (n 77), para 423; Fauvarque-Cosson (n 2), paras 13–15; Stoffel-Munck (n 2), 262.
168 See above, n 150.
169 Above, n 60.
170 As far as an obligation to renegotiate is admitted in German law, it is also inferred from §242 BGB, see above, para. 40.
171 See below, 4.3.
172 According to Bénabent (n 26), para 293, the amount of exceptions has rendered the principle 'an empty shell'.
173 See above, 3.1.
174 Cf von Bar/Clive/Schulte-Nölke (n 124), 738, for a similar consideration.
175 See above, para. 25.

4.2. The practical shortcomings of the reform proposal

52. In view of these general advantages that a separate exception for *imprévision* would have for French contract law, some of the arguments that had been put forward against the originally proposed provision and, especially, its practical effects, had to be put into perspective. A comparison to the conceptually similar approach of German law, for instance, could not only disprove the general concern that judicial intervention would unduly decrease legal certainty[176] but also allowed to address some of the more nuanced comments made by French authors.

53. In this regard, a first point of criticism concerned the fact that the provision was drafted in very broad and imprecise terms, which could create uncertainty concerning, in particular, the threshold of *imprévision* and its relationship to the doctrine of *force majeure*.[177] While the fact that the same uncertainty seems to surround the equally broadly formulated[178] German §313 BGB,[179] even though the provision was drafted on the back of 80 years of case law, might have indicated that this would indeed be a problem, there were a number of reasons not to overstate this risk. French courts do not only have considerable experience in fleshing out important doctrines and legal concepts (such as the doctrine *force majeure*)[180] on the basis of open and imprecisely formulated provisions, they could also draw from the impressive body of academic writing on the *théorie de l'imprévision*, the case law regarding types of contracts for which it is already admitted[181] and, most importantly, the case law of the administrative courts which have applied it alongside the doctrine of *force majeure* ever since the decision in *Gaz de Bordeaux*.[182]

54. While this criticism remains valid in light of the provision ultimately adopted, paragraph (1) of which has remained unchanged from the *projet d'ordonnance*, the fact that the *rapport* accompanying the final *ordonnance* expressly refers to *imprévision* as 'a notion well-known in administrative law'[183] makes it even more likely that the courts will adopt the distinction between *force majeure* and *imprévision* developed by the administrative courts, drawing a line between supervening events that are irresistible and those that are not.[184]

176 Cf Tallon (n 58), 410–12; Terré/Simler/Lequette (n 48), para 471; see also von Bar/Clive/Schulte-Nölke (n 124), 741.

177 Cf Dissaux/Jamin, *Projet de réforme du droit des contrats, du régime général et de la preuve des obligations rendu public le 25 février 2015. Commentaire article par article* (Dalloz 2015), Art. 1034, C; Bridier, 'Encore des critiques sur la réforme du droit des contrats', actuel-direction-juridique.fr, 22 July 2015 <www.actuel-direction-juridique.fr/content/encore-des-critiques-sur-la-reformes-du-droit-des-contrats> last accessed 12 February 2016.

178 Cf Finkenauer (n 33), para 7.

179 See above, n 39.

180 As to the development of which see Nicholas, 'Force Majeure in French Law', in McKendrick (n 48), 21.

181 See above, n 45.

182 Above, n 53.

183 See above, n 32.

184 Cf Cousin et al (n 51), II B 2; Fauvarque-Cosson (n 2), paras 10, 23.

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55. A second point of criticism went to the relatively tame remedies offered to the party for which performance had become more onerous.[185] While it is not uncommon to impose a duty to renegotiate the contract on that party,[186] the proposed French provision appeared as particularly weak insofar as it restricted judicial modification of the contract to cases where both parties had agreed to it if such renegotiation failed. To a certain degree, this could be explained by an awareness of many practitioners' hostility towards judicial interventionism. Yet, contractual parties had arguably always been free to demand a judge to amend their contract by common agreement.[187] As a consequence, the proposal would have changed the law only insofar as it allowed the judge to end the contract at the application of one of the parties if renegotiations were unsuccessful.[188]

56. While this perceived weakness has been remedied by *ordonnance n° 2016–131*,[189] it was arguably less problematic than many commentators seemed to think. In fact, the mere prospect of judicial termination could well have provided a significant incentive for the parties to either amend the contract themselves or agree on a judicial modification.[190] The fact that commercial parties regularly include hardship clauses into complex long-term contracts regardless of whether the applicable law provides for a remedy in cases of *imprévision* or not[191] seems to indicate that parties do indeed often want to uphold their contracts and remain in charge of potential modifications, rather than losing it altogether.[192]

57. Moreover, the practical impact of the proposed provision would have highly depended on how the courts would have interpreted the powers conferred upon them. Again, it should be borne in mind that the French courts have considerable experience in refining broadly formulated doctrines.[193] Just as the German courts have applied the solution developed during the hyperinflation of the 1920s to a myriad of other situations and legal problems,[194] there would have been a good chance that the French courts would have made use of their experience in developing and refining legal doctrines when interpreting the text of the new provision.

58. The proposed provision would have been open to such interpretation in at least two regards. First, the courts would have had to define the scope and content of the requirement to renegotiate the contract before it could be terminated; by considering an

185 See above, n 160.
186 See above, paras 35 (for international model rules) and 40 (for German law).
187 Latina (n 162).
188 Cousin et al (n 51), II B 1.
189 See below, 4.
190 Cf Rocher (n 163). See also *Rapport au Président de la République* (n 32), 14.
191 See above, n 69. In German law, these clauses usually also contain an obligation to renegotiate before the courts can be seized (see Finkenauer (n 33), para 123). For English law see Treitel (n 11), ch 12.
192 For a law-and-economics perspective on this point cf Cenini/Luppi/Parisi, in Hondius/Grigoleit (n 13), 37.
193 See above, at n 180.
194 See above, 3.3.1.

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offer made by the party seeking termination as unsatisfactory, they could have directly influenced the negotiations and the content of the potentially amended contract. Second, paragraph two of the proposal would have allowed the judge 'to end the contract at the date and under the conditions that [the judge] fixes'; again, it would have been up to the courts to determine what shape these conditions may take.[195]

59. The perceived weakness of the remedies provided in the reform proposal might thus have been counterbalanced, at least to a certain degree, by the room left to the courts by the wording of the proposal and the absence of a coherent body of former case law. Of course, there were still good reasons to doubt that this would have been sufficient to realise the beneficial economic effects usually ascribed to provisions on *imprévision*, i.e. to decrease transactions costs by reducing the need for *force majeure* and hardship clauses.[196]

4.3. The provision finally adopted

60. The provision ultimately adopted in *ordonnance n° 2016–131 du 10 février 2016* has rendered part of this discussion obsolete. The new Article 1195 does not only clarify that the parties are free to dissolve their contract if their renegotiations remain fruitless, it also allows each of them individually to seek a judicial adaptation of the contract. As a consequence, the courts will not be limited to 'end the contract at the date and under the conditions that [they] fix' but may also modify the contract at the request of one of the parties.

61. The French government seems to have taken into account the criticism regarding the perceived weakness of the originally proposed provision and has considerably strengthened both the party for which performance has become more onerous and the courts' role as guardians of the fairness of the contract. As a consequence, there does not remain much doubt that Article 1195 is an application of the principles of good faith in performance and contractual fairness, inspired by considerations of comparative law.[197]

62. The new provision, which will enter into force on 1 October 2016, now looks strikingly similar to its German counter-part. Two differences seem to remain: First, §313 BGB stipulates a clear hierarchy between its two remedies – adaptation and termination – which cannot be found in Article 1195.[198] Second, the text of §313 BGB

195 Cf Stoffel-Munck (n 2), 265; Alpa (n 162), 894. For a well-known example from English law for a court setting aside a contract 'on terms' (due to a common mistake), see *Solle v Butcher* [1950] 1 KB 671, 696–97.

196 Cf McKendrick (n 48), 43.

197 See also *Rapport au Président de la République* (n 32), 14: *'Cette consécration inspirée du droit comparé comme des projets d'harmonisation européens, permet de lutter contre les déséquilibres contractuels majeurs qui surviennent en cours d'exécution, conformément à l'objectif de justice contractuelle poursuivi par l'ordonnance.'*

198 See above, 3.3.3.

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does not contain a requirement to renegotiate, which however features quite prominently in Article 1195. In light of the ongoing debate among German scholars whether such a requirement can be found somewhere in the provision,[199] the recent decision by the *Bundesgerichtshof*,[200] and the fact that renegotiations are a requirement of virtually all provisions on *imprévision* in international harmonisation projects,[201] Article 1195 may even appear as the more progressive of the two provisions in this regard.

5. Conclusion

63. Over the last century, the different European legal systems have adopted a number of approaches to the problem of *imprévision*. While some have not admitted any exception to *pacta sunt servanda*, or merely extended the existing exception for impossibility, many legal systems have adopted a separate doctrine to accommodate these cases and to reconcile the principle of *pacta sunt servanda* with the doctrine of good faith.

64. Against this backdrop, the French reform should first and foremost be praised for the paradigm shift that it marks; it is submitted that it will increase both legal certainty and contractual fairness. Given the amendments that have been made to what appeared as a somewhat underwhelming reform proposal, there remains little doubt that the new Article 1195 of the *Code civil* will have a very positive impact on French law in practice.

65. Hopefully, this will extent to the economic effects of the provision. While it puts a greater emphasis on prior renegotiations than its German counterpart – clearly reflecting its roots in the principle of good faith – Article 1195 should be equally able to reduce transaction costs for commercial parties by minimising the need for hardship clauses.

199 ibid.
200 Above, n 151.
201 See above, 3.3.2.

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