Harmonisation impossible? On the evolution of the English, French, and Bulgarian approach to hardship in commercial contracts

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INTRODUCTION

During the International Week of Comparative Law in Paris in 1937, one of the largest comparative events to date, which was organised by the French Association Henri Capitant, the key topic of discussion was hardship. The viewpoints of 14 jurisdictions were presented and a summary report was drafted. The chief *rapporteur* of the discussion, Jean-Paulin Niboyet, identified persistent disparities and classified the responses into two groups – those which allowed judicial intervention in case of hardship and those that did not (JP Niboyet, "La révision des contrats par le juge. Rapport général" in *Travaux de la Semaine Internationale du Droit* (Syrey 1937) 8-13). He referred to the former as the "Latin group" and to the latter as the "Continental group".

France found itself in the non-interventionist camp due to its interpretation of good faith. In the "Continental group", in Niboyet's opinion, good faith required that promises be kept. While Niboyet did not explicitly discuss Bulgarian law, we will see below that Bulgaria had initially borrowed its law on obligations from France, so its approach was similar. By contrast, Niboyet argued that in the interventionist camp, good faith had acquired a social dimension which permitted contractual modification. He also asserted that the approach towards supervening events was directly linked to public policy (Niboyet 5). England, however, was placed in the middle of the spectrum of responses because of the doctrine of frustration. This doctrine emerged from the decision *Taylor v Caldwell* in which Blackburn J granted relief based on the implied condition theory ((1863) 3 B & S 826, 833). In the eyes of Niboyet, the implied condition theory allowed judges to modify contracts. This assertion, of course, can be criticised for, from an English perspective, implied conditions aim at giving effect to the parties' intentions, so this approach complies with the principle of "freedom of contract".

Since then, the spectrum of responses towards hardship seems to have shifted: the sharp division between what was known as the Latin group (Romanistic legal family) and the Continental group (Germanic legal family) can no longer be discerned. The modern French, Bulgarian, and English approach do not correspond to the picture painted by Niboyet. Bulgaria progressively moved to the far end of the interventionist camp. It enacted a principle allowing judicial interference in agreements in instances of hardship, albeit with a limited scope, as Article 266, paragraph 2 of its Law on Obligations and Contracts (LOC) as early as 1950. It is one of the first jurisdictions in Europe to introduce such a principle in its legislation. Moreover, in 1996, amidst a severe economic crisis, the country enacted a general principle on hardship as Article 307 of the Law on Commerce (LC) under the title "Economic onerosity". As discussed below, Bulgarian judges tend to interpret this provision generously.

By contrast, after a century of debate, France enacted the principle of *imprévision*, which allows judicial modification/termination in case of hardship, as Article 1195 of the *Code civil* only in 2016. In principle, French judges have been reluctant to develop a jurisprudential solution for civil contracts in contrast to their approach to administrative contracts. The two cases, which are traditionally distinguished, are *Canal de Craponne* in which the theory of *imprévision* was rejected for civil contracts and *Gaz de Bordeaux* in which it was allowed for administrative contracts (see D Mazeaud, "La révision du contrat. Rapport français" in *Le contrat: journées brésiliennes* (Société de la législation comparée 2008) 553-89; Y Lequette, F Terré and H Capitant, *Les grands arrêts de la jurisprudence civile*, (12th edn, Dalloz Bibliothèque, 2008) 183-92). That is why, historically, French legislators have intervened through temporary statutes,

such as the *Loi Faillot* (S Renner, *Inflation and the Enforcement of Contracts*, (Edward Elgar Publishing 1999) 15-17). In England, as explained below, the doctrine of frustration has also evolved, but to this day, courts are reluctant to apply it to instances of hardship.

This article examines the evolution of the approach to hardship in Bulgaria, France, and England to challenge the idea that the responses of national jurisdictions are converging and to shed light on the key role which context plays in doctrinal development and legal practice. This particularity seems important in view of initiatives aimed at harmonising contract law, such as the UNIDROIT Principles, the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR), etc. Moreover, the author demonstrates the palpable differences in results, which these jurisdictions reach in similar circumstances. These discrepancies may have implications for international trade because the same parties may be confronted with different outcomes depending on the applicable law – France and the UK are some of Bulgaria's key trade partners.

It should be clarified that in this article, the terms "hardship", "supervening onerousness", and "changed economic circumstances" are used as synonyms, unless indicated otherwise. In the Bulgarian legal tradition, the principle addressing these difficulties is known as "economic onerosity".

HISTORICAL BACKGROUND

As mentioned above, Bulgaria is one of the first jurisdictions in Europe to enact a principle on hardship in its legislation. While Germany was the first jurisdiction to address the problem of changed economic circumstances in the aftermath of World War I with a jurisprudential solution, a concrete legislative provision was enacted only in 2001 as section 313 of the *Bürgerliches Gesetzbuch* (A Janssen and R Schultze, "Legal Cultures and Legal Transplants in Germany" (2011) 2 *European Review of Private Law* 225, 232). In principle, Poland is recognised as the first jurisdiction to pass a legislative provision on hardship as Article 269 of its 1933 Code of Obligations (Alfons Puelinckx, "Frustration, Hardship, *Force majeure*, *Imprévision*, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances" [1986] 3 *Journal of International Arbitration* 47, 54). Italy and Greece followed suit with their new civil codes of 1942 and 1946 respectively (see E Zaccaria, "The Effects of Changed Circumstances in International Commercial Trade" (2005) 9 *International Trade and Business Law Review* 135, 147-49; PJ Zepos, "Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946 (Article 388)" (1948) 11 *Modern Law Review* 36-46). Bulgaria quickly walked in their footsteps.

Time of parting with the French model

The factors, which led to the evolution of the Bulgarian approach to hardship, are particularly interesting from a comparative perspective because Bulgaria borrowed its first LOC of 1892 indirectly from the French *Code civil* (see "Economic Onerosity in Context: Particularities and Development of Bulgarian Law" in R Vassileva, *Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?* (Doctoral Thesis, University College London, 2016) at ch 2). Bulgarian jurists were fascinated by French law, which they considered as a viable legal model for the country. Their enthusiasm, however, quickly faded away. The French reluctance to enact a general principle on hardship triggered a rebellion against the French model, which eventually resulted into a major reform of Bulgaria's law on obligations – a new LOC was enacted in 1950. Whilst the reform was carried out after Bulgaria became a communist country, one can identify its seeds in the scholarly activism from the interwar period.

For instance, in his article "Vis Major" of 1921, the Bulgarian scholar Nisim Mevorah argued in favour of recognizing changed economic circumstances as a permanent *force majeure* (Nisim Mevorah, "Vis Major (Legal Archive)" [2002] 5 *Turgovsko pravo* 559). He was particularly troubled by the effect of World War I on contracts:

> *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* (Mevorah 562).

He suggested that changed circumstances had to have the same effect as a permanent *force majeure* – terminate the contract – and that the degree of difficulty had to be evaluated on a case by case basis (Mevorah 564). In this way, Bulgarian law could achieve "flexibility and the highest possible justice which is different from dry formulations and Latin texts gone yellow" (Mevorah 564). In principle, at the time, war was treated as a temporary *force majeure*, which suspended performance, but once the war was over, performance was due although it was overly burdensome.

However, it was through the work of Lyuben Dikov, a leading Bulgarian authority, that a radical change of attitude was induced in Bulgaria. He had dedicated a significant part of his research to *clausula rebus sic stantibus* since 1923 (see *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). 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 (L Dikov, "Norma giuridica e volontà privata" (1934) 14 *Rivista internazionale di filosofia del diritto* 681-706; L Dikov, "L'évolution de la notion de contrat" in *Etudes de droit civil à la mémoire de Henri Capitant*, (Dalloz, 1939) 201-18). Dikov was convinced that the French *Code civil* was "too old and outdated" and that the liberal individualist philosophy, which underpinned it, was inadequate to society's needs (L Dikov, *Morality and Law*, (Sofia 1934) 15-

16). The reports of the International Week of Comparative Law in Paris in 1937, referred to above, enraged him and provoked him to write an article, which is highly critical of the liberal individualist model of contract and of Niboyet's "simplistic" assertions about the differences between the various jurisdictions (L Dikov, "Die Abänderung von Verträgen durch den Richter" in *Hedemann-Festschrift* (Jena 1938)). Dikov argued that the approach towards modification in case of supervening onerousness 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. Dikov was interested in organic social theory and believed that society and the individual were interdependent just like the cells and the human body, so the judge had to intervene in the name of society when the relationship between two cells could harm the body (for an overview of his contract law theory, see R Vassileva, "Contract Law and the Social Contract: Rethinking Law Reform in the Field of Contract Law from the Perspective of Social Contract Theory", (2016) LXV(III)(11) Pravni zivot 270-75).

The authors of the 1950 LOC, which is still in force following cosmetic amendments in the early 1990s, were influenced by Dikov's work. That is why, it is highly likely that as a nod to Dikov, they included a provision on changed economic circumstances in this piece of legislation (see "Economic Onerosity in Context: Particularities and Development of Bulgarian Law" in R Vassileva, *Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?* (Doctoral Thesis, University College London, 2016) at ch 2). In fact, since Dikov was fascinated by Italian law, they based the 1950 LOC on sections of the original Italian *Codice civile* of 1942, which is striking considering the ideological differences between Bulgaria and Italy at the time. This is how Article 266, paragraph 2 of the LOC pertinent to manufacturing contracts only was introduced:

> *If in the course of the performance of the contract the duly determined prices of materials or labour change, the compensation shall be adjusted accordingly, even where it was agreed upon as a total sum.*

This is almost a verbatim copy of Article 1664 of the Italian *Codice civile*: "If, by reason of unforeseeable circumstances have occurred increases or decreases in the cost of materials or labour, 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 ..." The main difference between the two provisions – the Bulgarian one does not stipulate a threshold of change – can be explained with the fact that the drafters took context into consideration. In communism, the economy is planned and prices are fixed by the government.

In 1996, Bulgaria enacted a general principle on hardship as Article 307 of its LC:

> *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.*

Bulgaria has an autonomous commercial law, but the LOC and the LC are considered subsidiary, so the provision is applicable to civil agreements too. It is also interesting that in the same year, Bulgaria enacted a similar provision pertinent to agricultural tenancies only. Article 16, para 1 of the Law on Agricultural Tenancy states: "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 …".

What may be striking for the Western European reader is that these provisions, which clearly give judges the power to modify and/or terminate contracts without the consent of both parties, were introduced without much debate. Generally, contemporary Bulgarian scholarship has not questioned these powers, which may appear overly interventionist both from an English and a French perspective. It is likely that English lawyers criticise such provisions from the perspective of "freedom of contract". In turn, we will see below that the new French Article 1195 is rather safely worded by comparison to the Bulgarian provisions.

France and England beg to differ

Considering the discussion above, it is important to highlight the stark contrast between Bulgaria and West European jurisdictions like France and England. Notably, it took France almost 70 more years than Bulgaria to introduce a principle on changed economic circumstances. The move was more controversial, too. The so-called solidarist movement represented by scholars like François Gény, Léon Duguit, Emmanuel Gounot never took solid ground. It has been observed that contractual solidarity was not embraced by the French courts (J 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).

Regarding the doctrine of *imprévision*, one could observe a change of attitude in some decisions by the French *Cour de cassation* as late as the 1990s. Scholars have identified case law in which the French court awarded damages to a party, which experienced excessively onerous performance, because the other party refused to renegotiate. It was deemed that this violated the principle of good faith (see D Mazeaud, "Le droit européen des contrats et ses influences sur le droit français" (2010) 1 *European Review of Contract Law* 10-12; M Fabre-Magnan, *Droit des obligations: 1 – Contrat et engagement unilatéral* (PUF 2016) 557-58). However, this was a compromise solution because it did not involve direct judicial intervention in the agreement. Moreover, these cases involve distributorship agreements and commercial agencies for which there are higher standards of loyalty and cooperation.

French scholars continue to be divided about the merits of the theory of *imprévision*. It is interesting to note that prior to the enactment of the Ordonnance in 2016, there were two main scholarly proposals for reform: the 2005 *avant-projet Catala* and the 2009 *avant-projet Terré*. While the *avant-projet Catala* does not accord the judge the right to modify agreements in case of changed economic circumstances (Article 1135-1), the *avant-projet Terré* does (Article 92). The tension between these two views could be seen in the rather safe way in which the new provision 1195 of the *Code civil* is worded:

> *If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.*
>
> *In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.*

Unlike the Bulgarian Article 307, the French provision specifically mentions negotiations. The legislator says that the party "may" negotiate instead of "must" negotiate, which seems to indicate that this is optional. Meanwhile, the provision seems to encourage parties to attempt negotiations before approaching the court because, if that was not important for the legislators, they could have skipped the reference to negotiations altogether. Furthermore, the French provision explicitly mentions that the change should not have been accepted as risk by one of the parties whereas the Bulgarian provision unequivocally puts a strong emphasis on fairness and good faith. Below, we will see that in the Bulgarian legal tradition, fairness and good faith are powerful tools for addressing substantive unfairness in agreements. By contrast, considering the traditional reluctance of French judges to relieve parties from onerous performance, it seems early to say how comfortable French judges would be in exercising their powers envisaged under Article 1195.

Finally, it may be helpful to note that at the time Bulgarian scholars were vocal about the necessity to develop a rule on hardship, English courts showed firm commitment to the sanctity of contract and freedom of contract. For example, in *Tennants (Lancashire)* v CS Wilson, 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" ([1917] AC 495, 510). Similarly, in *Blackburn Bobbin v TW Allen*, McCardie J stressed the "utmost importance to a commercial nation that vendors should be held to their business contracts" ([1918] 1 KB 540, 552). 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 beneficial to the vendor as a contract which contained such a provision* ([1918] 1 KB 540, 551).

This approach continues to inform judicial attitudes towards hardship today. In principle, the doctrine of frustration has evolved. The current application test, which emerged from *Davis Contractors Ltd v Fareham UDC*, requires that circumstances become "radically different" from the time of entry – a very high threshold, so unsurprisingly courts have not applied the principle to instances of hardship so far ([1956] AC 696, 729). Case law demonstrates that frustration 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, and illegality (see *Appleby v Myers* (1867) LR 2 CP 651; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724; *Fibrosa Spolka Ackcyjna v Fairbairn, Lawson Combe Barbour Ltd* [1943] AC 32). Moreover, judges take into consideration fault and foreseeability – the supervening event should not be due to the act or election of the party seeking to rely on it and it should be unforeseen/unforeseeable (*Davis Contractors AC 696, 729; Edwinton Commercial Corporation, Global Tradeways Ltds v Tsavliris Russ (The Sea Angel)* [2007] 2 Lloyd's Rep 517 [127]). One may argue that the scope of frustration remains very narrow because of its drastic consequences: the contract is terminated automatically at the time frustration occurs irrespective of the parties' wishes (*National Carriers v Panalpina* [1980] AC 675, 712).

However, English courts encourage parties to distribute risk and to determine the consequences of supervening events by themselves by inserting detailed *force majeure*/hardship clauses (E McKendrick, "*Force majeure* Clauses: The Gap between Doctrine and Practice" in A Burrows and E Peel (eds), *Contract Terms*, (2nd edn, OUP, 2009)). By contrast, it is interesting that empirical research has shown that inserting detailed hardship clauses is not common in France (C Kessedjian, "Competing Approaches to *Force majeure* and Hardship" (2005) 25 *International Review of Law and Economics* 415, 421). While similar research has not been carried out in Bulgaria, considering the various provisions envisaged in legislation, it is unlikely that hardship clauses are too common.

LEGAL PRACTICE: PERSISTENT DISPARITIES

It is important to underline that the differences between Bulgaria, France, and England are not merely on paper. One can also identify dissimilarities in legal practice, which reflect the diverging legal values of these jurisdictions. Bulgarian case law on hardship is not abundant, but the cases I have discovered amply illustrate the interventionist approach by Bulgarian courts, which sits in stark contrast to legal practice

in France and in England. Not only does Bulgarian law appear more invasive, but also judges do not shy away from using their powers, thus showing their commitment to promoting substantive fairness and social justice in contract law.

Article 266, para 2 of the LOC

The contemporary application of this provision provides an opportunity for comparison with the leading English case on frustration *Davis Contractors* ([1956] AC 696). The case concerned a contract for the building of 78 houses for eight months at a fixed price of £94,424. There were shortages of labour and material and a long period of frost, which made performance more onerous for Davis. Completion slowed down: the houses were built in 22 months. Davis filed a claim arguing frustration and requesting payment on a *quantum meruit* basis. The actual cost of construction was £115,233 – approximately 22 per cent more costly for Davis. Davis Contractors' claim failed. The House of Lords held:

> *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* ([1956] AC 696, 724).

The case would have likely had a different outcome had it been examined in Bulgaria. As mentioned above, Article 266, paragraph 2 requires that the price in a contract be modified when the costs of labour and materials change had the price been agreed as a total sum. Moreover, it does not stipulate a threshold of change. From a Bulgarian perspective, construction contracts are manufacturing contracts, which are governed by several laws, including LOC's rules on manufacturing contracts. The definition of manufacturing contract in Article 258 of the LOC is rather broad, which permits the application of the rules on manufacturing contracts to diverse agreements: "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."

Decision 1/2013 on com. c. 921/2011 by Bulgaria's Supreme Court of Cassation concerns facts reminiscent of Davis Contractors. A company and a local municipality entered into a construction agreement 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 held that the clause was enforceable, the Supreme Court of Cassation quashed their decision by virtue of Article 266, paragraph 2. The court held that since the price of materials and labour had increased, the municipality owed the company an additional payment, which it did not make. Hence, the court deemed that the municipality caused itself the delay in construction. The liquidated damages clause was unenforceable, and the municipality was ordered to pay the last tranche with interest.

It is also helpful to clarify that under Bulgarian law, the long period of frost may be deemed as an insurmountable force, too. Bulgarian legislation distinguishes between two types of supervening impossibility – the chance occurrence (Art 196, para 1 of the LOC) and the insurmountable force, which reminds of the French doctrine of *force majeure* (Art 306 of the LC). Article 306(2) of the LC stipulates: "An insurmountable force shall be an unforeseen or unavoidable event of an extraordinary nature which has occurred after the conclusion of the contract".

Unlike the French criteria on *force majeure*, the Bulgarian criteria on the insurmountable force appear less stringent (see B Nichol, "*Force majeure* in French Law" in E McKendrick (ed), *Force Majeure and Frustration of Contract*, (2nd edn, Lloyd's Press, 1995) 24). Because the provision itself uses the conjunction "or", courts treat unforeseeability and unavoidability as alternative criteria (see Decision 6/2013 on com. c. 1028/2011 by Bulgaria's Supreme Court of Cassation). Moreover, courts seem to interpret the requirement for "extraordinary nature" rather generously, too. For example, in Decision 368/2008 on com. c. 661/2008, the Veliko Turnovo Appellate Court concluded that partial non-performance was due to severe drought which impeded the harvest of the quantity of grain stipulated in the contract of sale. In other words, in the eyes of a Bulgarian court, the period of frost may constitute an insurmountable force because the contractors could not prevent it or foresee it despite exercising good care. Hence, the delay, which resulted from the period of frost, could be excused.

Finally, French law does not have an equivalent provision to Article 266, paragraph 2 of the Bulgarian LOC. However, one may consider if, from a French perspective, the contract between *Davis Contractors* and the municipality is an administrative contract. The definition is complex and beyond the scope of this article but in these circumstances, one of the parties is a public entity and the contract's purpose may fall under the scope of public works, so the definition may be satisfied. If that is the case, one may consider if the precedent set in the *arrêt Gaz de Bordeaux* (1916) could be applicable. 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 Y Lequette, F Terré and H Capitant, *Les grands arrêts de la jurisprudence civile* (12th edn, Dalloz Bibliothèque, 2008) 183-92). As noted above, however, the price for Davis increased by 22 per cent only, which means that the change is not as significant as the change addressed in *Gaz de Bordeaux*. Hence, it seems that the French response will be similar to the English response in these particular circumstances.

Article 307 of the LC

As explained above, Article 307 is a recent addition to the interventionist arsenal of Bulgarian judges. It was enacted in a period of monstrous inflation: annual inflation was estimated at 338.5 per cent in 1991, 91.3 per cent in 1992, 72.9 per cent in 1993, 96.1 per cent in 1994, 62.1 per cent in 1995, 121.6 per cent in 1996, and 1058.4 per cent in 1997 (see K Tochkov and H Nath, "Relative Inflation Dynamics in the EU Accession Countries of Central and Eastern Europe" (Bulgarian National Bank, May 2011). Hence, one may be tempted to assume that it was meant to address extreme cases of supervening onerousness. However, two recent cases in which Article 307 of the LC was successfully applied provide food for thought about the important differences between Bulgaria and West European jurisdictions like England and France: Decision 50/2010 on com. c. 10/2010 by the Varna Appellate Court and Decision 240/2013 on com. c. 259/2011 by Bulgaria's Supreme Court of Cassation. Both decisions concern long-term commercial lease agreements and involve similar facts. It is interesting that in the first case, the Varna Appellate Court (VAC) affirmed the application of Article 307. By contrast, in the second case the Supreme Court of Cassation quashed a decision by another chamber of the VAC, which had refused the application of Article 307.

Before examining these decisions, it is helpful to elaborate on the criteria of application which Bulgarian courts consider when examining cases on Article 307. Some of them stem from the provision itself. The rest are derived by analogy from other provisions in the law. The criteria, which derive from the provision are as follows: (1) One of the parties should file a claim in court. Unlike the English doctrine of frustration, Bulgarian economic onerosity does not have an "automatic" effect; (2) Parties could not and were not obliged to foresee the supervening event; (3) Following the event, the preservation of contract became contrary to fairness and good faith. By analogy to the rules on impossibility of performance, there are additional criteria – 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 is generally believed that these criteria are cumulative (see I Staykov "Economic Onerosity of Performance of Business Transactions" [1997] 5 *Pazar i pravo* 19; E Mateeva, "Necessary Changes in the Principle of Economic Onerosity in Article 307 of the Law on Commerce" in *Contemporary Law – Problems and Tendencies* (Sibi, 2011) 234).

As mentioned above, there are important differences between the Bulgarian provision and Article 1195 of the Code civil. Unlike the French provision, the Bulgarian provision does not encourage parties to negotiate. Moreover, the French provision allows the parties to approach the court together while the Bulgarian provision encourages a unilateral decision by one of the parties to approach the court. Furthermore, Article 307 puts a strong emphasis on fairness and good faith. In Bulgarian law, the two notions overlap (see "The Conceptions of Contract and Justice in Bulgarian and English Contract Law" in R Vassileva, *Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?* (Doctoral Thesis, University College London, 2016) at ch 4). What is important, however, is that fairness not only encompasses procedural fairness (the vitiating factors), but also substantive fairness. Unlike France, which deleted the reference to *la cause* in the *Code civil* with the 2016 reform, Bulgaria embraces the notion of "cause" both at the formation stage and the performance stage. Below we will see that in both cases in which Article 307 was successfully applied, the idea of equivalence of performance – what the promisor gives should be equivalent to what he receives – was a key factor. Bulgarian doctrine argues that this equivalence is subjective: if an agreement is the expression of free will, obligations are equivalent (A Kalaidjiev, *The Law of Obligations: General Part* (5th edn, Sibi 2010) 67). However, in the cases examined below, it seems that Bulgarian courts interpreted this requirement literally.

Decision 50/2010

This case concerned the lease for a store selling luxury goods in a shopping centre. The VAC 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, contrary to fairness and good faith, which resulted 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 …" It should be noted that the parties had entered negotiations and the lessor had proposed to decrease the rent by 20 per cent. 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 Article 307 were present and terminated the agreement as requested by the claimant.

It seems likely that English law would reach a different result if confronted with the same case. In evaluating whether the doctrine of frustration was applicable, English judges would examine whether the supervening event (the alleged 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 per vcent in 2007 and 7.8 per cent in 2008. By contrast, in 2006 it was 6.5 per cent (see press release by Bulgaria's National Institute of Statistics http://www.nsi.bg/sites/default/files/files/pressreleases/Inflation_god2011.pdf). Objectively,

there was a macroeconomic change which could be proven in court. However, it is difficult to argue that this change was "radical" and that it made the lessee perform something that he had not promised. The judgment does not make references to the clauses in the agreement, so for the purposes of our comparison, we can assume the lessee either had not assumed the risk of inflation 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 per cent (between 2006 and 2007) radically altered the promisor's obligations – to pay rent in this case. On the contrary – this change seems to fall under standard merchant risk.

English judges traditionally support the principle of nominalism for domestic contracts (D Fox, "The Case of Mixt Monies: Confirming Nominalism in the Common Law of Monetary Obligations" (2011) 70 *Cambridge Law Journal* 144-174). 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. For instance, in *Treseder-Griffin v Co-operative Insurance Society Ltd*, Lord Denning emphasised:

> *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 debasement of the currency by kings and rulers or the depreciation of it by the march of time or events* ([1956] 2 QB 127, 144).

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" ((1983) 25 BLR 1).

An exception is *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* in which Lord Denning used the rules on construction to terminate an agreement in which the cost of supplying water was approximately 20 times higher than the price agreed on in the contract ([1978] 1 WLR 1387). However, the inflation to which Denning refers is in the span of 16-24 per cent per year (see L Benati, "Long Run Evidence on Money Growth and Inflation" (Bank of England Quarterly Bulletin, Autumn 2005). 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.

Finally, it is difficult to put oneself in the shoes of a French judge since there is no case law on Article 1195. However, one may argue that a French court would reach a different result from the Bulgarian court. It is unclear whether, from a French perspective, the inflationary change of 6 per cent would be deemed unforeseeable/not assumed as risk by the lessee. It is also uncertain if the French court would establish excessively onerous performance given the circumstances, including the lessor's proposal to decrease the rent by 20 per cent.

Historically, French legislators and judges have been troubled by monstrous inflation and/or substantial increase in the price of input goods. When French legislators intervened with temporary statutes in the aftermath of World War I, it was estimated that between 1914-1918 French prices rose by 500 percent (H Oliver, "Economic Consequences of War since 1790: War and Inflation since 1790 in England, France, Germany, and the United States" (1941) 30 *The American Economic Review* 344, 345). Moreover, a temporary statute introduced in the aftermath of World War II (Law of 18 July 1952) permitted an increase of the minimum guaranteed salary only if a 25 per cent rise of the monthly family consumption was observed (M Vasseur, "French Monetary Depreciation and Methods Used to Remedy It" (1955) 30 *Tulane Law Review* 73, 76). Similarly, as mentioned above, in *Gaz de Bordeaux*, the *Conseil d'Etat* was concerned that the price of coal had increased five times since entry.

Decision 240/2013

This decision by the Supreme Court of Cassation is interesting because it quashed a prior decision by the VAC. In 2010, the VAC was confronted with a case concerning the 10-year lease of a store selling jeans and shoes which faced low revenues and closed down (Decision 192/2010 on com. c. 446/2010 by the Varna Appellate Court). The contract itself contained a termination clause stipulating that

- 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;
- 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 per cent. The court, however, examined extrinsic evidence to establish that while the lessee did not accept the proposed 20 per cent decrease in this contract, it accepted a 12 per cent decrease of rent in another contract it renegotiated.

Similarly to Decision 50/2010, discussed above, 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 recognised 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". 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 as a criterion. It is thus not surprising that the claimants in the second decision demanded cassation by claiming that Decision 192/2010 contradicted Decision 50/2010.

In Decision 240/2013, the Supreme Court of Cassation quashed Decision 192/2010 on com. c. 446/2010 by stating it was "incorrect". Bulgaria's Supreme Court of Cassation 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 Supreme Court of Cassation 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. It declared that the request for termination had to be honoured and terminated the agreement.

The decision by the Supreme Court of Cassation is interesting for several reasons. Firstly, it demonstrates that Decision 50/2010 of the VAC is not accidental, but compliant with the principle in Article 307. Secondly, it seems crucial that the Supreme Court of Cassation 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 (lack of equivalence of obligations) is one of the most important, yet the most difficult to apply uniformly. Although the Supreme Court of Cassation 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.

In that light, if English courts were confronted with this case, it seems that they would reach a different conclusion from the one reached by the Supreme Court of Cassation. 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 per cent 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 of commercial sensibility and freedom of contract.

Finally, it is highly doubtful that a French court would reach the same conclusion as Bulgaria's Supreme Court of Cassation either. As indicated in our discussion on Decision 50/2010 above, it is questionable whether a 6 per cent inflationary change would be deemed as unforeseeable at the time of contract entry or that performance would be considered excessively onerous. Moreover, as visible from Article 1195, a key factor is the distribution of risk. The fact that this agreement had a special clause providing for early termination under specific conditions could be deemed as a strong indication that the lessee had assumed the inflationary change as risk.

CONCLUDING REMARKS: HARMONISATION IMPOSSIBLE?

The above discussion is important because it demonstrates that England, France, and Bulgaria have a distinct approach to hardship not only on paper, but also in practice. In addition, these divergences can be explained with the key role, which context plays in doctrinal development and legal practice. These observations can challenge the common assumption that the attitudes of legal systems are converging in light of the influence of globalisation or harmonisation initiatives. It may be the case that such generalisations flourish because East European jurisdictions are traditionally ignored by comparative researchers. The study on unexpected circumstances, which was published by the Trento Common Core Project, which aims at identifying the common core of principles in Europe, discusses the approach of Slovakia, Lithuania, and the Czech Republic only even though, at the time it was published, the European Union already had eleven members from the former communist bloc (see E Hondius and HC Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP, 2014)).

If, similarly to Niboyet, we paint the modern spectrum of responses to hardship in Europe, Bulgaria and England will surely stand on the two opposite ends. From a historical perspective, it is interesting that the same event (World War I) triggered different responses and set the pattern for long-term divergences. Moreover, as seen above, contemporary case law illustrates how Bulgarian judges are sensitive to relatively minor imbalances in agreements. This is, of course, consistent with the spirit of Bulgaria's legal culture which became even more committed to social justice and substantive fairness in contract law because of its communist experience. In turn, unlike Bulgaria, England is a market economy that has not faced drastic legal or ideological changes in its recent history. It has stayed committed to its basic common law values of commercial sensibility and freedom of contract.

The dynamic between Bulgaria and France is also thought-provoking. From the perspective of legal families, a "daughter" parted ways with its alleged "mother" and never looked up to it for guidance in private law again. In general, Bulgaria's legal development not only challenges traditional legal taxonomies, but also serves as evidence that the legal system is highly responsive to social challenges and creates its own compilatory solutions. Bulgaria's response to changed economic circumstances evolved primarily because of internal tensions and debates on how social issues had to be addressed rather than because of external influences and blind following of "prestigious" models. In that light, even though Bulgaria and France find each other on the same side of the spectrum of responses towards hardship today, the distance between them is significant. It is likely that the two jurisdictions will continue to reach different results in similar circumstances because of doctrinal divergences and different degrees of sensitivity towards substantive unfairness in contract law.

Contrary to what has been observed in some European jurisdictions, Bulgaria has not been influenced by harmonising instruments like the PECL, the DCFR, etc. There is a timing issue, which cannot be underestimated – Bulgaria carried out its major reforms in civil and commercial law in the early 1990s when these instruments were not developed. Above all, however, Bulgaria's legal cultural particularities persist. In my prior work, I have shown that even the detailed commentaries in the DCFR are insufficient to harmonise the responses of Bulgaria with other jurisdictions because Bulgaria's idiosyncrasies were not taken into consideration when drafting the DCFR and the accompanying commentaries (see "Lessons for the Harmonization of Contract Law in the European Union" in R Vassileva, *Change of Economic Circumstances in Bulgarian and English Law. What Lessons for the Harmonization of Contract Law in the European Union?* (Doctoral Thesis, University College London, 2016) at ch 6). It should not be surprising that Bulgarian judges do not reason like English or French judges – the current senior judges earned their degrees during communism and survived crucial social and ideological changes, which have influenced their way of thinking and their values.

Ultimately, harmonisation between England, France, and Bulgaria, at least on the question of hardship in commercial contracts, seems impossible at this stage. The question, which remains, is how troublesome this is. From a legal cultural perspective, diversity is embraced. In practice, however, Western companies which contract with Bulgarian companies usually impose their national law as governing the agreement because they fear Bulgaria's interventionist approach. Bulgarian companies often cannot afford the legal fees of foreign lawyers, so they sign agreements without proper advice. If something goes wrong, they do not have the resources to defend their interests either. In other words, legal cultural diversity comes with a hefty price tag for Bulgarian businesses.

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