Comparative Contract Law and Economics
Contents

Acknowledgements xi

1. Introduction 1
   1.1. Introduction 1
   1.2. Subject matter 2
   1.3. Methodology 3
      1.3.A. Methodology and concepts used in the economic analysis of law 4
      1.3.B. Methodology and concepts used in comparative contract law 7
      1.3.C. Steps of comparative enquiry 9
      1.3.D. Methodology and concepts used in comparative contract law and economics 11
   1.4. Outline of the book 13

2. Pre-contractual Duty to Disclose Information 15
   2.1. Introduction 15
   2.2. Prior literature 17
   2.3. Optimal model rule 24
      2.3.A. Preliminaries: Information – some conceptual distinctions 26
      2.3.B. Preliminaries: Mistake or duty of disclosure 27
      2.3.C. Optimal model rule: Fundamental principle 30
         2.3.C.I. Optimal amount of information 34
      2.3.D. Upgraded model rule: Utilization, productive and redistributive information 35
         2.3.D.I. Deliberately acquired productive or redistributive information 37
         2.3.D.II. Deliberately acquired pure redistributive information 39
         2.3.D.III. Casually acquired productive or redistributive information 39
         2.3.D.IV. Casually acquired purely redistributive information 43
2.3.D.V. Simultaneously productive/redistributive information
2.3.D.VI. Administering and enforcement costs
2.3.D.VII. Right to lie
2.3.E. Synthesis: Towards an optimal doctrine
2.4. French law: Duty to inform (réfinition dolosive)
2.4.A. General overview
2.4.B. Assessment of current doctrine
2.4.C. Assessment of the law in action
2.4.D. Conclusions on French law
2.5. English law
2.5.A. General overview
2.5.B. Assessment of current doctrine
2.5.C. Assessment of the law in action
2.5.C.I. Further exemptions
2.5.D. Conclusions on English law
2.6. American law
2.6.A. General overview
2.6.B. Assessment of current doctrine
2.6.C. Assessment of the law in action
2.6.C.I. Further exemptions
2.6.D. Conclusions on American law
2.7. German law: Duties to inform (aufklärungspflichten)
2.7.A. General overview
2.7.B. Assessment of current doctrine
2.7.C. Assessment of the law in action
2.7.D. Conclusions on German law
2.8. Conclusion

3. Unforeseen Contingencies
3.1. Introduction
3.2. Prior literature
3.3. Foreseeability
3.3.A. Analysis applied
3.3.B. Synthesis and implications
3.4. Optimal model rule
3.4.A. Preliminaries
3.4.B. Optimal model rule
3.4.B.I. Onerous performance – slight rise in cost of performance – no excuse
3.4.B.II. Excessively onerous performance – performance inefficient
<table>
<thead>
<tr>
<th>3.4.B.III.</th>
<th>Performance useless – frustration of purpose</th>
<th>148</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.4.B.IV.</td>
<td>Performance still efficient – adjustment or discharge</td>
<td>150</td>
</tr>
<tr>
<td>3.4.B.V.</td>
<td>Operational issues of adjustment rule – court’s application</td>
<td>153</td>
</tr>
<tr>
<td>3.4.B.VI.</td>
<td>Decrease in costs of performance</td>
<td>156</td>
</tr>
<tr>
<td>3.4.C.</td>
<td>Synthesis: Towards an optimal discharge/adjustment doctrine</td>
<td>157</td>
</tr>
<tr>
<td>3.5.</td>
<td>French law (revision pur imprévision)</td>
<td>159</td>
</tr>
<tr>
<td>3.5.A.</td>
<td>General overview</td>
<td>160</td>
</tr>
<tr>
<td>3.5.B.</td>
<td>Analysis</td>
<td>165</td>
</tr>
<tr>
<td>3.5.B.I.</td>
<td>Assessment of current doctrine</td>
<td>165</td>
</tr>
<tr>
<td>3.5.B.II.</td>
<td>Assessment of the law in action</td>
<td>173</td>
</tr>
<tr>
<td>3.5.B.III.</td>
<td>Broad interpretation of impossibility requirement</td>
<td>184</td>
</tr>
<tr>
<td>3.5.B.IV.</td>
<td>Purpose frustrated</td>
<td>189</td>
</tr>
<tr>
<td>3.5.B.V.</td>
<td>Strikes constituting force majeure</td>
<td>192</td>
</tr>
<tr>
<td>3.5.C.</td>
<td>French administrative law</td>
<td>194</td>
</tr>
<tr>
<td>3.5.C.I.</td>
<td>French administrative law – law in action</td>
<td>195</td>
</tr>
<tr>
<td>3.5.D.</td>
<td>Conclusions on French law</td>
<td>199</td>
</tr>
<tr>
<td>3.6.</td>
<td>English common law</td>
<td>200</td>
</tr>
<tr>
<td>3.6.A.</td>
<td>General overview</td>
<td>201</td>
</tr>
<tr>
<td>3.6.A.I.</td>
<td>Short comparative and terminological note</td>
<td>206</td>
</tr>
<tr>
<td>3.6.B.</td>
<td>Analysis</td>
<td>207</td>
</tr>
<tr>
<td>3.6.B.I.</td>
<td>Assessment of current doctrine</td>
<td>207</td>
</tr>
<tr>
<td>3.6.B.II.</td>
<td>Assessment of the law in action</td>
<td>213</td>
</tr>
<tr>
<td>3.6.B.III.</td>
<td>Excessively onerous performance – discharge of contract</td>
<td>214</td>
</tr>
<tr>
<td>3.6.B.IV.</td>
<td>Merely more onerous performance – no excuse</td>
<td>218</td>
</tr>
<tr>
<td>3.6.B.V.</td>
<td>Simultaneous substantial increase in cost and in value – performance efficient</td>
<td>225</td>
</tr>
<tr>
<td>3.6.B.VI.</td>
<td>Purpose frustrated</td>
<td>229</td>
</tr>
<tr>
<td>3.6.C.</td>
<td>Conclusions about English law</td>
<td>235</td>
</tr>
<tr>
<td>3.7.</td>
<td>American law (absolute impossibility, frustration and impracticability)</td>
<td>235</td>
</tr>
<tr>
<td>3.7.A.</td>
<td>General overview</td>
<td>237</td>
</tr>
<tr>
<td>3.7.A.I.</td>
<td>A brief comparative and terminological note</td>
<td>242</td>
</tr>
<tr>
<td>3.7.B.</td>
<td>Analysis</td>
<td>243</td>
</tr>
<tr>
<td>3.7.B.I.</td>
<td>Assessment of current doctrine</td>
<td>243</td>
</tr>
</tbody>
</table>
3.7.B.II. Well established rules of law – traditional categories of impracticability excuse 253
3.7.B.III. Assessment of the law in action 254
3.7.B.IV. Excessively onerous performance – discharge of contract 254
3.7.B.V. Merely more onerous performance – no excuse 263
3.7.B.VI. Simultaneous substantial increase in costs and value – performance still efficient 266
3.7.B.VII. Purpose frustrated 269

3.7.C. Conclusions on American law 272

3.8. German law (störung der geschäftsgrundlage) 272
3.8.A. General overview 273
3.8.A.I. Short comparative and terminological note 279
3.8.B. Analysis 280
3.8.B.I. Assessment of current doctrine 281
3.8.B.II. Assessment of the law in action 289
3.8.B.III. Excessively onerous performance – discharge of contract 290
3.8.B.IV. Merely more onerous performance – no excuse 294
3.8.B.V. Simultaneous substantial increase in costs and value – performance still efficient 297
3.8.B.VI. Purpose frustrated – generally no excuse 301
3.8.C. Conclusions on German law 306

3.9. Conclusion 307

4. Unilateral Termination 309
4.1. Introduction 309
4.2. Prior literature 311
4.3. Optimal model rule 315
4.3.A. Preliminaries and terminological distinctions 316
4.3.B. Optimal model rule – fundamental principles 317
4.3.C. Unilateral termination of long-term contracts for an indefinite period of time 318
4.3.C.I. Optimal risk allocation 322
4.3.C.II. Relation-specific investments 323
4.3.C.III. Reducing transaction costs 324
4.3.D. Termination upon specific provision 325
4.3.D.I. Optimal risk allocation 326
4.3.D.II. Relation-specific investment 327
4.3.D.III. Reducing transaction costs 328
4.3.E. Termination of fixed-term contracts 328