Alteration of public contracts and its interface with public procurement objectives:

A comparative analysis

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Abstract

The law of alterations of public contracts was for some time a matter reserved for national contract law. Thus, countries regulated the area via private contract law or administrative law, depending on their traditions, and procurement concerns were not especially observed as important in the area. However, the "expansionary" nature of procurement has arrived at these shores and national and international objectives in public procurement are now closely regarded in the law of alterations of public contracts. This has occurred, as demonstrated in this thesis, in a reactive manner, and generally based on a case-by-case evolution that is not always orderly. This reactive and case-by-case expansion has created scattered and not necessarily orderly/systematised rules in some of the analysed regulatory frameworks. Scholarly presents similar features.

Moreover, the emerging rules and preoccupations are not a nascent field in new soil but a new seed in old soil: contract law, traditions, and different approaches to the very understanding of law. Therefore, it is important to have a "conversational" approach that aims to present the procurement concerns without overlooking traditions in the field.

This study presents, analyses, and systematises the law of alterations of public contracts in three national jurisdictions and five international regulatory frameworks with the purpose of critically and comparatively analysing the rules applicable to contract alterations as well as their rationales; contribute to the understanding of the law applicable to contract alterations in several national jurisdictions and regulatory frameworks in a comparative manner, and inform the assessment of national and international regulators when deciding whether and how to regulate public contract alterations.

The thesis presents and analyses the law on alterations in the EU, the OECD instruments, the World Bank, the UNCITRAL instruments, the GPA, and the UK, France, and the US. On that basis, it was found that: all these systems deal, in different manners, with alterations of public contracts; similar concepts and ideas in this area are shared in several analysed systems; most analysed systems limit alterations due to procurement concerns and do so in similar fashions, and even wordings and test have similitudes; and it was concluded, hopefully not hastily, that the law of alterations of public contracts is not, anymore, exclusively a creature of contract law. It has become a field where procurement concerns are on the rise and clash between them

and pre-existing national contract law and traditions. Those interests must be balanced. The precise manner of doing so requires further research, including data. Nonetheless, some factors to consider were found and systematised throughout this thesis.

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Part I: Introductory elements

Chapter 1: Introduction to the study

1.1. Context of the study

This study is devoted to the law applicable to alterations of public contracts in three national jurisdictions and five international regulatory frameworks. The definition of alterations for this thesis will be presented in section 1.3. and the selected jurisdictions and international regulatory frameworks will be introduced in section 1.7.

The approach of international organisations and, to a lesser extent, domestic legislation to public procurement has been mainly focused on the selection of the supplier. The other two stages of the procurement cycle (planning and budgeting and the management stage) have received less attention.[1]

Nonetheless, public procurement law and policy have had an evolving nature regarding the covered areas of the procurement cycle, and the management stage of public contracts is currently a growing concern at both national and international levels. On this, UNCITRAL has stated that the other two phases are "increasingly exposed to corruption". "Thus, the procurement system must have integrated systems to link budgeting and planning, procurement procedures and contract or project implementation".[2]

In other organisations, like the EU, case law and Directives have demonstrated this expansionary nature of procurement law. Cases such as Commission v. Germany[3] or Pressetext,[4] and rules such as the inclusion of the remedy of ineffectiveness, rules on modifications, and rules on termination that are part of the new wave of directives reveal the current importance of the management stage in the analysis of public contracts. Perhaps because of this phenomenon, literature has also recognised and devoted more attention to it.[5]

[1] UNCITRAL, 'United Nations Convention against Corruption: implementing procurement-related aspects' (2008) 15 https://www.unodc.org/documents/treaties/UNCAC/COSP/session2/V0850164e.pdf accessed 3 November 2021
[2] UNCITRAL (n. 1) 15
[3] Cases C-20/01 and C-28/01 *Commission v Germany [2003],* ECR I-3630
[4] Case C-456/06 *Pressetext* [2008], ECR I-04401
[5] For instance, Steen Treumer, 'Towards an Obligation to Terminate Contracts Concluded in Breach of the EC Public Procurement Rules: The End of the Status of Concluded Public Contracts as Sacred Cows' [2007] PPLR

A similar statement, perhaps less emphatic, can be made about the growing attention to the first stage, i.e., planning and budgeting.[6]

The rules on alterations of public contracts occupy a prevalent position amongst the topics of the management stage. This, it is submitted, responds to the presence of several concerns meeting in that field, as explained throughout this thesis. The emergence of these rules and the demand that arises for scholars to analyse them explains, to a large extent, the subject matter of this study.

1.2. The justification for studying alterations to public contracts in a comparative manner

This sub-section is divided into two subsections: one devoted to justifying the substantive subject matter of this study: alterations to public contracts (1.2.1.), and the other dedicated to explaining the chosen method: a comparative analysis (1.2.2.).

1.2.1. The reasons for devoting attention to alterations of public contracts

The emergence of rules dealing with public contract alterations demonstrates, it will be held, that they are necessary to achieve public procurement objectives. This has moved the 'procurement community' to the common understanding that rules on contract alterations belong to public procurement/contracts analysis. Before the emergence of rules limiting alterations, parties had an unbounded right to modify the contract in most analysed systems. This was based on the need for flexibility or the parties' freedom of contract. As mentioned, legal systems have developed a particular concern for public contract alterations.

371; Mari Simovart, *Limit to Freedom of Contract: The Influence of EC Public Procurement Law on Estonian Private Law* (University of Tartu 2010) <http://dspace.ut.ee/bitstream/handle/10062/15148/simovart_mari_ann.pdf?sequence=5&isAllowed=y> accessed 3 november 2021; Joel Arnould, 'Damages for Performing an Illegal Contract : The Other Side of the Mirror - Comments on the Three Recent Judgments of the French Council of State' [2008] PPLR 274; Marian Niestedt, 'Penalties despite Compliance ? A Note on Case C-503 / 04 , Commission v Germany' [2005] PPLR 164; MJ Hebly and P Heijnsbroek, 'When Amending Leads to an Ending: A Theoretical and Practical Insight into the Retendering of Contracts after a Material Change' in Steen Treumer and Gustavo Piga (eds), *The Applied Law and Economics of Public Procurement* (Routledge 2013); Vito Auricchio, 'The Problem of Discrimination and Anti-Competitive Behaviour in the Execution Phase of Public Contracts' (1998) PPLR 113; Sue Arrowsmith, *The Law of Public and Utilities Procurement* (Volume 1, 3rd Ed, Sweet & Maxwell 2015) paras 6-267 and ss

[6] European Commission, *Public procurement guidance for practitioners,* (2018) 16 and ss, https://ec.europa.eu/regional_policy/sources/docgener/guides/public_procurement/2018/guidance_public_procurement_2018_en.pdf accessed 3 November 2021

However, these rules arising from procurement concerns are not a nascent field in new soil but a new seed in old soil: contract law, traditions, and different approaches to the very understanding of the law.

This hardly disputed fact led this study towards a "conversational" approach that aims for procurement concerns to be heard in the field of alterations, but without overlooking that other contract law, traditions, practices, and rules pre-existed.

The 'common understanding' that alterations are important and the growing literature on the matter suffices to justify the attention devoted to it from a public procurement perspective. However, further explanations are necessary to discharge the duty to justify a doctoral thesis on it.

For that purpose, it is relevant to annotate that the expansionary nature of public procurement law and policy referred to above have led to the design and enactment of rules dealing with alterations reactively, and generally (as demonstrated by several of the systems analysed below) based on a case-by-case evolution that is not always orderly. This, on not few occasions, has been (attempted to be) controlled via subsequent codification of case-law.

This reactive and case-by-case expansion has created scattered and not necessarily orderly/systematised rules in some of the analysed regulatory frameworks. Scholarly presents similar features. Thus, there has not been a comprehensive effort to analyse the evolution of rules dealing with alterations of public contracts in a comparative manner to the best of our knowledge.[7]

There is not either, to the best of our knowledge, an analysis of the rules dealing with alteration to public contracts that has researched, organised, categorised, and criticised these rules and the rationales that underpin them in more than one legal system. It was precisely to fill this void that this study was undertaken.

[7] Notable exceptions to this statement is the work of Gabriella Racca, Roberto Cavallo, 'Material Amendments of Public Contracts during their Terms: From Violations of Competition to Symptoms of Corruption´, *European Procurement and Public Private Partnerships* (Volume 8, number 4) 288; H Schröder, R Noguellou and U Stelkens, *Comparative Law on Public Contracts* (Bruylant 2010)

Therefore, this study aims to identify, organise, systematise, analyse, and criticise (to the practicable extent possible) the rules on public contract alterations and the rationales that demanded the adoption of such rules.

Against the background, it may be said that the reasons that motivated this study are fourfold: (i) identifying and systematising the rules on alterations in different systems; (ii) understanding the procurement concerns that led to the development of rules on alterations; (iii) identifying the rules that pre-existed the rules on alterations based on procurement concerns and (iv) understanding their rationales.

This is ultimately justified since sensible laws, it is submitted, can only be adopted by comprehending what rules pre-existed, what rules exist, and the reasons for one and other.

1.2.2. Justifying a comparative analysis: a description of the method

There are profound analyses on the law of alterations to public contracts that are jurisdiction-specific. Salient by their quality and depth are the works of only to provide few examples, Smith,[8] Hoepffner,[9] and Guecha.[10] However, these (as the analyses on rules at the international level)[11] are jurisdiction or framework-specific and are deprived of the advantages of comparative analysis.

A mono-jurisdiction analysis does not allow to investigate if different systems have arrived at similar conclusions based on similar concerns. Or if the rule of a country appears to be better, *prima facie,* to achieve shared concerns of different jurisdictions. This may be the case of "reasonable to have allowed for" vs foreseeability standards in physical conditions, where the former seems more aligned with commercial concerns than the second.

Moreover, a comparative analysis also highlights the constant flux of rules from national to international regulatory frameworks and vice versa. Thus, in this thesis, it will be observed that

[8] Katie Smith, *Contract Adjustments and Public Procurement: An Analysis of the Law and Its Application* (University of Nottingham 2016)
[9] Hélène Hoepffner, *La modification du contrat admininstratif* (LGDJ 2009).
[10] Carlos Guecha, *La modification du contrat administratif en droit colombien* (Doctoral Dissertation, Paris 2 2015)
[11] See note 5

legal concepts travel between legal systems, and adaptations occur to adjust the legal construct to the particularities of the transposing system.[12]

This comparative method also permits highlighting the relation between objectives and the design of rules on alterations in different systems. In other words, it may be possible to research if national rules on alterations to public contracts may undermine, help, or have no bearing on the achievement of international organisations' objectives in public procurement. The opposite is also true since a comparative analysis opens the possibility to research if rules from international regulatory frameworks on alterations undermine, help, or have no bearing on the achievement of national objectives.

To provide one example, it would be possible to assess whether clauses dealing with the effects of unforeseen circumstances help achieve, undermine, or are neutral to the opening of markets or if a different approach such as case-law or legislation provides a better option.

Against the background, the comparative analysis proposed in this thesis allows to compare (i) the rules of international regulatory frameworks against the objectives of each regulatory framework, (ii) the rules of national jurisdictions against the objectives of each national jurisdiction, as well as (iii) 'cross-analysis' of rules from different systems (iv) and of rules from one system with objectives from a different system. These analyses will not be undertaken for each rule, but only where appropriate.

1.3. Research question and objectives of the research

Considering the above, this thesis displays a comparative analysis of the rules applicable to contract alterations as well as their rationales to: i) contribute to the understanding of the law applicable to contract alterations in several national jurisdictions and regulatory frameworks in a comparative manner, and (ii) inform the assessment of national and international regulators when deciding whether and how to regulate public contract alterations.

[12] Alan Watson, *Sources of law, legal change, and ambiguity (*University of Pennsylvania Press, 2016)

1.4. How to achieve the proposed objectives: an outline of the work

This study is divided into two parts and several chapters to achieve the pursued objectives. Part 2 is devoted to analysing the rules on alterations in the selected regulatory frameworks, and part 3 to the analysis of alterations in the selected jurisdictions.

Each part above is further divided into chapters dedicated to each of the analysed frameworks and jurisdictions. For instance, chapter 2 focuses on the analysis of EU rules on alterations, and chapter 7 focuses on the UK.

Before the process of writing this thesis was undertaken, two possible options for the outline were considered: (i) by topics and (ii) by jurisdictions. The first option allowed to devote chapters to, for instance, bilateral modifications and analyse each jurisdiction or framework. The second demanded one chapter per jurisdiction, thus analysing all rules on alterations that are within the scope of this thesis together. The latter option was adopted. The primary rationale for this decision is the interlinked and highly mutually dependent nature of the rules on alterations within each of the analysed systems. For instance, a limit to alterations originated for unilateral modifications may rapidly be adopted to limit bilateral modifications. Thus, it was artificial to present the rules on unilateral modifications and bilateral modifications separately when they, in the selected jurisdictions, evolved jointly and reached similar limits. On that basis, it was considered that a system-by-system analysis provided a smoother and more structured study.

1.5. Some necessary definitions: selected jurisdictions, international regulatory frameworks, alterations, and public contracts

In this study, **public procurement refers** to the acquisition of goods and services from an outside body by the public sector.[13] Consequently, a **public contract** relates to a contractual arrangement concluded by the public sector and through which public procurement takes place. All other agreements concluded by the public sector that do not imply the acquisition of goods, works or services are excluded from this analysis.

[13] Sue Arrowsmith (n. 5) 1

A specific definition of the public sector will not be provided since a dynamic concept has been privileged over a static description. In other words, whether a contract is public or not is not pre-determined by this thesis but is left to the specific jurisdiction or regulatory framework.

Adopting a dynamic concept is grounded in one assumption and one methodological rationale. The assumption is that each country or regulatory framework has undertaken an assessment and has adopted a particular definition of 'public procurement', 'government contracts', 'administrative contracts', or 'covered procurement'. Thus, to compare likes-with-likes, it is necessary to study those contracts that are granted certain special status in a particular system and are generally accompanied by a special legal regime.

The methodological rationale for this decision refers to the need to recognise the differences and peculiarities of each analysed system without imposing on them particular pre-conceptions of the author or from different systems.

Therefore, a public contract is a contract concluded by the public sector that is regarded as such by the law of the country or international organisation. Special attention will be devoted to rules that differ from private law, where they exist.

The national level or domestic public procurement law refers to the law (hard or soft) and policies enacted or adopted by countries that establish the expected behaviour of contracting authorities for the conclusion and performance of public contracts.

Selected Jurisdictions are the national country systems selected as case-studies for the comparative analysis described above. The reasons for choosing these jurisdictions will be expanded below. However, it is important to anticipate that these jurisdictions are France, the United Kingdom (hereinafter the UK), and the United States of America (hereinafter the US).

International Regulatory Frameworks are the rules and policies issued by international organisations or bodies part of these organisations that deal with public contracts. These frameworks aim to influence the law or practice, systemic or by-cases, of national contracting authorities. Thus, rules on contracts concluded by international organisations are excluded from this work. As with the jurisdictions, it is considered relevant to mention that the selected international regulatory frameworks are the European Union (EU hereinafter), the documents

issued by the Organisation for Economic Cooperation and Development (OECD hereinafter), the World Bank (WB hereinafter), the World Trade Organisation (WTO hereinafter) and particularly the Government Procurement Agreement (GPA hereinafter), and the instruments adopted by the United Nations Commission on International Trade Law (UNCITRAL hereinafter).

This thesis explores a range of scenarios through different legal systems, and a neutral term is required to encompass several phenomena without including unconnected ones. The need for a 'neutral' concept in comparative legal studies is widely recognised[14]. It relates, mainly to the need to compare similar phenomena across borders, to facilitate the comparison of like-with-likes and avoid comparisons of the apples-and-oranges type.

The term "adjustments" used by Smith, whose definition is adopted below, does have a particular meaning in American Law: equitable adjustments. The term variation also carries a specific meaning in construction law in general, in the UK and in some international regulatory frameworks (WB-FIDIC). Finally, the word modification has a particular meaning in most selected jurisdictions which hinders the use of Modification as a neutral term.

Considering the above, the term **alteration** was selected since it does not have a particular meaning in the selected jurisdictions or international regulatory frameworks.

In this study, an **alteration** is:

> "An event which causes the performance of or a provision of an existing contract to be different to the performance or provision before the occurrence of the event. Such event can be the operation of a provision of the contract, an external event, or the performance or acceptance by a party of an obligation in a manner which differs from that provided for in the contract as awarded".[15]

This definition, in terms of amplitude, offers various advantages. It includes unilateral and bilateral modifications; changes formally concluded and "de facto" changes via accepted

[14] Oliver Brand, 'Conceptual comparisons: towards a coherent methodology of comparative legal studies' [2006] in Brook. J. Int'l L. 32, 405
[15] Smith (n. 8) 10

performance; changes caused by an external event, which involves changes operated by law, compensations caused by unforeseen circumstances, etc.

This definition includes what can be termed as *intra-contracto* and *extra-contracto* alterations. *Intra-contracto* alterations are alterations of a provision or performance that originate in the contract, such as review clauses or options. *Extra-contracto* alterations are all alterations with no source in the contract itself.

1.6. Further precisions relating to the definition of alterations relevant to the scope of this thesis

This thesis will devote attention only to: unilateral and bilateral modifications, and alterations consequence of an external event, particularly those caused by changes in the material/physical and economic conditions.

The reason to limit the scope to these changes concerns the time and space limitations of a doctoral project. A whole-encompassing analysis of every single type of alteration to public contracts in the nine analysed systems would render impossible a meaningful analysis.

Although changes in the law are part of the definition of alterations, they will be excluded from this study. Moreover, legal systems generally rely on similar formulas to deal with economic and material unforeseen circumstances (included in the study) and changes in the law (excluded from the study). Thus, on more than one occasion, the analysis of the latter would be, to a considerable extent, a repetition of the former.

The analysis of the economic consequences of alterations is also excluded. This decision was adopted after observing that: (i) Most rules on compensations for alterations are similar across jurisdictions and aim to compensate the incurred cost and vary the amount of, or if, profit paid. (ii) Monetary compensations' analyses raise issues strictly related to accounting and compensable factors closer to accounting and other non-legal disciplines. However, the price will be included as part of the analysis when it is not a consequence of an alteration but a limit to it.

Another topic that is excluded from the study is change in the contractor. The change of contractors raises important issues from an award procedure, competition, transparency, and other procurement objectives perspective. However, the analysis of alterations to the parties, a topic initially included within the scope, demonstrated that its nature is different and its concern distinctive compared to objective alterations (generally understood as changes to elements other than the subject). Therefore, it was necessary to exclude it to focus on alterations that raised similar concerns to maximise the advantages of the comparative method.

Finally, procedural and locus standi considerations do not belong to this thesis scope. However, it is important to annotate that procedural rules may be as important as substantive rules. Thus, it is immaterial to have access and legal limits to alterations of public contracts to avoid awards via modifications if competitors do not have procedural ways to enforce them. Similarly, substantive and procedural rules without access (transparency) to concluded alterations do not reach the objectives of the rules. Nonetheless, procedural rules and their design raise issues that are different in nature, although similar in purpose, to substantive rules on alterations.

1.7. The selected Jurisdictions and International Regulatory Framework

It is difficult to determine how many jurisdictions have set up rules relating to public procurement. It is equally difficult to establish the approach that each jurisdiction has adopted. Nonetheless, it is easy to conclude from available literature that many countries have in place rules regarding public procurement.[16]

At the international level, there are numerous instruments on public procurement. These documents range from bilateral treaties on trade with public procurement chapters to instruments exclusively dedicated to Plurilateral Agreements on Public Procurement formally joined by States,[17] the spectrum includes as well soft law issued by bodies of international organisations[18] and several regional trade agreements with specific public procurement rules.[19]

[16] Geo Quinot and Sue Arrowsmith, Public Procurement Regulation in Africa (Cambridge University Press 2013); Sue Arrowsmith (n. 5); Juan Carlos Expósito Vélez, Forma Y Contendio Del Contrato Estatal (Universidad Externado de Colombia 2013); See notes 11-14
[17] GPA
[18] UNCITRAL Model Law on Public Procurement
[19] Robert Anderson, AC Müller and K Osei-Lah, 'Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?' in Sue Arrowsmith and Robert Anderson (eds), The WTO Regime on Government Procurement: Challenge and Reform (Cambridge University Press 2011)

Due to space constraints, this thesis must be devoted to a limited number of jurisdictions. This section explains the rationales that led to analysing the selected jurisdictions and international regulatory frameworks.

This section is divided into two parts: subsection 1.7.1 will present the reasons for choosing the selected international regulatory frameworks, and section 1.7.2 will display the same analysis for the selected national jurisdictions.

1.7.1. The selected international regulatory frameworks and the reasons behind their selection

International regulatory frameworks are not as numerous as national jurisdictions. Therefore, it was possible to encompass the most 'significant' and researched international regulatory frameworks. For their selection, the first rule was the impact width. Thus, plurilateral agreements were chosen over bilateral treaties considering that the first type covers more states. This explains, for instance, the inclusion of the GPA and not of BTA.

The second criterion was the 'evolution' and 'legalisation' of the regulatory framework regarding public procurement. This consideration is grounded on the need to compare actual rules and policies on alterations and systems with few or no rules were excluded. Thus, EU law is considerably more 'developed' in this aspect than Mercosur, which led to the inclusion of the former over the latter.

Based on these two considerations is easy to understand the selected frameworks. The GPA is the only hard law instrument at the international level that has a global impact, or at least a global aim. EU law is currently the most legalised regional public procurement system, and it developed a set of rules relating to contract alterations that have no equal at the international level.

The OECD is an organisation that has been involved in shaping public procurement in several jurisdictions. The organisation has produced a vast amount of literature on several topics relating

to procurement[20], including some national analyses for accession processes. Further, all countries included as case studies in this thesis are members of the OECD.

UNCITRAL has issued some of the most relevant instruments relating to public procurement in the world, and they have had a considerable impact on the way public procurement is conceived. The Model Law on Public Procurement has been called a 'global standard'. To provide one example of its importance, it is relevant to remind that this Model Law was adopted by former socialist states,[21] and it serves as a benchmark for states to assess their systems. This responds to the 'conciliation' of national interest with trade objectives.[22]

Finally, it is submitted that this background would not be complete without drawing some attention to development institutions, whose work has also influenced procurement regulations in the world.[23] The World Bank will be the main focus of this research, given its global scope, as opposed to regional development banks, and the leading role it plays both in aid generally and in the procurement field specifically.[24] It is important to mention that the Multilateral Banks have a harmonisation agenda[25] that has led to similar guidelines on procurement[26], which facilitates the analysis.

1.7.2. The selected jurisdictions and the reasons behind their selection

As mentioned, the selected jurisdictions are France, the United Kingdom, and the United States of America.

The main criterion for selecting these jurisdictions was an idea that originated outside legal studies: maximising variance. The concept of variance belongs to statistics and data. However, it is submitted, it is a valuable concept, especially for the field of comparative legal studies.

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[20] Organisation for Economic Co-operation and Development, 'Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money' (2008); OECD, 'Public Procurement: The Roles of Competition Authorities in Promoting Competition' (2008) http://www.oecd.org/competition/cartels/39891049.pdf accessed 3 December 2021

[21] Sue Arrowsmith, 'Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard' (2004) 53 International and comparative law quarterly 17

[22] Ibid

[23] Sue Arrowsmith, John Linarelli and Don Wallace, Regulating Public Procurement: National and International Perspectives (Kluwer Law International 2000), 99

[24] Sope Williams-Elegbe, Public Procurement and Multilateral Development Banks: Law, Practice and Problems (Hart 2017) 5

[25] Rome Declaration on Harmonisation' https://www.oecd.org/dac/effectiveness/31451637.pdf accessed 3 November 2021

[26] Williams-Elegbe (n. 24) 59

Variance measures how far a set of (random) numbers are spread out from their average. This is the, so to speak, 'variability' of the data. Thus, maximising variance implies trying to account for the most 'variability' possible in the data set chosen.[27]

In this case, the concept was applied to present the most diverse, as between themselves, national jurisdictions to improve the comparison and identify common and divergent variables in the law of the selected countries. In that fashion, the main objective was to achieve the highest possible number of different rules with the greater differences or nuances between them.

Exclusively under this consideration, the lack of Islamic, other religious, and socialist jurisdictions would be problematic. However, there is an insurmountable obstacle to include Islamic, or socialist jurisdictions: the lack of language skills of the author which hampers such inclusion, at least in a rigorous manner.

A second reason for choosing the selected jurisdictions was their influence on other countries[28] and the design of international regulatory frameworks.[29]

Against the two primary considerations mentioned above, it shall be said that several filters or further criteria were taken into consideration. The first filter, based on the maximisation of variance, was to select jurisdictions from the two main 'traditions' of western law, i.e., common and civil law.

The second factor was, as mentioned, based on the most influential jurisdictions within each of the traditions. Thus, the US and the UK stand out as the obvious choices for common law countries, and France, with its peculiar constructs of administrative law of contracts, as the civil law jurisdiction par excellence. The other obvious jurisdiction from the civil law tradition would have been Germany. Nonetheless, the insurmountable language barrier (at least for a PhD) impeded such inclusion.

[27] Patrick Doncaster and Andrew JH Davey, *Analysis of variance and covariance: how to choose and construct models for the life sciences* (Cambridge University Press, 2007), 1 and ss
[28] Heinz Klug, Yves Dezalay and Bryant G Garth, 'Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order' 196
[29] As demonstrated throughout this study

Regarding all the jurisdictions selected for this study, it is important to make a general precision. The study only encompasses the national/federal level of the public procurement/acquisition system. Therefore, all the rules applicable to the local/state level will be excluded from the analysis.

To recapitulate, the UK was selected since it is the 'oldest and original' common law jurisdiction. Thus, all common law jurisdictions in the world have been, and still are to an extent, influenced by UK law. Thus, it was sensible to select this jurisdiction based on the two main criteria explained above.

Furthermore, the UK, and here another reason to select it, was for some decades under the influence of, or at least under permanent conversation with, Civil law jurisdictions through the deliberation and adoption of EU public procurement rules. This reason for selecting the UK allows to include one warning: this study encompasses the study of law on alterations of the UK before Brexit. The, potentially, forthcoming law was not considered.[30] A second important commentary refers to the meaning of the UK as a jurisdiction; when reference is made to the UK, it refers to England and Wales.

The inclusion of the US was driven by their experience in regulating and dealing with procurement.[31] The US was the first country, along with France, that considered necessary to limit contract alterations based on procurement concerns. This gave rise to the creation of the Cardinal Changes Doctrine, which is a core element for comparison throughout the study and therefore a rationale for including this jurisdiction. Another important reason relates to the divergence of US law from UK common law. The US, so to speak, is a whole different tradition relating to public procurement compared to the UK, and this 'new' perspective was considered worth analysing and contrasting against other systems. Just to mention one example, the US has been using enforceable regulation for public procurement for a long time. In contrast, the UK, with exceptions, only enforced whole-encompassing legislation on procurement after the EU demanded such an approach.

[30] Cfr. Sue Arrowsmith, 'Reimagining public procurement law after Brexit: seven core principles for reform and their practical implementation', part 1, Arrowsmith, Sue, Reimagining public procurement law after Brexit: seven core principles for reform and their practical implementation Part 1 [2020] Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523172 accessed on 3 november 2021

[31] John Cibinic, Ralph Nash, and James Nagle, *Administration of Government Contract* (Wolster Kluwer, 2016)

From a civil law perspective, France stands out as the most obvious choice, and it therefore requires less explanation when it comes to matters that are considered administrative law such as public contracts. France has a well-developed, long-lasting, and good quality literature on public contracts.[32] It also provides some peculiarities on public contract issues such as the existence of a specialised judge; a specialised jurisdiction to be more precise. Moreover, the French tradition has a manner of constructing and conceiving public contracts (contrats administratives) different from the common law tradition: public contracts are conceived as a discipline within the realm of administrative law and as such public law applies to these contracts.

From a substantive standpoint, France is also interesting since the economic balance of the contract evolved in that jurisdiction. Although the precise concept will be explained further below,[33] it is worth noting that the economic balance is one of the tenets of administrative contracts in that country, and it implies a duty to compensate the contractor when there are serious changes in conditions (legal, contractual, economic, or technical).[34] Furthermore, as will be observed, the concept of economic balance has been adopted and adapted by other jurisdictions[35] and international regulatory frameworks to deal with their own issues and concerns in the area of public contracts alterations.[36]

Once all regulatory frameworks and selected jurisdictions have been presented, another remark is required. The systems deal differently with similar phenomena. Thus, the possibility to modify the contract under French law has traditionally been considered a public power arising out of the law. On the contrary, the US and the UK grant the same possibility as a contractual right arising out of the contract. This allows to introduce that the legal device used by legal systems to face similar situations vary. Therefore, it was considered necessary for the author to locate the appropriate object of study, and this forced to compare different legal devices. Thus, at times, Acts will be compared to contract clauses and those with jurisprudential doctrines. This creates space for

[32] André de Laubadère, *Traité Théorique et Pratique Des Contrats Administratifs* (Librairie générale de droit et de jurisprudence 1956); André de Laubadère, Franck Moderne and Pierre Delvolvé, *Traité Des Contrats Administratifs* (Librairie générale de droit et de jurisprudence 1983). – all quotes from Spanish and French languages were translated by the author without permission of the writers and for academic purposes
[33] See chapter 8
[34] Gaz de Bordeaux, 1913, Conseil D'État; Laurent Vidal, 'L'équilibre Financier Du Contrat Dans La Jurisprudence Administrative' <http://www.theses.fr/2003PA010267> accessed 21 November 2021
[35] See for example: Libardo Rodríguez R., *El Equilibrio Económico En Los Contratos Administrativos* (Fundación Editorial Jurídica Venezolana 2015)
[36] The concept of economic balance made its way into Article 72 of the Public Contract Directives of the European Union

potential criticism due to the comparison of unlike phenomena. The author acknowledges these issues. However, this approach is backed by methodological and substantial rationales.

First, it is important to acknowledge that procurement systems started, in their development, from different legal cultures. Thus, it is consequential that they arrived at different means to achieve similar ends. Being attentive to the differences between devices seems more appropriate than trying to compare exclusively based on the legal device. The approach here adopted, it is submitted, recognises, and tries to understand the differences between legal traditions. Just to provide one example, had this work not adopted this approach, the UK analysis on unilateral modifications would have to end with a note indicating that no legal rules allow contracting authorities to unilaterally modify the contract. In contrast, paying attention to clauses turns the analysis, in our view, more meaningful and fruitful from a comparative law perspective since it permits comparing legal devices that are similar from a substantive perspective even if different from a formal one.

Second, differences in assumptions, traditions, legal devices to solve similar issues or the idea that "they must be there and so we find them" are at the very heart of comparative legal studies and the criticism that can be addressed against it.[37] However, for the purposes of this thesis, it is assumed that comparative legal studies are possible and directing attention to different legal devices that are similar from a substantive perspective tries, precisely, to avoid creating homogeneity when it does not exists.

Third, the offered mode of comparison is useful despite its flaws and incompleteness. Denying the limitations of a method or discouraging research, for this reason, may lead to the paradox of the "Exactitude in science": ""Only *six inches*!" exclaimed Mein Herr. "We very soon got to six yards to the mile. Then we tried a *hundred* yards to the mile. And then came the grandest idea of all! We actually made a map of the country, on the scale of a *mile to the mile*!"[38]. A perfect method in law, as in cartography, may be the mere reproduction of phenomena, but this approach is as ideal as it is useless.

A final methodological observation relates to the lack of an extended introduction to the selected jurisdictions and international regulatory framework. The first draft of this thesis had a complete

[37] Pierre Legrand and Roderick Munday, eds. *Comparative legal studies: traditions and transitions*. Cambridge University Press, 2003
[38] Jorge Borges, *on the exactitude in science, (quaderns-barcelona-collegi d arquitectes de Catalunya* 2002)

overview (50.000 words) of these systems; however, length constraints obliged to leave them aside. Moreover, this thesis aims to reach procurement specialists who are familiar with these legal systems, or, if not, with other similar ones that provide them with "transferrable skills" to understand the analysed ones, another reason that discharge the author from the duty to fully introduce them.

Part II: Analysing the rules on alterations of public contracts in the selected international regulatory frameworks

The second part is divided into five chapters; as mentioned, each chapter is devoted to the rules on alterations of one international regulatory framework. Thus, chapter 2 is dedicated to the EU, Chapter 3 to the GPA, Chapter 4 to the OECD instruments, Chapter 5 to the World Bank, and Chapter 6 to UNCITRAL documents.

Chapter 2: The EU rules on alterations

The current rules on alterations of public contracts in the EU are the most extensive regulation on the topic at the international level. These rules have been issued in a manner that at least intends to balance the international and national objectives in procurement. The main objective of the EU in regulating procurement is the creation of the internal market, a trade objective, through the application of the four freedoms and sector-specific principles such as equal treatment and transparency. These principles and objectives are the basis of the whole system and, *a fortiori,* of the rules on alterations. EU rules are aimed at influencing the national procurement system of its Member States. Therefore, rules on alterations cannot be blind to national objectives and these objectives were at least considered in the design of the rules.

Initially, EU law did not have rules regarding alterations of public contracts. However, the progressive enforcement of procurement-pre-award- rules and the principles arising out of the TFEU demonstrated that some rules on alterations were required to guarantee the effectiveness of pre-award procurement rules.

As they currently stand in both legislation and case law, EU rules on modifications are a direct consequence of the enforcement of EU procurement rules through private (bidders) and public (commission) enforcement. Initially, the management stage was not a field of application of the secondary instruments. However, rulings of the CJEU and their 'codification' in secondary instruments have taken over a regulatory space previously left to the Member States.

Against the background, three different stages can be identified in EU law regarding the treatment of alterations of public contracts: the first stage with no rules on modification (2.1.);

a second stage when some rules streamed from case law (2.2.) and finally, a third stage when these rules were codified and, so to speak, formalised in legislation; a tipping point that might imply that modification is, perhaps invariably, a topic within EU public procurement law. (2.3.)

2.1. First stage: alterations are not part of EU procurement law

It must be said that there was never an express indication that EU procurement law was an area restricted to the regulation of the pre-award stage. Nonetheless, there was a sort of implicit assumption that this was the case, and whereas EU procurement law was an area regulating the award, national contract law dealt with all the issues arising after award or conclusion. It must be mentioned that another interpretation existed in the sense that the lack of regulation in secondary instruments did not mean a complete lack of rules.[39]

The first directives seemed to indicate that they were restricted to the award procedures. For instance, Council Directive 71/305/EEC was "concerning the co-ordination of procedures for the award of public works contracts", and Directive 77/62/EEC "coordinating procedures for the award of public supply contracts" because the prohibition of restrictions on the free movements of goods "should be supplemented by the coordination of the procedures relating to public supply contracts". Therefore, both directives were aimed at coordinating procedures for the award, where, it can be argued, the award demarcates a final point for the application of these secondary instruments. In Togel, Advocate General Fenelly indicated:

> "Indeed, the proper functioning of the Services Directive presupposes the continuing application of national rules to the conclusion of contracts subsequent to an award in accordance with its terms. This is borne out by the emphasis placed in the services Directive on procedures which bind contracting authorities regarding the awards of contracts, rather than binding both parties regarding the conclusion of contracts. Article 2(6) of the Review Directive illustrates the effects of distinction, which preserves the role of national contract rules in the field of public procurement".[40]

[39] Vito (5) 130
[40] Case c-76/97 Opinion of Advocate General Fenelly *Walter Tögel v Niederösterreichische Gebietskrankenkasse* [1998] I-5630, para 62.

Similarly, when rules on modification started arising, several scholars focused precisely on the fact that EU law was traditionally concerned with regulating the stage up to the award. For instance, Treumer ascertained:

> "It is well known to those working in the field of EU public procurement law that the EU Public Procurement Directives in principle are focused on the action of the contracting authority until the conclusion of the contract, even though an exception to this principle can be found in art. 31(4) of the Public Sector Directive"[41]

This, however, was qualified since there was at least one exception: the ground for using the negotiated procedure without publication of a contract notice found in Article 31(4). This ground allowed contracting authorities to use this procedure for contracts under two different circumstances:

(a) "for additional works or services not included" in the original contract "but which have, through unforeseen circumstances, become necessary" for the performance of the contract "on condition that the award is made to the economic operator performing" the contract. This circumstance was further limited since it could be used when: (i) such additional works or services cannot be technically or economically separated from the original contract without major inconvenience or (ii) when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion. In both cases, the aggregate value of contracts awarded for additional works or services may not exceed 50% of the value of the original contract.

(b) "for new works or services consisting in the repetition of similar works or services entrusted to the" contractor "to whom the same" authority "awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure". Authorities should disclose the possible use of this procedure with the first project alongside the total estimated cost of

[41] Steen Treumer, 'Regulation of contract changes leading to a duty to retender the contract: the European Commission's proposal of December 2011´, [2012] *PPLR*, 153, 153; Similarly: Mari Ann Simovart, 'Amenments to Procurement Contracts', [2010], 17 Juridica Intl, 151, 151. Carri Ginter, Nele Parrest, Mari Ann Simovart, 'Access to the content of public procurement contracts: the case for a general EU-law duty of disclosure´, [2013] *PPLR*, 156, 156. Kristian Hartlev; Morten Wahl Lijenbol, 'Changes to existing contract under the EU public procurement rules and the drafting of review clauses to avoid the need for a new tender', [2013] *PPLR*, 51, 52. Steen Treumer, 'Contract changes and the duty to retender under the new public procurement Directive', [2014], *PPLR*, 148, 148

subsequent works or services. Finally, the use of this procedure was temporally limited to three years following the conclusion of the contract.

As will be seen, this provision anticipated some elements of the current rules on alterations. Although this Article does not regulate the phenomenon of alterations as such, it might be argued that it technically provides for one since it is an event that causes the performance of a contract to be different to the performance before its occurrence. Regardless of its legal nature and whether it might or not be regarded as an alteration, the provision seems to provide a valid way to substitute what an alteration will normally do. Nonetheless, the law was unclear[42] as to whether these were the only valid "alterations", and all other alterations must be considered a new award not permitted by EU law. For these reasons, further clarification was required and arrived in good time from the CJEU.

2.2. Second stage: Rules arising out of case law

The existence of a body of rules on alterations in the EU, as has been mentioned, is largely a consequence of the CJEU's role in adjudicating procurement cases. Furthermore, this emergence had a progressive nature since rules appeared and were progressively made more stringent and extensive. The main cases will be presented chronologically to show this progressive pace of case law and its content.

2.2.1. Rennes[43]

Perhaps the first case[44] where the CJEU accepts that alterations to a public contract can be assessed under EU law is Rennes, brought by the Commission against France.

This case concerned the application *ratione temporis* of Directive 93/38. The award procedure for constructing a tramway began "before 1 July 1994, the date on which the period prescribed for transposition of Directive 93/38 expired (…)"[45]. However, only until November 1996, the District Council issued a resolution approving the draft-negotiated contract. Several

[42] Vito (n. 5) 128; Sue Arrowsmith 'Amendments to Specifications under the European Public Procurement Directives' Public Procurement Law Review (1997): 128-137
[43] Case C—337/98 *Commission v France* [2000] ECR I-8416.
[44] Hebly and Heijnsbroe (n. 5) 180
[45] *Commission v France* (n. 43) 25

circumstances delayed the moment of the conclusion. In February 1994, the Administrative Tribunal of Rennes annulled the declaration of public interest (UDP) of February 1993; and in September 1995, the District Council withdrew its resolution of March 1993 approving the contract with Mantra.

The Commission argued that the award was not formally concluded until the date of the approval by the Council in November 1996. Additionally, the former resolution was annulled definitively, "which means that the resolution is deemed never to have existed".[46] Then, the contract was awarded after the date for transposition, the award procedure formally began later than this, which meant that the Directive should have been applied.

On the other hand, France argued that it should be the date of the first resolution and not of the last one, which should be taken into consideration to determine the applicable rules. "[T]he appointment of Matra as the contractor does not date from the resolution of 22 November 1996 but, implicitly, from that of 26 October 1989 (…)".[47] Additionally, and very important for the future precedent in the EU, "[a]s regards the withdrawal (…), first, that it was imposed on the contracting entity and, second, that it was not the result of a wish to **renegotiate the substantive terms of the contract**".[48] The French government recognised that the withdrawal entailed the eradication *ex tunc* of the contract. However, it considered this a purely formal circumstance, "**the contractual substantive terms** were, if not validated, at least beyond all reproach and, as a result, the procedure for the award" was "in fact if not in law" merely suspended pending a new UDP.[49]

In sum, the case of the French Government was that materially the contract was the same before and after the annulment of the UDP. Hence, the new UDP and contract approval held continuity with the award procedure that begun in 1989. The key element to demonstrate that the contract was the same was that the "contractual substantive terms" were the same, and there was no wish to "renegotiate the substantive terms". This aimed at demonstrating that Directive 93/38 *ratione temporis* was not applicable since the procedure started before its adoption and date of transposition.

[46] Ibid, 30
[47] Ibid, 32
[48] Ibid, 33
[49] Ibid, 34

In deciding the arguments submitted by the parties, the CJEU stated:

> "Accordingly, it must be considered whether the negotiations opened after 22 September 1995 **were substantially different in character** from those already conducted and were, therefore, such as to demonstrate **intention of the parties to renegotiate the essential terms** of the contract, so that the application of the provision of Directive 93/38 might be justified".[50]

Therefore, what was at stake was whether (i) negotiations substantially different in character were being conducted and (ii) there was intention of the parties to renegotiate the essential terms of the contract, giving place to a new contract. Although without a legislative basis, with good judgement, those two were the elements used by the parties and the Court to test the existence of a new contract.

The Court then analysed the changes presented by the commission "in terms of technology and price". Regarding the change in technology, the Court ruled that it did not "constitute proof that an essential term of the contract was renegotiated".[51] This since "the alteration" "is attributable to the developments of equipment between 1993 and 1996 and concerns its dimension and then only marginally (2 cm in width)". The Court also mentioned that the inclusion of technological development during a negotiated procedure, which by its nature might extend over a long period, cannot be ruled out.

Relating to the price greater than the rate of inflation during that period, the Court said that it "does not prove that the negotiations opened after the withdrawal (…) were intended to renegotiate an essential term of the contract". Additionally, as the Government submitted, "the increase in price was a result of the exact application of the formula for the revision of prices contained in the draft approved by the two parties in 1993". In other words, there was a review clause which proved continuity between awards procedures and between contracts, being the variation in price a simple "modification" based on terms already agreed for in the original agreement – an *intra contracto* alteration-.

[50] Ibid, 44
[51] Ibid, 50

To conclude, it might be said that some of the most important elements of the current rules on alterations were designed to establish whether a directive should have been applied, *ratione temporis*, because the procedure that started before it entered into force was a different one, for a different contract, than the one concluded after that moment. Hence, the renegotiation of essential terms, the substantially different negotiations, the importance of the review clauses, and the permission to change technological aspects all streamed out from this case.

Additionally, it also stands out that, as in other areas of procurement, the determinations and definitions at the EU level do not depend on the determinations and definitions in the relevant member state.[52] In this case, under French law, given the annulment and withdrawal, the contract was, legally speaking, a new contract (*ex tunc*). However, this did not halt the CJEU to declare that there were no "fresh negotiations", "intention of the parties to renegotiate the essential terms", and implicitly no new contract.[53]

2.2.2. Succhi di Frutta[54]

In this case, the central issue was the application of the principles of transparency and equal treatment to alterations. Unlike Rennes, that implied the application *ratione temporis* of a Directive, in Succhi, the Court directly assessed alterations as such to verify its legality. As will be explained, the CJEU, in assessing whether and how alterations can in practice impair these principles, firmly concluded that the management/performance stage could be assessed through the lens of transparency and equal treatment.

This case concerned the application of rules "for the free supply of agricultural products held in intervention stocks to" some countries, namely Council Regulation 1975/75 and Commission Regulation 2009/95. Under this regulatory framework, the Commission initiated a tendering procedure in Regulation 228/96. This case does not concern the application of the "traditional" procurement directives, i.e. supply, works, services, utilities but principles on procurement arising out directly from the TFEU.

[52] For example, relating to the definition of contracting authority see: Arrowsmith (n. 5) para 5-02
[53] Rennes (n. 43), 56
[54] Case C-469/99 P, *Succhi di Frutta v Commission* [2004] ECR I-3835

In the tendering notice, the payment of the contractor by the Commission was related "to the quantity of products to be removed physically from intervention stocks as payment for the supply of processed products".[55] Regulation 228/96 concerned fruit juice, concentrated fruit juice, fruit jams, and a fixed quantity of fruit by way of payment.

The successful tenderer offered specific quantities, and additionally, it stated that in the event of a lack of apples (one "payment" fruit), it was prepared to accept peaches. The Commission awarded the lots to Trento Frutta and established a mechanism of substitution of fruit between apples and oranges (the fruits initially provided for in the regulation) and peaches, as offered by the tenderer. Moreover, because of a lack of fruit for payments, later, through other decisions, the Commission adjusted the agreement to include more fruits and different coefficients as a mechanism of substitution. The claimant brought proceedings against the Commission.

There was an undisputed fact: some elements in the performance "do not correspond to the conditions laid down in the notice of invitation to tender".[56] The dispute concerned whether the disparity between notice and performance was legal.

The judgement of the Court of First Instance stated: "The substitution of peaches for apples or oranges for the supplies concerned, and the fixing of the coefficients of equivalence between those fruits constitute a significant amendment of **an essential condition** of the notice to tender (…)".[57]

The Commission, in challenging the first instance judgement, sustained that the "judgement attributed excessive scope to the principle of equal treatment"; however, "different rules apply once the contract has been awarded".[58] In short, the Commission argued that the principles no longer applied "at the stage when the award is being implemented".[59]

Succhi di Fruta argued that the contracting authority "has to adhere strictly to the conditions which it has laid down in that notice", where it must define the subject-matter of and conditions

[55] As provided in Article 2(2) of Regulation 2009/95
[56] *Succhi di Frutta* (n. 54) 7
[57] Ibid, 7
[58] Ibid, 15, 16, 19
[59] Ibid, 52

governing the award procedure. "That obligation prevails throughout the procedure, including the stage when the contract (…) is performed."[60]

The CJEU ruled that "the decision challenged by the tenderer's action (…) was capable of directly affecting the manner in which the tenderer actually formulated its tender and the equality of opportunity of all undertakings taking part in the procedure concerned".[61] After highlighting the importance of the principles of equal treatment and transparency, the CJEU stated:

> "Against the background, it consequently falls to the Commission (…) strictly to comply with the criteria which it has itself laid down on that basis not only in the tendering procedure *per se* (…), but also, more generally, **up to the end of the stage during which the relevant contract is performed**".[62]

The first conclusion that deserves attention is that the principle of equal treatment and transparency shall be respected until the end of the performance stage. From this conclusion, a consequence that, it is submitted, has not been sufficiently stressed in literature might arise: some rules on alterations arise directly from the TFEU principles and apply to contracts not covered by the Directives.

In this case, the parameter to measure the respect of the principles was prohibiting authorities to alter the general scheme to tender by amending the essential conditions for the award. This applied if the condition would have made it possible for tenderers to submit a substantially different tender.[63]

This is different from Rennes, where the "intention of the parties to renegotiate the essential terms" was searched. This element found in Rennes is considered unnecessary and misleading precisely against the facts of Succhi di Frutta. It would not make sense to search for the intention of the parties to renegotiate essential terms where the contracting authority ordered the modifications unilaterally. Additionally, the intention to renegotiate or circumvent the rules

[60] Ibid, 37-38
[61] Ibid, 64
[62] Ibid, 115
[63] Ibid, 116

imposes, from a practical perspective, a very high burden of proof on the complaining bidder, as well as transforms the violation of a rule in a subjective rather than an objective matter.

Nevertheless, the "subjective" standard of violation in Rennes, the intention, might be understood against the particular facts of the case: the court was trying to determine the existence of a new award procedure and a new contract to apply or not a new directive. In Succhi di Fruta, the Court is establishing the violation or not of principles via alterations. Henceforth, it does not seem suitable to use a subjective standard when it is a unilateral modification being assessed and when the approach is different in the sense that violation of principles is, also by definition, objectively rather than subjectively established.[64]

Furthermore, a rule that was reiterated in Succhi di Fruta was the possibility to include review clauses. The CJEU stated that "to be able to amend some conditions", "it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender".[65]

In addition to Rennes, the Court not only mentioned the possibility to amend based on a review clause (or terms provided within the notice) but also established that relevant detailed rules should be provided. Henceforth, it started drawing the importance of details in drafting review clauses, as the legislator expanded it in the 2014 directives.

2.2.3. Commission v France[66]

This case refers to the construction in a three-staged process of a sewage treatment plant. Notices were issued for the first and the third phases. In the notice for the first one, it was provided that the successful tenderer "may be invited to cooperate in the execution of his idea, under a study contract for [inter alia] the provision of assistance to the maître d'ouvrage envisaged in the first and third parts of the second phase".[67]

[64] This does not mean that the intention of the parties cannot be considered in assessing the violation of the principles of equal treatment and transparency, but, as a rule, this assessment does not require intention of violation
[65] Ibid, para 118
[66] Case C-340/02, *Commission v France [2004]* ECR I-9858
[67] Ibid, 11

The French government argued that the option relating to the second phase set out in the notice for the first phase released it from the obligation to publish another notice prior to the award of that contract.

In rejecting this argument, the Court stated:

> "The principles of equal treatment of service providers (…) require the subject-matter of each contract and the criteria governing its award to be clearly defined".
>
> "That obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed".
>
> "It follows that in the present case the mere option of awarding the contract relating to the second phase according to criteria laid down in respect of a different contract, that is the one related to the first phase, does not amount to awarding the contract in accordance with one of the procedures laid down in the Directive".

The Court is analysing whether an option included in a contract notice to award a different contract -a completely different phase of a project- is enough to comply with the Services Directive. Therefore, the Court is analysing the existence of a new contract that would have justified a new award procedure because materially this is what happened.

For the purposes of interpretation of the 2014 directives, it is relevant that in this case, the Court did not refer to the concept of substantial or material changes even though it had already been developed in previous case law.

2.2.4. Pressetext[68]

The rules included in the 2014 directives stream, largely, from this decision, which explains the importance and length of this section.

[68] *Pressetext* (n. 4)

APA is a limited liability registered cooperative. Almost all daily newspaper, radio and television broadcasting corporations were members of the cooperative. APA was the main operator in the news agencies market in Austria.

In 1994, prior to the accession to the EU, the Austrian Government concluded a contract with APA relating to the provision of certain services for remuneration. This agreement "was concluded for an indefinite period, subject to a clause by which the parties waived the right to terminate the agreement until 31 December 1999".[69]

There were three main alterations over the performance of the contract that raised the complaints of the claimant in the national proceeding and, subsequently, the referral to the CJEU for a preliminary ruling. These three alterations were:

- The operation of part of the contract was transferred to a newly established subsidiary, and APA was jointly and severally liable with the subsidiary (APA-OTS).[70]
- The price was altered because of the adoption of the Euro by Austria. It included the change of the currency and the rounded-off of some values. The conversion would have been EUR 802.538.61 but to round-off the figure, the price was reduced by 0.3%. All the prices were converted, and the rounded-off implied some reductions of 2.94% and 1.47%.[71] Another change included the reformulation of a price indexation clause.
- Another supplemental agreement introduced two alterations. First, the waiver to terminate initially agreed until 1999 was agreed upon once again until December 2008. Second, the reduction of price for online inquiries for APA information services, fixed at 15% in the basic agreement, was increased to 25%.

PN, another economic operator, brought proceedings because it considered these alterations unlawful and "de facto awards".

It must be remembered that the original agreement was concluded before Austria's accession to the EU. Therefore, the EU procurement rules did not apply to the procurement of that

[69] Ibid, 11
[70] Ibid, 14-15
[71] Ibid, 16-20

agreement. However, the alterations were entered into after accession, and following the wording of the CJEU, "the relevant community rules apply to such agreement as from the date of that State's accession".[72] Hence, the alterations were analysed to verify whether they were new awards because in that case, they should have been awarded following EU law.

The CJEU explained some existing rules on alterations. As a start, it held:

> "In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 **when they are materially different in character from the original contract** and, therefore, **such as to demonstrate the intention of the parties to renegotiate essential terms of that contract**".[73]

The CJEU spelt out three situations that constitute a new contract because they are materially different in character where: (i) introduces conditions that would have allowed for the admission of different tenderers or the acceptance of a different tender; (ii) extends the scope of the contract considerably to encompass services not initially covered; (iii) changes the economic balance of the contract in favour of the contractor.

For the first situation, the Court uses similar wording to the one in *Rennes* to explain what constitutes a materially different contract. Moreover, it is worth noting that in Succhi, the standard was that the condition "would have made it possible for tenderers to submit a substantially different tender". In Pressetext, the court changed the wording and explained that an amendment was material when the conditions "had they been part of the initial procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted". [74]

Although the change seems irrelevant, it is not. This is so since Pressetext considers potential tenderers that would have been allowed to tender and not only actual tenderers. This does not mean that the standard changed from one case to the other. However, the fact presented

[72] Ibid, 28
[73] Ibid, 34
[74] Ibid, 35

different circumstances. In Succhi, the claimant was an actual tenderer, whereas in Pressetex was a potential one, which explains the change in standard (or wording).

From this slight difference emerges a very important conclusion: the potential tenderer test seems better suited to achieve the EU procurement objectives than the "actual tenderer test". Where the objective of the system is to open-up markets to undistorted competition, it seems more accurate to use as a standard of comparison a potential tenderer than an actual tenderer.

Another circumstance that perhaps has not been sufficiently stressed in literature, and that does not arise directly from the rules on alterations but the rules on remedies, is that potential tenderers also have *locus standi* to challenge modifications. This, however, is not part of this thesis.

Moreover, this judgement brings at least two new elements compared to earlier cases. The CJEU understood that the adjusted contract might be materially different in two new circumstances: (ii) When it extends the scope of the contract considerably to encompass services not initially covered. (iii) When it changes the economic balance of the contract in favour of the contractor, in a manner that was not provided for in the terms of the initial contract. [75]

There is no reference to these two circumstances in previous case law or legislation. It is perhaps interesting to note, as will be expanded further below,[76] that the economic balance of the contract theory resembles a national practice in France "d'équilibre" or "d'équation" "financière" of the contract.[77]

After these considerations, the Court went on to answering the questions. For the first question, relating to the transfer of part of the operation from APA to one of its subsidiaries, the CJEU established a general rule pertaining to the change of contractor. However, changes in the person of the contractor are out-of-scope and will not be analysed.

[75] Ibid, 35-36
[76] See chapter 8
[77] Laubadere et al (n. 32) 726

The second question, which relates to the change in price, was addressed by the CJEU carefully. The Court refers that the price is "an important condition of a public contract".[78] It is relevant to highlight that the Court did not characterise the price as an essential term, as opposed to the parties of the contract. It might be hypothesised that the CJEU refrained from this to not state that "as a rule all price adjustments" are changes to an essential term. This since the consequence will be that, as a rule, a materially different contract from the one originally awarded will emerge and exceptions of allowed alterations had to be provided. This might have had a strong effect on the flexibility and efficiency of contracting authorities. Thus, it might be argued that the CJEU approach might have been chosen to allow flexibility in price alterations.

The Courts continued by analysing the change of currency and ruled that this was not a material change "but only an adjustment of the contract to **accommodate changed external circumstances**, provided that the amounts in euros are rounded off in accordance with the provision in force (…)".

Here the Court introduced a new element to allow adjustments to a contract: change in external circumstances. This resembles national legal categories relating to changes in external circumstances, and it reminds of the cases that might be grouped under the label "The adaptation of the contract for supervening events"[79]. Nonetheless, it is out of the scope of this research to trace whether this decision of the Court draws inspiration from those national categories.

Furthermore, the Court analysed the rounded-off of prices and held that this change in the intrinsic price might be done: "without giving rise to a new award of a contract, provided **the adjustment is minimal and objectively justified** (…)".[80]

This is, it is submitted, rather than a new concept, the other face of a material change; a change cannot be material if it is minimal and objectively justified. Under that umbrella, the Court decides that the price changes, in favour of the contracting authority and that do not exceed 3% are small changes.

[78] *Pressetext* (n. 4) 59
[79] Jose Félix Chamie Gandur, *La adaptación del contrato por eventos sobrevenidos, (*1 ed, Universidad Externado de Colombia, 2013)
[80] Ibid, 60

The third change regarding the price was the change of an index for price indexation. In this case, the Court relied on the fact that the original contract provided for the price index to be replaced. The decision reads, "the first supplemental agreement merely applied the stipulations of the basic agreement as regards keeping the indexation clause up to date"[81]. The argument here is that for changes provided for in the initial terms of the contract, there seems to be no reason, from a transparency and equal treatment principles perspective, to curtail the ability to make changes.

Finally, the Court analysed the third alteration to the contract: the waiver of the right to terminate, jointly with the increase in the rebates granted on the prices of certain services. The CJEU highlighted that although EU law did not forbid a public contract for an indefinite period, it was at odds with "the scheme and purpose of the Community rules governing public contracts". This was so since "over time, [it] impede[s] competition between potential service providers and hinder the application of the provision of Community directives"[82] governing the award of public contracts.

Then the analysis turned into whether the alterations could be regarded as a new award and recalled that the relevant criterion was whether the alteration constituted a material amendment to the initial contract.

In rejecting the materiality of this alteration, the Court took into consideration several factual circumstances and does not use (avoids?) prescriptive general statements. The analysis of the factual circumstances can be seen as the reluctance of the Court to consider price alterations as *de principio* material changes, and thus it is necessary to analyse the facts to determine its material character, factually speaking.

The Court considered that the waiver is for three years only. Second, it observed that there is no proof that absent the waiver, the authority would have considered terminating the contract, and, thirdly, that it "has not been demonstrated that such a waiver (…) entails a risk of distorting competition, to the detriment of potential tenderers".

[81] Ibid, 68
[82] Ibid, 73

Hence, the CJEU is expressly restricting its own analysis and wording to the *sub iudice* case. In other words, in the presence of evidence suggesting that the authority would have considered terminating in the absence of the waiver or demonstrated the distortion to the detriment of potential tenderers, possibly the answer would have differed.

Relating to the increase in rebates of certain prices and their decrease, the CJEU held that it had the practical effect of a lower price. This was within the ambit of the original contract and as not shift the economic balance in favour of the contractor. Moreover, it was held that this alteration was covered by the contract and was not liable to entail distortion of competition to the detriment of potential tenderers.[83]

It can be observed that the Court: first applies the rule that changes originally provided for in the original contract, or tender documentation are not, generally, regarded as being material. And second, it expressly mentions that the standard to assess the materiality of a change are the effects on "potential tenderers", particularly of competition type. This consideration fits perfectly within the framework of EU objectives.

2.2.5. Wall

Although Wall refers to changes in subcontractors, which is a 'subjective change', relevant rules that are transposable to 'objective changes' were elaborated in this case and will therefore be analysed.

The City of Frankfurt invited interested undertakers to submit tenders for a concession contract. The contract annexed to the invitation stated that a change of subcontractor was only permitted if the city consented. Tenders were submitted by Wall, FES, and three other undertakers. It is worth mentioning that FES is a legal person governed by private law, and the City of Frankfurt holds 51% of its shares. FES tender was described as giving FES an opportunity "together with an efficient and experience parent such as Wall (…) a fully automated City-WC from [Wall] will be integrated beneath the suburban railway bridge" (…).

[83] Ibid, 86

This case concerned the replacement of a subcontractor "on whom weight was laid during the procedure". The question asked to the Court was whether the principles of equal treatment, non-discrimination, and transparency required reopening up the contract to competition due to this alteration in a concession contract (by then excluded from secondary legislation).

The CJEU ruled that "substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession if they are materially different in character from the original contract and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract".[84] In this ruling, as in Pressetext, the concept of intention to renegotiate essential terms was mentioned again by the CJEU. However, it is submitted, that no particular importance should be granted to this since it does not seem to have practical effects; in these cases, the analysis focuses on objective rather than subjective factors.

Then, the CJEU determined that if the use of a subcontractor was decisive in concluding the contract with a given contractor, this change might be an alteration to one of the essential provisions of the contract, even if the possibility for such a change was provided for in the original contract. If there was an alteration of an essential element term of the contract: this might extend to the need for a new award.[85]

This case is hard to reconcile with Pressetext and generally with the analysis set out in previous sections. Indeed, suppose the change for the subcontractor was provided for in the original documentation. In that case, there is an *intra-contracto* alteration that, generally, is regarded as giving rise to fewer concerns from a procurement perspective. Since the possibility to change subcontractors was included in the original documentation and all other bidders were aware of such a possibility, it is hard to observe the issues in terms of competition, transparency, and equal treatment. This apparent incoherence between the use of a review clause to alter the contract might be softened by the wording used by the Court and the factual circumstances of the case.

[84] Ibid, 37
[85] Ibidem, 39 and 40

First, it must be noted that the contractor was a company where the contracting authority held 51% of the shares. This might have raised doubts to the Court about the existence of a preferred bidder.

Second, there might be a competition concern. The use of Wall, one competitor that submitted a tender for the procurement, as a subcontractor and its change once the contract was awarded is at least suspicious. Indeed, if the circumstance is considered *in abstracto,* offering a competitor as a subcontractor and then not using it in the performance of the contract seems like a way of muscling out the competition, or, at least, using competitive advantages of a competitor to be awarded a contract without using it in the performance.

Against the background, it might be considered that the CJEU was using the substantial modification: materially different contracts by intention to renegotiate an essential term, but it was considering other factors in the case.

Moreover, this case should be restrictively interpreted as applying only to review clauses that refers to changes in the contractor, including subcontractors. And, it is submitted, do not extend its effects to 'objective changes'.

This is important since, from Pressetext the CJEU said that changes in the contractor are generally substantial changes, and only some exceptions were allowed. A reasoning that the CJEU did not apply to other alterations like price changes. Therefore, this precedent should be construed as applying exclusively to changes in the contractor.

Furthermore, it applies for this type of changes but only "exceptionally" this might be read as when the subcontractor was "a decisive factor" for the award. The exceptional application can be interpreted having the principles into consideration and saying that the limit to the use of review clauses applies when there is an impact on the public procurement principles and objectives.

2.2.6. Finn Frogne[86]

This case concerns a contract concluded between the Danish Government (CFB) and a contractor (Terma) to supply a global communications system common to all emergency response services and for the maintenance of that system. The contract involved a total amount of 527 Million Danish Kroner (roughly EUR 70.629.800), and 299.854.699 Kroner (some EUR 40.187.000) related to a minimum solution, with the remainder relating to options and services whose performance was not necessarily going to be requested.

Difficulties arose during the performance. The parties concluded a settlement agreement in which the scope of the contract was to be reduced to the supply of a radio communication system for regional police forces (EUR 4.69 Million), and CFB would acquire two central server farms worth approximately (EUR 6.7 Million), which Terma had acquired with a view to leasing them to CFB.

Frogne, which did not apply for pre-selection in the tendering procedure for the original contract, brought an action against these alterations.

A National Court ruled that the alteration constituted a material alteration to the original contract. However, it took the view that the settlement "had not been the result of an intention (…) of" the parties to "renegotiate the material terms of the original contract" and that "there was no basis on which to assume that the intention" of the parties was to circumvent the public procurement rules.[87]

Moreover, the Court held that the principles of equal treatment and transparency "did not preclude the conclusion of the settlement agreement provided that there was a close link between the original contract and the services provided in connection with it".[88] This analysis allowed the provision of services for the radio communications systems but not for the sale of two central server farms. However, the Court ruled that CFB's assessment of the settlement agreement was not manifestly wrong. It considered a notice for voluntary *ex-ante* transparency

[86] Case C-549/14 *Finn Frogne* [2016] ECLI:EU:C:2016:634
[87] Ibid 18
[88] Ibid, 19

and that the CFB waited for the expiry ten days period and for the Complaints Board's ruling and found that the agreement could not be declared illegal.

Frogne appealed before the Supreme Court and claimed that the assessment was to be made exclusively on whether such an alteration to the contract was material. It sustained that the alteration was material since it was likely to interest smaller undertakers.[89]

The arguments of the first instance Court to rule in favour of CFB and the arguments of CFB can be divided into two. The first argument attempts to demonstrate that the changes should not be considered material under EU law. The second argument focuses on the tension between the transparency and effectiveness of the international rules and the flexibility that authorities require to manage the implementation of public contracts successfully. The two strands will be presented and analysed separately.

First, CFB defended its position by claiming that: 1. "the amendment consisted in a significant reduction in the services to be supplied, a situation which, it claims, is not governed by EU law".[90] 2. "the fact that such equipment [central server farms] was sold rather than leased did not constitute a material change in that contract".[91]

These two arguments were specifically phrased to indicate that the alterations were allowed under EU law. The first argument draws on former CJEU decisions that referred to the extension of scope in services,[92] rather than reduction, to sustain that only the former and not the latter fall within the scope of alterations not allowed under EU rules.

The second argument relied on the test of the materiality of the alteration and tried to establish that the change of acquisition method (lease to sell) was not a material alteration.

The CJEU presented three cases of material amendments, the ones identified in Pressetext: extending the contract's scope, changing the economic balance in favour of the contractor, and, if the amendment was included in the original documents, had it interested other tenderers or allowed other tenders.

[89] Ibid, 21
[90] Ibid, 22
[91] Ibid
[92] See rennes above

The Court then analysed whether a reduction in the scope of the contract was allowed or not under EU law. It ruled, in short, that a reduction in the scale or scope of the contract calls into question the award since these elements would have allowed other tenderers (smaller operators) to be admitted or another tenderer to be awarded.[93]

The second argument focuses on a different aspect. First, it clearly places the issue in the dichotomy: flexibility/discretion/value-for-money/national objectives versus rigidity/transparency/rule-compliance/international objectives.[94] From all the case law presented, this is the first instance where one of the parties argues that a certain way of interpreting community law may be against its own national objectives.

The authority highlights that that interpretation of EU law cannot be accepted since authorities must be allowed discretion to reach reasonable solutions to controversies. Furthermore, allowing such interpretation would oblige the authority either to refrain from making reasonable adjustments or terminating the contract with the risk and costs that this entails. Under that interpretation, the party argues, it cannot make the necessary alterations and must continue with a contract that perhaps will not successfully meet its requirement, or might not achieve value for money, or cannot be performed.

Moreover, although this is not mentioned by the authority, this might strengthen the negotiating position of the contractor or might strengthen its negotiating position, since each party knows that the other has a limited capacity to negotiate settlement agreements and alterations more generally. On the other hand, failing to make reasonable alterations, the authority might be obliged to terminate the contract, assuming breakings costs.

Finally, CFB expressly said that the interpretation put forward by the claimant would, in practice, prevent a settlement agreement from being concluded, which would be an interference with the law of obligations, a situation that considers is not permitted by the treaties. In a way, CFB expressed the assumption that the law of contracts and obligations is not within the ambit of procurement and is the national law that governs them.

[93] Ibid, 29
[94] See Arrowsmith (n. 5), paras 3-70- 3-80

The Court considered whether there was any difference since the alteration arose, not from the desire to renegotiate essential terms, but out of objective difficulties. The Court rejected that intention had any role in determining the validity of an alteration under EU law. "it must be held that neither (i) the fact that a material amendment of the terms of a contract results from the deliberate intention of the contracting authority and the successful tenderer to renegotiate the terms of that contract, but from their intention to reach a settlement in order to resolve objective difficulties encountered in the performance nor (ii) the objectively unpredictable nature of the performance of certain aspects of the contract can provide justification for the decision to carry out that amendment without respecting the principle of equal treatment from which all operators potentially interest in a public contract must benefit".[95]

The first part of the argument is straightforward: intention and even causes of an alteration are irrelevant to assessing its materiality. This is exclusively to be evaluated on its own, against the original contract, and under case law (or legislation).

The Court was even more explicit and said: "the deliberate intention of the parties to renegotiate the terms of that contract is not a decisive factor. It is true that the Court refers to such an (…) [in] the judgement of Commission v France (…). However, (…) that formulation related to the specific factual context of the case giving rise to that judgement. On the other hand, the question whether there has been **a material amendment must be analysed from an objective point of view**".[96]

The second part of the argument rejects that the unpredictable nature of the performance justifies materially amending the contract. The CJEU seems to be balancing in favour of the international objectives in the tension presented by the CFB. The flexibility that the body asks for to face the circumstances is expressly denied by the CJEU, favouring the principle of equal treatment. This, it is submitted, might be seen as a mere consequence of the fact that the CJEU is the judge of the international system and the international principles and objectives, and not the national ones. This is an understandable attitude if it is considered that the Court does not have the mandate to balance national procurement objectives against the international ones or prioritise the former over the latter.

[95] Frogne (n. 86) 32
[96] Ibid, 33

The CJEU referred that other possibilities granted to contracting authorities to achieve similar results. The Court referred that direct award was allowed in various cases, many of which are characterised by the unforeseeability of certain circumstances. The Court said that "It does not, however, appear that the situation at issue in the main proceedings corresponds to one of those situations", in a way excluding the use of direct award for the contract at stake.

The Court also mentioned another source of flexibility and said: "as is clear from paragraph 30 above, the contracting authority may retain the possibility of making amendments, **even material ones**, to the contract, after it has been awarded, on condition that this is provided for in the documents which governed the award procedure".[97]

In short, the Court explains that by curtailing the ability to conclude settlement agreements, it was not ruling out flexibility altogether from public contracts but channelling flexibility through ways that respect EU law. Non-expressly the CJEU seems to indicate that the settlement agreement is unnecessary, since there are different ways to achieve the result without hindering those objectives, and therefore, it was not proportionate.

Although this has been criticised for being anti-commercial, in the sense that it grants too much importance to the mechanisms of contractual modification and relies on the design of a "perfect contract".[98] It is submitted that by curtailing the possibility to make material alterations via settlement agreements, the CJEU not only guaranteed the respect of the principles of equal treatment and transparency[99] but also imposed a general and objective standard regardless of the mechanism being used to materialise the alteration, and also without considering the intention of the parties. In other words, a standard where the intention of the parties and the mechanism to make alterations are irrelevant from a legal standpoint, seems a positive step. By establishing an objective, all-encompassing test, it might be argued, that predictability increases.

[97] Ibid, 36
[98] Albert Sanchez Graells, 'CJEU ignores commercial reality and sets unjustified contractual boilerplate requirements for contractual modifications (C-549/14)' http://www.howtocrackanut.com/blog/2016/9/15/cjeu-ignores-commercial-reality-and-sets-unjustified-contractual-boilerplate-requirements-for-contractual-modifications-c-54914 accessed 22 November 2021
[99] Adrian Brown, 'Case comment, Whether a new tendering procedure is required when a public contract is amended under a settlement agreement: the EU Court of Justice ruling in case C-549/14 Finn Frogne A/S' [2017] PPLR NA5

First, by taking intention out of the equation, the standard, and the subsequent burden of proof, are reachable; demonstrating intention to renegotiate essential terms might be difficult. Moreover, it is submitted, that the achievement of the principles and objectives cannot be pursued only when parties intend not doing so but optimised to the largest practicable extent. Hence, even when no intention to breach principles existed but it happened, the law must react to guarantee the application and achievement of such principles.

Second, this all-encompassing test will catch situations where the settlement agreement might have been used precisely to circumvent the rules on modification: since they would not have been modifications, legally speaking. A "commercial decision"[100] excluding settlement agreements from the scope of the rules on modification would have opened the door and created incentives to use this mechanism precisely to circumvent the rules on modification.

Furthermore, this type of standard also might help avoid corruption; it is plausible to use a bigger project to exclude potential smaller tenderers and, after the award, scale it down, adjusting it to the real needs of the authority.

Nonetheless, the criticisms addressed to this all-encompassing standard are perfectly valid. It cannot be denied that curtailing the ability to conclude settlement agreements might place the authority in the dilemma of continuing in a non-functioning contract or the cost to achieve an alternative commercial relationship. It cannot be denied that the Court does give an over-important role to "contractual modification mechanisms" and seems to work in a "perfect-design-contract" scenario that generally does not exist, especially in the provision of complex services, precisely like IT.

To conclude, it might be said that in the design of these rules, a balance must be struck between different objectives and interests. Thus, the balance might differ depending on the interests and realities of a given country or international regulatory body that aims to limit the ability to alter public contracts. For instance, it seems more reasonable to have an all-encompassing test when corruption is an issue when transparency and integrity are generally favoured over flexibility and discretion. On the other hand, a strict test like the one designed by the CJEU does not seem to suit realities where public officers are generally trusted, where flexibility is generally

[100] In the sense of Sanchez (n. 98)

favoured over the risk of corruption, and where modifications are not in practice used to circumvent rules leading up to the award.

2.3. Rules on modification 'codified' in the EU procurement directives

The EU legislator decided to 'codify' the rules on modifications. Articles 72 of the Public Contracts Directive, 89 of the Public Utilities Directive, and 43 of the Concession Directive compiled the case-law referred to above. The three articles have very similar wording with slight variations, e.g., only the public contract directive includes a price limit of 50% to otherwise allowed "modifications".

This section will be mainly focused on the Public Contract Directives because it provides more rules and include all the rules incorporated in other directives. Thus, most of the analysis can be extrapolated to them. The Defence directives as it stands nowadays does not have rules on modifications and, most probably, only rules arising out from case law would be applicable.

From a legislative technique perspective, Article 72 has a structure that is, at least, atypical. Most commonly, exceptions are provided for only after setting out the general rule. However, Article 72 starts by providing exceptions rather than the general rule.[101]

Article 72-1 set out five cases in which "contracts and framework agreements may be modified without a new procurement procedure". This means that all other modifications require a new procurement procedure; thus, the general rule that prohibits modifications, as a rule, is provided tacitly within the announcement of exceptions.

Before embarking on the analysis of exceptions, it is relevant to mention that they do not seem to be exhaustive. The most authoritative voices[102] have agreed on this. Therefore, these cases are only "a statement of principle and not a rule without exception (…)".[103] Nonetheless, an opposite argument has been made[104] based on the wording of Art. 72-1, and especially Art. 72-5, which reads, "a new procurement procedure" (…) "**shall be required for other**

[101] Bogdanowicz, Piotr, 'Reappraising the Rules on Modifications of Public Contracts in EU Public Procurement Law' [2017], paper presented at the Public Procurement: Global Revolution VIII, Nottingham
[102] Treumer (n. 41) 'Contract changes (…) 148; Arrowsmith (n. 5) 602
[103] Treumer (n. 41) 'contract changes (…)', 148
[104] Bogdanowicz (n. 101)

modifications of the provisions of a public contract" "during its terms than those provided for under paragraphs 1 and 2", which seems to imply that the exceptions are *numerus clausus*.

Nonetheless, it is submitted that even if the legislator attempted to provide for exhaustive exceptions, the Courts might find cases where modifications are allowed even if they do not clearly fall within Articles 72-1 or 72-2. This might be the case when they do not impact the procurement objectives.

2.3.1. Review clauses, options, or contractual adjustment mechanisms

Article 72-1-a authorises modifications "irrespective of their monetary value" when they "have been provided for in the initial procurement documents in **clear, precise and unequivocal review clauses**, which may include price revision clauses, or options. Such clauses shall **state the scope and nature of possible modifications or options as well as the conditions under which they may be used**. They shall not provide for modifications or options that would alter the **overall nature** of the contract or the framework agreement".

The rationale for allowing alterations when they are a consequence of review clauses is that they might not raise transparency and equal treatment issues. When, as the rule requests, review clauses were provided for in the initial procurement documents, bidders and potential bidders had the opportunity to consider whether or not to participate in the procurement procedure and assess the impact that these clauses may have on contract performance.[105]

An argument can be made in the sense that the use of a clause initially provided for in the contract is simply the implementation of an existing commitment by the parties.[106] However, the opposite argument might also be made based on Edenred,[107] that treats the expansion of services pursuant a review clause as modifications rather than the implementation of the contract, as will be explained below.

[105] Smith (n. 8) 79
[106] Cfr. Arrowsmith (n. 5) 587; Smith (n. 8) 76
[107] Edenred v Her Majesty's Treasury and others, [2015] UKSC 45

In any case, it is the respect to the principles granted by review clauses in the initial procurement documents which explain this exception. This also explains, amongst others, the 'limitless' value of alterations that can be made pursuant review clauses.

At this point, a commentary is needed to highlight that there is a differentiation between variations within the contractual framework and variations pursuant review clauses. It might further be argued that this differentiation was created by EU law when included review clauses within the framework of contract modifications (implicitly stating that they were not variations within the contractual framework).

Despite criticisms that may arise from this, it is submitted that the classification of review clauses as modifications was needed to limit them with the aim of protecting procurement objectives, as explained below. Providing a general clause allowing modifications and using it arbitrarily raises the same concerns as not having it at all.[108] As Arrowsmith has clearly explained it:

> "a change cannot be permitted *merely* because it is contemplated in the contract in advance-that would provide *carte blanche* to avoid the constraints of the Directive by amending or extending any contract as soon as it is concluded by including a general clause that provides for adjustment of obligations by mutual agreement".[109]

In this line, it seems reasonable to impose some limits to review clauses aimed at respecting procurement principles. The drafting of the exception in the Directive reflects case law. In Succhi, the CJEU stated the possibility of making alterations under review clauses but clarified the need to provide detailed rules. Similarly, in Pressetext, the fact that price revision was made following a pre-specified index led the CJEU not to consider the alteration to be material.

Arrowsmith has mentioned that this provision "reflects the existing possibilities for adjusting the contract under express contractual clauses".[110] Nonetheless, some criticism might arise from the wording used by legislation, as will be explained in the following paragraphs.

[108] Hartlev and Liljenbøl (n. 41)
[109] Arrowsmith (n. 5) 587
[110] Arrowsmith (n. 5) 600

The Directive specified requirements for the valid use of review clauses, which apparently is based on a legal certainty argument. However, it is difficult to observe if these requirements effectively added something in terms of legal certainty.

"Detailed rules" was an open-ended standard used by the CJEU that allowed flexibility to determine on a case-by-case basis whether the rules provided in the procurement documentation were satisfactory in the light of procurement principles. In other words, what detailed rules meant could have been determined based on the clause as such in each case if the Directive had not introduced further rules. This exercise cannot be done currently with the same freedom.

It might be argued that clarity was introduced by specifying that the scope and nature of possible modifications or options should be provided alongside the conditions under which they might be used. However, the meaning of these concepts is open to interpretation. It is difficult to establish what is required to meet the standard of 'stating the scope and nature' or to what extent the conditions shall be specified. Therefore, it might be argued that the greater degree of legal certainty intended by the EU legislator through this wording was not (fully) achieved.

The increase in certainty is given exclusively by the fact that now conditions, scope and nature are part of the standard. However, "uncertainty" was transferred from one concept-detailed rules- to the three new ones. Arguably, conditions should be specified in a general and abstract manner; otherwise, the directive would be asking for an exercise of divination. Similarly, the scope and nature of the possible modification should be provided only in a generic rather than fact-specific manner. For instance, it might be argued, a clause could validly provide for price revision every five years and in cases of hyperinflation. It could hardly be argued that clauses need to provide for the causes of hyperinflation. Only such interpretation allows practical uses to review clauses as case law seemed to have pursued.

In addition, from case law and the directive, it seems that price revision clauses, when tied to an index, cast little doubt. Beyond that "certainty", there seems to be little difference in terms of legal certainty.

On a different matter, it is possible that legislation, in a sense, raised the standard to use review clauses. There may be a difference between asking for "detailed rules" and asking for all the requirements set out in the directive. It is obvious that only when the CJEU interprets the meaning of conditions, nature, etc., a conclusive position can be presented; notwithstanding, currently, it is possible to say that the threshold from the texts seems to be higher.

First, it might be said that more elements in the test make it stricter. From a procedural and practical perspective, if more requirements are needed, parties subject to challenges need to discharge the burden of proof for 4 or 5 elements rather than only demonstrate that rules were 'detailed'.

Second, these requirements incorporate certain elements that cannot be overlooked by Courts. In that fashion, the requirement to state the conditions is a requisite to set out future events that might trigger the use of review clauses. Case law always referred to events when the clause provided for these conditions; however, the CJEU never expressly requested the events to be set out in the clause. Arguably, the Directive extracted this requisite from the factual circumstances of the cases rather than Court decisions. For instance, it might be argued that a clause stating that the "contract might be expanded to deliver to other organisations, potentially resulting in significant growth of the outsourced operation" does not state under which condition such an expansion can be applied. Therefore, the review clause analysed by the UK Supreme Court in Edenred[111] might fall short under a strict application of the rules on modification of the 2014 Public Contracts Directive. Edenred, as explained below, was a case in which a Tax Free Childcare was included in an existing contract for services outsourcing concluded between the NS&I and Atos.

Similarly, the requirement to set out the scope and nature of the modification necessarily implies that review clauses need to spell out some elements of the alteration as such. In other terms, the clause would have to provide the factual circumstances that justify the modification and the legal consequences: the potential modification, or some of its elements.

Accordingly, a review clause, to continue with Edenred, that reads: the "contract might be expanded to deliver to other organisation, potentially resulting in significant growth of the

[111] Edenred (n. 107)

outsourced operational services. NS&I intends to structure the contract so that it may be used by other central government departments and by local authorities", clearly states the scope and nature of the modification.

As mentioned above, for review clauses to have some practical effects, it is necessary for the CJEU to interpret these requirements in a general and abstract rather than a strict, precise, and fact-specific manner.

Another requirement is that the modifications cannot alter the overall nature of the contract. Arrowsmith has explained that this requirement reflects the point above that "the extent and nature of the new work provided for in the adjusted arrangement may be such that there is a new contract requiring a new procedure, even if provided for in clear and detailed terms".[112] Thus, it seems inspired by the case Commission v. France.[113]

This requirement has been criticised because "as it may be difficult in practice to define what constitutes a change to the overall nature of a contract".[114] This criticism, it is submitted, does not take into consideration Commission v. France that can help determine its content. Furthermore, such a criticism disregards the need to impose limits to review clauses and options to prevent potential abuses, precisely as the one in Commission v. France.

No definition of alteration to the overall nature is included in the legislation. Arguably there are two different interpretations of this standard: First, it may be related to the concept of substantial modification, and second, it may be an independent concept not related to other legal standards in EU law. Arguments for both interpretations will be provided below.

It could be argued that this concept is related to the substantial change concept.[115] This would explain, for instance, that in Pressetext, it was said that a new contractual partner, as a rule, must be regarded as constituting a change to one of the essential terms "unless that substitution was provided for in the terms of the initial contract". Thus, it might be argued that the legislator is stating this within the referred "overall nature" but changing the wording. The CJEU might

[112] Arrowsmith, 2015 (n. 5) 590
[113] *Commission v France* (n. 66)
[114] Smith (n. 8) 174 and 294.
[115] Piotr Bogdanowicz (n. 101) 6

interpret that a modification does alter the overall nature when it is a substantial change under Art. 72-4.

On the other hand, it can be argued that the exceptions of Article 72-1, including the review clauses, are exceptions to the general rule that modifications amounting to substantial changes are prohibited.[116] Therefore, sustaining that the limit to a review clause is the substantial modification might prove unhelpful since it would have sufficed for the legislator to provide for a general rule stating that any non-substantial modification is permitted without express reference to review clauses.

Against the former argument may be sustained that the inclusion of review clauses and other "exceptions" are not exceptions as such, but only clarifications to the general rule to increase legal certainty. In other words, the general non-exempted rule would be that substantial modifications cannot be made without a new procurement procedure, and Article 72-1 provides for cases where those modifications are not substantial and are consequently permitted.

Nonetheless, the "exceptions" interpretation, this is that review clauses do allow substantial changes to the contract, better fits efficiency, delivery, and value for money. This is so since it provides a more flexible framework for alterations within the strict rules provided by legislation. Moreover, it is important to mention that this requirement seems to be 'codifying' Commission v. France, where the CJEU made no reference to the concept of substantial or material changes, even though it was already referred to in previous case law.[117]

The wording in the Draft of the Commission[118] seemed to treat review clauses as not being an exception since it contemplated that "Contract modifications shall not be considered substantial" for the case of review clauses. However, this wording was not adopted. Also, the Draft read for unforeseeable circumstances that "a substantial modification shall not require a new procedure", a clear exception to the rule. None of these wordings was kept, and the same standard (not to alter the overall nature) was adopted in legislation for both.

[116] This is the view of Albert Sanchez Graells, 'Modification of contracts during their term under reg. 72 public contracts regulations 2015' (How to Crack a nut, June 19 2015) http://www.howtocrackanut.com/blog/2015/06/modification-of-contracts-during-their.html accessed 23 November 2021

[117] See section 2.2.3.

[118] Commission, COM(2011) 896 final. Proposal for a Directive of the European Parliament and of the Council on public procurement. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0896&from=EN accessed 27 November 2021

Recital 109 for unforeseen circumstances analysed further below reinforces the "exceptions" interpretation defended in this thesis.[119] Nonetheless, Wall provides arguments for the link between overall nature and substantial modification, as explained below.[120]

2.3.2. Additional works, services, or supplies

Alterations are also allowed under EU law "for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor". In this case, legislation granted the flexibility to contracting authorities when supplies, works or services become necessary, and it is justified not to have a new procurement procedure.[121]

Additional works, as mentioned,[122] was one of the grounds for the use of a negotiated procedure without notice. Indeed, as Arrowsmith has concluded, "the 2014 Directive does not include the ground that allows the use of the negotiated procedure without a notice under certain conditions for additional works and services that were unforeseen and cannot be separated from other work or are strictly necessary to it".[123] However, "many, and indeed possibly all, of the situation falling within the ground in the 2004 directive are treated expressly in the 2014 directive's rules in Art. 72 on" modifications.[124]

The fact that rules on modification were included in the new wave of directives made it possible to include these grounds here. This reinforces Treumer's position in the sense that these rules were some kind of 'proto-regulation' on alterations but translated into the form of a ground for using a negotiated procedure without prior notice.

Additionally, the reasoning for relocating these grounds, it is submitted, derives from the very logic of the rules on modification and the CJEU rulings. "The key rule for determining when a

[119] See section 2.3.3
[120] See section 2.3.4
[121] Recital 108 Public Contracts Directive
[122] See section 2.1
[123] Arrowsmith (n. 5) 1082
[124] Ibid.

modification (…) constitutes a new contract requiring a new award procedure" is that "a new contract arises when the new provisions are 'materially different from the old' ones".[125]

Thus, valid alterations do not require a new award procedure since the adjusted contract does not materially differ from the original one, or in case they do, there is a justification for it. This depends on whether Art. 72-1 is considered as an exception to the prohibition of substantial modifications or as setting out cases where there are no substantial changes. Thus, if additional works (72-1-b) and unforeseen circumstances (72-1-c-i) would have been kept as a ground for the negotiated procedure without notice, they, implicitly, were being regarded by the legislator as new contracts: materially different from the original one, or without a justification for being entrusted via a modification to the original contractor. Such a treatment would contradict the logic of the whole Article 72 since more significant 'modifications' are considered as not constituting a new contract or being justified: e.g., substantial changes under review clauses.

It might be argued that the relocation does not have much of a practical effect, but it does help in terms of the coherence of the legal system. Perhaps the only practical effect is that modifications are not expressly included within the report for procedures of Art. 84, whereas circumstances of Art. 32 for negotiated procedures without a notice are included.

It must be mentioned that Art. 32 on the grounds for the use of negotiated procedure without a notice still includes grounds for additional supplies, services and works, 32-3-b, and 32-5. However, it is submitted that these grounds are reserved for when modifications are not permitted or not possible: specifically when the contract has been already terminated or completely performed, and a modification to an existing contract is not feasible. Thus, awarding to the original contractor repetition of works or services "indicated in the basic project, and the conditions under which they will be awarded" (32-5) might have been included for cases when the contract was already terminated. The same reasoning can be applied to 32-3-b on supplies. It shall be reminded that Art 32. provides for a 3-year window to conclude these types of "new contracts".

Article 72-1-b allows additional works, services, or supplies by the original contractor that have become necessary and were not included in the initial procurement. The circumstances

[125] Arrowsmith (n. 5) 580

are when the change of contractor (i) cannot be made or (ii) would cause significant inconvenience or substantial duplication of costs. Any price increase cannot be higher than 50% of the value of the original contract. This limitation only applies to the value of each modification in the case of consecutive modifications, but they cannot be aimed at circumventing the directive.

The impossibility to change contractor (i) can be by economic or technical reasons, and some examples are given: the requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement. The fact that economic considerations were included widens the situations in which this exception can be used. For instance, it might be argued that it allows the inclusion of works or services that became necessary for unforeseen but foreseeable circumstances.[126]

Similarly, the significant inconvenience or substantial duplication of costs for the change of the contractor (ii) encompasses a considerable number of cases. Thus, it might be argued that it would cause significant inconvenience and duplication of costs, to change (have a new) contractor for the construction of a pedestrian bridge once the construction for a road was awarded. Similar cases might arise for services and supplies that become necessary: if a new department within the same contracting authority is set up during the life of a contract for the supply of IT equipment arguably supplying the same equipment to the new department through a new procurement procedure would cause significant inconvenience and duplication of costs. It can be noted that the substantial duplication of costs might include transaction costs for a new procurement procedure: an interpretation that might extend the scope of this exception.

This exception, it is submitted, was included to allow modifications for unforeseen but foreseeable circumstances. In our understanding, allowing authorities to modify a contract for additional works, services, and supplies only when there are unforeseeable circumstances makes the system inflexible and, arguably, impractical, specially if the definition of unforeseeability provided for in the recitals to the directives is considered.[127] This inflexibility would bring serious difficulties: for instance, a modification for unforeseen but foreseeable circumstances that do not fall within the *de minimis* exception would have to be re-procured. This rule would create transaction costs, duplication of costs in the performance, delays in the

[126] Arrowsmith (n. 5) 602
[127] Cfr. 2.3.3 below

delivery, and is therefore not desirable. In this sense, it can be said that the exception provides for flexibility in the modification of public contracts and was, possibly, included precisely considering the national objectives of procurement: VfM and delivery.

Nonetheless, this rule is also one of the most critical in terms of procurement principles. In this sense, the only limit provided for in this rule is the 50% limit. This implies that if the authority can meet the requirements set out in the article, it can increase the value of the contract up to 50%. Arguably this high threshold (already included in Art. 32 of the 2004 Directive) would have attracted a different pool of bidders, at least in some cases.

At this point, it shall be mentioned that there are no clear reasons why the limit is 50% and not lower, higher, or variable. Although subject to criticisms, this is a valid legislative decision to limit alterations. This decision might be based on the idea that if the contract is altered up to 50% of the original value, there are fewer concerns in terms of the tenderers that could have been interested and the conditions that could have been obtained in the award procedure, e.g.., not many new tenderers would have been attracted for the contract as adjusted, and not considerable better terms would have been achieved. However, the argument that an increase up to 50% creates fewer equal treatment, competition, and transparency concerns might not be held before a rigorous analysis in certain markets and for certain contracts. Therefore, the rules could be variable depending on the market and contract value if better results are pursued on a case-by-case basis.

Furthermore, it is submitted, that the legislator could have provided for variable limits. Thus, it could have indicated that modifications would be valid if the change of contractor cannot be made or would cause significant inconvenience or substantial duplication of costs. And instead of a 50% limit, it could have provided that the consequent increase in price is “proportionate” to or “reasonable” against the “impossibility”, “inconvenience”, or the duplication of costs. A flexible rule of this type would have provided more flexibility for certain contracts that need so and a stricter test than the 50% for other contracts.

In this sense, it seems interesting to contrast this with the American Cardinal change doctrine, where a 175% accumulated of alterations was not considered cardinal, and lower alterations have been so.[128]

Despite this criticism, possibly the EU legislator considered all these factors and decided to have a 50% limit. With this, the EU legislator privileged legal certainty over flexibility in the system and over case-by-case solutions that could offer results more adapted to the contract and the situation.

For other systems, it could be a good idea to balance the different interests at stake, including the need for flexibility and legal certainty, in order to adopt a similar rigid limit or lean towards a variable one.

To counter the criticism just mentioned, it must be taken into consideration that this is an exception to the rule of the need for a new procurement. As an exception, it should be restrictively interpreted. Thus, the standards for when a change of contractor cannot be made or would cause inconvenience or duplication of costs must be carefully read to allow flexibility without granting space for competition, equal treatment, transparency and integrity concerns.

For instance, when the authority has awarded the contract to a preferred bidder (even if not illegally), it can then use this exception to increase the value of the contract. Moreover, the contractor might offer a bribe to procurement officers to be awarded a modification for additional services and price increases. In these cases, this exception might provide a halo of legality to such a modification. Similarly, the authority can have a lower price to award a contract to a bidder (that perhaps provides incompatible services, goods, or works with other bidders) and then addition it (up to 50%) to a price that would have been interesting to other bidders that did not participate in the procedure due to the original price.

Against the background, governments and international organisations might include this type of rule with clear limits and interpret them in a restrictive manner. This must allow flexibility and curtail the undesired practices just mentioned.

[128] See chapter 9

Finally, it is relevant to mention that, unlike exceptions 72-1-a and c, this does not include a limit not to change the overall nature of the contract. Nevertheless, it is submitted that this is implicit from the type of modification that exception b allows. When reference is being made to additional works, services, or supplies, it allows only the same type as the ones originally procured: more of the same. In this line, recital 108 of the Public Contract Directive states that this kind of modification is justified "in particular where the additional deliveries are intended either as a partial replacement or as the extension of existing services, supplies, or installations".

2.3.3. Unforeseeable circumstances that do not change the overall nature of the contract

Another ground that allowed the use of the negotiated procedure without notice was the presence of unforeseen circumstances. However, this was relocated within the rules on modifications seemingly to reinforce that only material alterations were considered new contracts requiring a new award.

The requirement set up in legislation is that the modification has been brought about by circumstances which a diligent contracting authority could not foresee (i) if it does not alter the overall nature of the contract (ii).

The law is about unforeseeable and not unforeseen circumstances.[129] The concept of unforeseeable circumstances seems to be somehow related to the concept of force majeure[130] or *cas fortuit*, that in several national jurisdictions includes a requirement of an unforeseeable event. Both force majeure and *cas fortuit* are cases that relieve from liability,[131] which puts the debtor in a non-performance situation[132] rather than breach of contract.[133] However, it might be argued that the national interpretation of the unforeseeable element within force or *cas* might be extrapolated to the interpretation of this provision.

[129] Cfr. Treumer 2014 (n. 41) 151
[130] Smith (n. 8) 133
[131] Joseph Chitty and H.G. Beale, *Chitty on Contracts*. (32nd Ed., Sweet & Maxwell 2015) Volume 1, part 4, chapter 15, section 8
[132] The consequence of a force majeure event depends on the legal system and the contract clauses if a FM clause exists. Thus, it might entitle to cancel the contract, excuse from performance in whole or in part, entitle to suspend performance or to claim extension for performance Chitty (n. 131) para. 15-152
[133] Fernando Hinestrosa *Tratado de las Obligaciones* (3 ed, Universidad Externado 2007) 790

There is limited case law and no definition in the law as to the content of this requirement, which might render important the concept of recital 109. From the recital is important to mention that the foreseeability takes into consideration the available means, the nature and characteristic of the project, good practices in the field in question, and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value.

This reinforces the idea that the concept of unforeseeable circumstances may have been taken from national laws and more precisely from foreseeability in force majeure or *cas fortuit*. Thus, French case law has considered that l'imprevisibilité (unforeseeability) must consider the circumstances of place, time, and by reference to a prudent and diligent person.[134]

Against the background, foreseeability is a concrete concept that needs to be determined on a case-by-case basis taking into consideration all the factors referred to in the recital. Perhaps the main factors would be the nature and characteristic of the project and the good practices in the field (sector) of the contract since these two elements can serve as a standard to measure whether the authority acted diligently or not to foresee the event.

It is difficult to think that the lack of means (technical or economical) or the relationship between the resources spent in preparing the award and its foreseeable value might be taken into consideration without reference to good practices in the field in question. The reference to good practices of the recital might be understood, it is submitted, as the state of the art in certain areas in the planning and budgeting of the contract. For instance, the good engineering practices for designing, planning, and budgeting a road/bridge construction.

Other requirement established in legislation is that the modification does not alter the overall nature of the contract. As mentioned,[135] this requirement might be interpreted as being related to the substantial modification concept, or as a different standard since 72-1 a-c are cases where even substantial modifications would be permitted. As also mentioned, Recital 109 provides for an argument that allows interpreting the overall nature as a higher standard. The Recital reads that an alteration to the overall nature happens "for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the

[134] See chapter on 8
[135] See 2.3.1 in this section

type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed". It might be argued that procuring something different implies completely changing the object of the contract, and the originally agreed delivery, thus, imposing a higher standard than that contained in Article 72-4.

This is also reinforced by the fact that this seems to be codifying the requirement spelt out in Commission v France, where the Court made no reference to the substantial modification concept, even though it was referred to in previous cases. Thus, it might be concluded that substantial modifications can be made for both unforeseen circumstances and review clauses and options, provided that these alterations do not change the overall nature.

Also relating to the overall nature, this appears to be the replacement of the stricter rule included in the 2004 Directive for the use of the negotiated procedure without notice; the requirement was to be "inseparable from the original contract".[136]

Finally, this exception provides for a negative requirement: any increase in price may not be higher than 50% of the value of the original contract, this limit applies for each modification in cases when there are consecutive alterations, and it cannot be used to circumvent the Directive.

Arguably, this exception looks for a balance between international and national objectives in procurement. It can hardly be denied that alterations made pursuant an unforeseeable event may prejudice international objectives on procurement.[137] Parties facing it are likely to renegotiate. And a direct negotiation clearly raises issues, at least, in terms of equal treatment and competition: in practice this may amount to directly awarding a contract with a value of 50% of the original agreement. Thus, the concern is precisely that parties can negotiate up to a 50% additional to the original price of the contract directly and with the only limit not to change the overall nature of the contract.

These concerns, as opposed to what happens with the exception of the additional work, decrease because they are only justified when there are unforeseeable circumstances. If this concept is interpreted based on the recital only when good practices in the field are not enough

[136] Treumer, 2012 (n. 41) 163; Treumer, 2014 (n. 41) 150
[137] Smith (n. 8) 136

to foresee the event, this ground can be adequately invoked to modify the contract. The occurrence of unforeseeable events, by its nature, is exceptional. It shall be noted that unforeseeable events are more likely to occur in more complex projects (as the recital mentions).

This exception, it is submitted, generates not only concerns but also advantages in terms of international objectives. For instance, in complex projects, unforeseeable circumstances and alterations are more likely to arise. In those cases, not to have rules allowing this type of changes might create a disincentive for bidders to participate in the procurement project. Thus, if modifications for unforeseeable circumstances were not allowed, the contract would need to be terminated and re-procured.[138] The administrative costs and investments made to be awarded a contract and to perform it are made by bidders under the expectation of earning the whole profit of the contract. An anticipated termination may deprive them from profit. In such a situation, bidders might be disincentivised from participating in the award procedure altogether when unforeseeable circumstances are likely to arise, and this leads to termination. This would be especially the case if the contract is being performed outside the home country of the contractor since it would not necessarily know the remedies allowed for anticipated termination in a different jurisdiction or be familiarised with the compensation scheme that might require litigation. Thus, the lack of this rule might also result in a prejudicial consequence for the creation of a single market, the removal of barriers to trade and competition.

Finally, this exception also brings concerns and advantages in terms of national objectives. Thus, precisely because there is direct negotiation between the parties with only 50% and the overall nature limits, the parties might agree on terms that are more favourable for the contractor. This would be against VfM, competition, integrity, and transparency. Nonetheless, not having this rule might also be prejudicial for authorities since each time an unforeseeable circumstance arises, and it does not fall within other exceptions, it would have to terminate the contract and re-procure it, with the transaction and duplication costs that this implies; payment of costs incurred by contractors and possibly a proportional profit is likely to be due. Moreover, it also implies a delay in the delivery.

[138] Smith (n. 8) 136

More serious are the cases where unforeseeable events are likely to arise in the life of projects by their nature, since in those cases, not just one or few but several events may be likely to occur. Thus, lacking this rule, the contracting authority might be faced with the absurd need to terminate and re-procure the contract several times. The law simply cannot have this practical effect.

However, the concern of equal treatment remains, especially because the contractor might negotiate terms that are more favourable than the ones initially awarded. Although this exception does not include an "economic balance" restriction, and in spite that under the arguments above, substantial changes are permitted under this exception, an argument can be made in the sense that the economic balance should not be changed, or more favourable terms agreed. This argument can be based on procurement principles: alterations must be allowed for unforeseeable circumstances; notwithstanding, such alterations must respect the principles of equal treatment, transparency, and competition. In practice, this might imply that most favourable terms for the contractor cannot be negotiated since it would undermine the award procedure and the competition, transparency, and equal treatment that it grants. A more flexible approach has been advocated by Arrowsmith, who argues that the principle of proportionality can be used to control potential abuses for modification under the unforeseeable circumstance exception.[139]

Additionally, it is interesting to observe that the Public Utilities Directive and the Concession Directives, when dealing with the concession of utilities (Annex II), do not include the 50% limit for modifications caused by unforeseen circumstances. Although it is impossible to ascertain the rationale for this, it is possible to appreciate that the limit was removed for the sector where initially l'imprevision was conceived. It is not impossible that the same rationale was taken into consideration to exclude the limit from the utilities sector since then a plus-50% change for unforeseen circumstances will require termination + re-procurement, which creates a risk in continuous delivery. It is also possible that the exclusion of the 50% relates to the more flexible rules generally established for contracting authorities under the Utilities Directive.[140]

[139] Arrowsmith (n. 5)
[140] Arrowsmith (n. 5)

A criticism against the 50% limit of the EU directive can be included. In case of war (or pandemics), for instance, the current rules of the Public Contracts Directive might lead to absurd results.

If an unforeseen circumstance demands a plus-50% adjustment, the authority would be required to terminate the contract and re-procure. Generally, this is not an undesired result. However, when the circumstance is 'truly exceptional' and urgent, the authority must terminate it. However, it might be re-procured using the negotiated procedure without prior publication.

The idea of having rules limiting modifications is to respect the competition, value for money, and the award procedure more generally. This explains that the standard for a modification to be substantial requires that the new condition, had it been included in the original procurement, 'would have allowed for the admission of other candidates or the acceptance of other tenders, or attracted additional participants". In this case the standard is inane because possibly it would have done so, but in practice after termination it will not be so since the contract can be re-procured under Article 32-C.

Thus, the objectives would not be achieved by ordering the termination of a contract and then authorising negotiated procedure without prior notice. In that case, the contractor will be paid for the work done and depending on the national law or the contract, for the whole profit or a proportion of it. In addition, the authority will need to pay the new contractor, and this will include, most likely, profit. Moreover, the new contractor can be the same contractor of the original agreement. This can also be advantageous since he is already aware of the technicalities of the contract, and possibly of the unforeseen and urgent circumstances. Thus, the contractor will receive double profit due to the stringency of the procurement rules.

Against the background, it is submitted, EU law might be well served by incorporating into the rules on modification the content of Article 32-C of the Public Contract Directives. In that case, authorities, when facing unforeseen events that are of extreme urgency, can modify an existing contract instead of having to terminate the contract and re-launch a procurement procedure using negotiated procedure without notice. This is so since both paths: modification and the new procedure, offer similar transparency and competitive levels (concerns).

However, from a national objectives perspective generally, it might be argued that it is cheaper to modify the contract since this does not require recognising two times the profit to contractors. It might also be argued that it is more transparent since at least the original contractor was awarded the original contract. This is true for cases when the second contractor is different. Moreover, arguably, modifications imply lower transaction costs when compared to termination plus re-procurement.

It shall be stressed that this must be kept as a possibility, not an obligation, for authorities since the original contractor might not be capable of performing the contract as the unforeseen events demand.

2.3.4. Where modifications, irrespective of their value, are not substantial

As indicated, Article 72 provides firstly for exceptions and only implicitly sets out the general rule. This is that modifications require a new award unless they are not substantial (Art. 72-1-E), or even if substantial (under the interpretation defended in this thesis), they fall within one of the exceptions of Art. 72-1 a-d.

Subsequently, a core element in the law of alterations is the concept of substantial modifications. This concept, as mentioned,[141] generally determines whether an altered contract requires to be re-procured. The basic rule mandates a new procedure when an altered contract is considered a new contract. The key rule[142] to determine it, is where the modification "renders the contract or the framework agreement materially different in character from the one initially concluded".[143]

The substantial modification test originated in the first cases of the CJEU on modification and was perfectioned in Pressetext, where three different circumstances were considered as material amendments. In any of those three events, "a modification shall be considered to be substantial", "without prejudice to paragraphs 1 and 2". The fact that they shall be considered substantial without prejudice to paragraphs 1 and 2 reinforces that even if substantial, modifications falling within those exceptions do not require a new award procedure.

[141] Section 2.2
[142] Arrowsmith (n. 5) 579
[143] Art. 72-4 Directive 2014

Having said that, the circumstances spelt out in Art 72-4 are:

2.3.4.1. *(a) that "the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure".*

This provision has several advantages. First, it considers that the condition would have allowed for the admission of other candidates. Therefore, it takes into consideration "potential competitors" as the standard for determining the substantial character of the modification.[144]

Second, it considers conditions that would have allowed for the acceptance of a tender other than that originally accepted. This case was considered in Pressetext with the same wording. Nonetheless, this requires further clarification. The provision must be interpreted as including the wording in Succhi; this is that the condition "would have made it possible for tenderers to submit a substantially different tender". Then, the first case is that tenderers might have submitted a different tender had the term been provided prior to the award procedure.

Furthermore, it seems clear that the provision was drafted bearing in mind that actual tenderers might have submitted a different tender. Nonetheless, it might be argued that this provision could also be interpreted as including events where the condition would have made successful a different tenderer based on their original tender. Thus, the meaning of 'tender originally accepted' would not be restricted to the possibility of submitting a different tender but include the possibility that a different tender would have been awarded the contract under the altered conditions. Although this interpretation might attract criticism, it is based on case law and contributes to the achievement of procurement objectives.

This interpretation is based on Wall, where the CJEU considered that the change of a subcontractor on whom (decisive) weight was laid during the award procedure would lead to the obligation to re-tender because of the material modification. In the proposed interpretation, the alteration of a condition on which (decisive) weight was laid during the award procedure

[144] Cfr. section 2.3.3

would require a new procurement since it would entail a material alteration. This would be so under the scenario that a different tenderer would have been chosen given the new conditions. For instance, if special weight was laid on sustainable criteria during the award procedure (it permitted to choose one tenderer over another one), but those obligations are later modified or excluded, it might be considered that this would have allowed for a tender other than that originally accepted, in the sense that another tenderer might have resulted awardee.

It is worth noting that the above interpretation seems necessary since no explicit rule on the current Directive prevents a decisive condition during the award procedure from being changed or excluded during the performance via alterations. Thus, if such a situation does not fall under one of the events in Article 72-4, the parties may undertake that course of action, which will entail a complete disregard for the result of the award procedure and the rules in Wall.

Arrowsmith seems to support this interpretation when she says that "there is a close analogy here with a rule that applies to changes during the contract award procedure, where changes that could have affected the outcome are not permitted without revisiting the earlier stages of the process".[145]

Finally, 72-4-a provides for a third event that shall be considered substantial: when the modification is to a condition that would have "attracted additional participants in the procurement". This event refers to the modification of a condition that would have made the contract attractive to a different pool of tenderers. It is submitted that the purpose of this rule is to honour the transparency and competition granted by the award procedure. Generally, tenderers determine their interest in participating in an award procedure by observing the notice. If what was advertised and procured changes, the respect for the obligation of transparency and the competition held are affected. This applies even when the contract is smaller than the one initially awarded, as in Frogne. In short, this rule was designed to protect the decision on whether to express interest or to tender that is made by tenderers based on the early stages of the award procedure.

[145] Arrowsmith (n. 5) 580

2.3.4.2. *(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement*

This event was introduced in Pressetext and it seems to draw inspiration from the French concept of "economic balance of the contract" that gives a right to compensation under certain grounds. Although it is impossible to demonstrate a direct link between concepts, it is submitted, there is a certain resemblance.

Arrowsmith has clearly spelt out the meaning of this rule "the price cannot be increased without the addition of corresponding obligations".[146] Similarly, obligations cannot be excluded without decreasing the corresponding price. This also resembles the rules on consideration in UK law.

Another case is to include "new services that are generously remunerated" for any reason, including "for losses occurred in the rest of the project".[147] Moreover, allowing changes that modify the economic balance would increase the risk of lowballing since contractors might tender artificially low, or in terms excessively beneficial for the authority, only under the expectation of achieving a beneficial renegotiation later. Thus, this rule does benefit not only international procurement objectives, but also national ones like keeping VfM and other conditions obtained through the award procedure.

Arrowsmith has pointed out that Pressetext can be helpful in interpreting this circumstance. It has been explained that "a change that alters the economic balance in favour of the authority will not *per se* be a material change".[148] Indeed, the provision clearly covers where the economic balance is changed in favour of the contractor. This is perfectly understandable considering the award procedure and its objectives. Thus, if the "best offer" was chosen after respecting transparency and competition, it might be argued that even better terms for the authority would not be detrimental to transparency or competition.

[146] Arrowsmith (n. 5) 584
[147] Ibid
[148] Arrowsmith (n. 5) 585

Arrowsmith has mentioned that "it seems that a change in the currency payment may often in practice be assessed as neutral in its effects as between the contracting authority and other contracting partners, as well as between tenderers".[149] Although this might often be the case, especially when the change in the currency of the contract is a consequence of the change in currency in the country, this case has to be assessed carefully under some circumstances. For instance, it is not uncommon that the currency of payment is factored in by contractors as a risk, or it is assessed and allocated as a risk of the contract; therefore, a change in currency payments might modify who bears the risk of, e.g., exchange rates. This, in turn, might be a fundamental risk which modification arguably might be considered substantial under the terms of this provision.

2.3.4.3. *(c) extends the scope of the contract or framework agreement considerably*

This condition includes cases where the modification in the contract, even in the price, does not fall within events included in point a. For example, it is possible that in some markets, a change of scope to increase the contract value by 100% makes no difference to who would tender. Moreover, some extensions in scope might make no difference in the terms on which tenderers would tender. Nonetheless, case law and legislation seem to give importance to the extent of the scope to guarantee respect to the award procedure.

Additionally, this event might have been included to lower the burden of proof for claimants, that might find it easier to demonstrate a "considerable extension to the scope" than to provide evidence that the altered contract "would have allowed acceptance of other candidates", "would have attracted more participants", or "would have allowed the acceptance of different tenders". Therefore, the procedural consequences of this event can be considered as a rationale for its inclusion.

Arrowsmith seems to share this perspective when she argues: "the purpose of this test is to ensure that a new award procedure is conducted where there are modifications that appear likely to have some impact on the outcome, without the need to actually show such a potential impact for the specific contract".[150]

[149] Ibid
[150] Arrowsmith (n. 5) 587

The meaning of a considerable extension was considered in Commission v. Germany.[151] In that case, the Court referred that a modification is substantial "when it extends the scope of the contract considerably to encompass services not initially covered". "In this instance, it is apparent from the information in the documents before the Court that the value of the contract relating to the operation of the ambulance station at Bed Bevensen amounts to EUR 674.719.92, which is considerably higher than the thresholds set under Article 7 of Directive (…)".[152] Therefore, the Court interpreted "considerably" in economic terms.

However, as Arrowsmith refers "Advocate General Trstenjak used a different reasoning, that there was a new contract based on the fact that there was a 15 per cent increase in value and 25 per cent increase in the area covered".[153]

On this basis, it seems reasonable to infer that the interpretation of "considerable" extension in the scope might be interpreted considering the economic impact and variation of the services or works added. Moreover, it might be argued that potential claimants might only be interested in remedies, including termination and re-procurement, when the extension represents a significant economic benefit (or might bring it). Therefore, not only the CJEU would have this into consideration, but also competitors might base their decision to submit claims on the same basis. And claims, as has been demonstrated throughout this section, shape case law.

This rule provides some flexibility for contracting authorities. For instance, the authority is entitled to shortly renew the existing contract to give time for a new one to be concluded. This is a case of foreseeable circumstances when the authority requires some flexibility in order not to affect the delivery of certain services. Although this event might also fall within the exception of the additional works analysed above; this rule reinforces the permission by not including those as substantial changes.

It might be said that non-considerable extensions under this provision might raise issues in terms of principles and objectives since it allows authorities to grant extensions. However, it is submitted that this is tolerated under EU law to grant flexibility and due to its "non-significance" in terms of impact. Moreover, if the extension falls within Article 72-4-A is to

[151] Case C-160/08, *Commission v Germany,* [2010] E.C.R. I-03713
[152] Ibid, 100
[153] Arrowsmith (n. 5) 583

be regarded as material regardless of this provision, which further limits it. These issues might be tolerated under a "proportionality" argument: it is not proportionate (necessary) to order a new award due to a minor impact on the procurement objectives.

2.3.5. De minimis

Art. 72-4-2 provides for another exception that allows modifying the contract without the need to hold a new award procedure; the *de minimis* exception. This provision explains that "without any need to verify whether the conditions set put under points (a) to (d) of paragraph 4 are met, contracts may equally modified" where the value of the modification is below both of the following values:

(i) The thresholds set out in Article 4.
(ii) 10% of the initial contract value for services and supply contracts and below 15% for works.

The negative requirement that the modification may not alter the overall nature of the contract also applies (iii). Here, unlike modifications of Art. 72-1 the value shall be assessed based on the net cumulative value of the successive modifications and not individually. This does not necessarily mean that the modification will be regarded as substantial since it would have to fall under Article 72-4.

The *de minimis* exception is another case in which alterations that impact the procurement objectives are tolerated given minor effects and the need to grant legal certainty and flexibility.

The fact that the contract might be modified for these values without verifying whether a substantial modification exists grants legal certainty to authorities. Consequently, they may modify the contract within those limits without having to consider whether the adjustment is or not substantial. Additionally, it provides flexibility and decreases transaction costs for potential modifications; the very analysis whether a modification is substantial creates transaction costs, e.g., fees from consultants.

Against the background, the *de minimis* modifications may be made even if it might be argued that the alteration might have attracted other candidates or that tenderers might have submitted different offers. Similarly, an argument might be made that a modification meeting the conditions of this provision cannot be regarded as a "considerable" extension of the scope of the contract under Art. 74-4-C. However, as explained, an alteration over the limits set out in this provision are not necessarily considerable since this must be demonstrated in the specific case. Nonetheless, it cannot be overlooked that a 15% increase in a services contract was considered substantial in Commission v Germany. Thus, although not without doubt, an argument might be made that modification over these percentages or above the thresholds might, *prima facie,* be regarded considerable under Art. 72-4-C.

Despite the benefits granted by this Article, it is submitted that some criticism arises because the Article clearly states that it is not necessary to verify whether the modifications falling within the provision changes the economic balance of the contract (condition c).[154] This, as Arrowsmith has explained, "open a significant loophole: it opens the possibility of the contracting authority offering consideration that is not in proportion to the extra obligations undertaken and so undermining the original competition, including for discriminatory reasons",[155] or, it can be added, for corruption reasons. Nevertheless, also as Arrowsmith has explained, this literal interpretation will possibly be read through the lens of the general principles of proportionality in the sense that if a change to the economic balance is permitted will require "that any such change is proportionate in the sense of being limited to what is necessary in light of the non-competitive conditions under which the contract modification is negotiated"[156].

Moreover, it is submitted that judges and enforcers would not tolerate this exception being used to circumvent the directive and to bend the award procedure. Therefore, a 9% or 14% modification in price in exchange for nothing would not be allowed since it is a direct affront to the award procedures and procurement objectives.

Finally, this exception provides for a negative requirement: the modification may not alter the overall nature of the contract. First, the fact that this limit is included here, where there is "no

[154] Arrowsmith (n. 5) 599
[155] Ibid, 599
[156] Ibid, 599

need to verify whether" there are substantial modifications reinforces the interpretation that the overall nature is a concept not related to the substantial changes, and those exceptions in Art. 72-1 and 72-2 are exceptions to the rule that substantial changes require a new procedure. Second, the interpretation of what an alteration to the overall nature might mean has been included somewhere else.[157]

A change to the overall nature that might fall within the *de minimis* exception might be when the contract is a works contract that is modified to be a supply contract where only the 10% is added to the original price, provided is below the thresholds. At first sight, the 10% variation would make it fall within the *de minimis* exception because Art. 72-4-A does not apply it could not be argued that the new contract, a services contract, would have attracted different candidates or that different tenders would have been accepted. Therefore, a limit to avoid such gross circumventions of the law was needed; such a limit is provided by the "overall nature" standard.

2.3.6. Can contracting authorities accept under-performance of the contract?

An interesting point that was included within the proposal of the Commission but not adopted by the legislator was the prohibition of resorting to contract modifications "where the modification would aim at remedying deficiencies in the performance of the contractor or the consequences, which can be remedied through the enforcement of contractual obligations" and "where the modification would aim at compensating risks of price increases that have been hedged by the contractor".[158]

It has been explained that "the background of this limitation is consideration of the interests of the potential competitors. The changes needed to settle disagreements on a possible breach or deficiencies in the performance will frequently be substantial because other tenderers would have been selected or awarded the contract had the terms of initial contract been changed from start".[159]

[157] See sections 2.3.1 and 2.3.3
[158] Article 72-7 of the Proposal (n. 118)
[159] Treumer 2012 (n. 41) 160

In other words, had the contractor offered at the award stage the "under-performance" at the prices it was awarded, it is likely it would not have been awarded the contract. First, its offer could have been rejected for not complying with technical specifications. Second, more obviously, other tenders would have been admitted under the new conditions since what is now "performed" could have been offered at the award stage. Additionally, other candidates would have been admitted had the conditions be the ones accepted as performance, for instance, because they could have guaranteed performance of the contract as performed but not as initially agreed. Third, it might be argued that other tenderers would have been interested had they known under-performance was acceptable.

Moreover, these alterations might be considered substantial since accepting under-performance necessarily impacts the economic balance of the contract unless a price reduction accompanies under-performance. This is so under the assumption that under-performance is cheaper than performance according to the contract, which creates an additional profit for the contractor.

In a similar fashion, where alterations aim at compensating risks of price-increase hedged by the contractor, it can be argued, the modification was not allowed since that would imply an impact on the economic balance of the contract. This, in consequence, would have been a substantial modification that would have allowed different tenders, candidates, and conditions.

The Proposal was criticised for being remarkably restrictive. It was considered that this was not in accordance with the approach in practice. Since contracting authorities will typically be flexible and open to modifications when there is likelihood of reasonable performance.[160] This tendency, it was argued, was "notable when the contract was complex and where the contract has partly been implemented, as the ultimate consequence of breach of contract is a change of the contractual partner, which can be very costly, cause great difficulties in practice and, typically, will be very time consuming".[161]

On this basis, it was argued that "it was highly likely that there is a larger margin for changes in case of deficiencies in the contract than in the standard scenario where this problem is not present".[162] An argument that will be criticised further below.

[160] Treumer 2012 (n. 41) 161
[161] Ibid
[162] Ibid

As was mentioned, these two prohibitions did not make their way into legislation. However, it is submitted, this does not mean that substantial under-performance can be accepted, nor the economic balance modified via compensation of risks assumed by the contractor.

Treumer, before Finn Frogne, remarked that the "current state of law on the issue is linked with considerable legal uncertainty after the deletion of the draft provision on the issue".[163] Nonetheless, it is submitted that the case introduced some legal certainty and put the law in a similar stage as if the proposal on this point would have been adopted by legislation.

It must be reminded that in Finn Frogne, it was decided that the intention of the parties, the mean for modifying, and even the causes were expressly ruled out as factors to take into consideration to assessing a modification. The CJEU was categorical when ascertaining that "a material amendment must be analysed from an objective point of view". Which, in the context of Finn Frogne, meant that the intention of the parties, the special circumstances, or the fact that the modification was made via a settlement agreement was irrelevant. This, it is submitted, implies that tacit substantial modifications via acceptance of under-performance are equally prohibited. Subsequently, alterations that do not fall within the exceptions of Art. 72 are not permitted.

This might give rise to criticisms for the lack of flexibility, the anti-commercial approach, the overconfidence in a "perfect contract" scenario, and for being against the approach in practice.[164] However, as it was argued,[165] an objective standard that disregards the intention of the parties and the mean for the alteration seems a positive step for several reasons.

First, it increases legal certainty for the parties involved that are aware that no substantial modification can be agreed upon by any means, and under any circumstances, unless duly framed within one of the exceptions. Second, an all-encompassing test reduces the risk of circumvention and undesired results. Allowing substantial modifications via accepting under-performance opens a door for circumvention since alterations that are not permitted for formal modifications would be permitted via this tacit modification. i.e., if the rules on modification

[163] Treumer 2014 (n. 41)
[164] Sanchez (n. 98); Treumer 2014 (n 41)
[165] See section 2.2.6

do not apply to accepted under-performance, parties might use it when a modification is not permitted under EU law.

Against this background, Treumer's argument that it is highly likely that there is a larger margin for changes in case of deficiencies in the contract than in a standard scenario must be rejected. EU law, it is submitted, cannot tolerate a larger margin precisely when the principles are already at stake: if there is underperformance, it is likely that there is a substantial modification for the reasons explained above. Therefore, it seems counterintuitive to allow more discretion when an impact to the principles already exists. On the contrary, and based on Finn Frogne, a case decided after Treumer's presented his case, it might be argued precisely that the margin is the same for under-performance, controversies, or similar management stage issues: only modifications under Articles 72-1 and 72-2, including non-substantial modifications, would be permitted.

Such an interpretation also has as rationale the protection of competition, transparency, and other procurement principles. It is submitted that such a rule would protect VfM since by "obliging" the contracting authority to receive what was agreed, it is guaranteed that the best VfM is not only promised but also delivered.[166]

This interpretation of the law is beneficial for EU objectives since the competition during the award procedure is truly honoured only when the best offer is not only promised but also delivered. An argument that might be extended for VfM. Indeed, as it has been explained "the overall compliance with the contract conditions set at the awarding stage, ensures a real and effective competition in the entire cycle of public procurement".[167]

Additionally, this general standard applying to acceptance of under-performance might help avoid corruption. For instance, in the absence of such a rule, the authority and the contractor might agree for the contractor to offer the MEAT provided that the authority accepts under-performance during the management stage. However, if such under-performance is unlawful, the door for corruption, additional earnings, and a cap of money for bribes will be closed.

[166] Racca et al (n. 7) 288
[167] Ibid

Moreover, by including acceptance of under-performance, a further advantage is obtained: competitors might help ensure that contractual conditions are honoured. This helps honour the competition held in the award procedure.[168]

An argument might also be made in the sense that allowing competitors to review the management stage, including performance in accordance with the contractual terms, reduces costs of supervision for controllers of the procurement system, including public enforcers. In other words, the position defended in this point is that considering that the law on alterations applies to under-performance will bring for a great part of the management stage all the benefits that the remedies system has already brought for the award stage. Nonetheless, also the undesired consequence may arrive.

All arguments mentioned above do not mean that the criticism that this test creates is not valid. As with the settlement agreements, the prohibition to accept under-performance curtails the ability to face management stage issues, especially in complex projects. These rules, furthermore, might place the authority in the dilemma of continuing in a non-functioning contractual relationship or assuming the cost of setting up an alternative commercial relationship.

Again, it might be concluded that in designing the rules on alterations a balance must be struck between the differing objectives and interests at stake. Thus, the balance will differ depending on the interests and realities of a given country or international regulatory body that aims to limit the ability to alter contracts.

For instance, it seems more reasonable to allow the possibility of controlling under-performance when corruption is an important issue. Similarly, this solution appears adequate when the benefits of a remedies system includes the possibility of controlling acceptance of under-performance overcomes the undesired consequences that might include delays due to litigation. On the other hand, a more flexible test might be appropriate when integrity is not a major concern and where flexibility and delivery are generally favoured over transparency and integrity, or simply where accepted under-performance is not generally used to circumvent procurement law.

[168] Racca (n. 7) 288

Similarly, as also pointed out for settlement agreements, a case-by-case test might also be contemplated. For instance, it might be possible to determine, considering the principle of proportionality, whether a material modification via accepted under-performance is justified in the case given the peculiar surrounding circumstances. These might include the need to favour flexibility and delivery despite the impact on procurement principles. This can be caused, for example, due to the sensitive nature of a project: e.g., water provision. Criticism may arise for this solution since the nature of the project might change the legal regime. This might be remedied by including contractual consequences for the under-performing contractor: e.g., reduction of incomes/profit.

Chapter 3: The Government Procurement Agreement Rules on Alterations

The second international instrument that is part of the analysis in this thesis is the Government Procurement Agreement. The starting point for analysing alterations to public contracts in the GPA is Article XV-7. This provision reads:

> "A procuring entity shall not use options, cancel a procurement or modify awarded contracts in a manner that circumvents the obligations under this Agreement".

This rule, although short, reflects the same principles that underpin the EU rules: that modifications to contracts could be used to circumvent Procurement rules. More precisely, modifications could be used to circumvent GPA obligations.

Although it is impossible to present all potential modifications that may be concluded to circumvent GPA obligations, some examples can be mentioned. Thus, Arrowsmith has highlighted that:

> "[A]mendments can be abused- often in collusion with the supplier concerned- deliberately to favour a particular supplier contrary to the prohibitions on discrimination and corruption. Thus the favoured supplier can win the competition conducted under the GPA rules simply by submitting a very favourable tender, but on the understanding that once the contract is awarded the contract terms will be formally

amended in the supplier's favour (for example, by a price increase or adding extra work for generous remuneration) [i.e. lowballing], or will not be properly enforced (for example, by allowing the supplier to provide sub-standard goods or services)".[169]

More situations could occur that fall under the examined prohibition. For instance, contract prices can be lowered for the contract not to meet the thresholds and after award modify it in a manner that do fall within covered procurement.

Such cases may also fall within the prohibition of Article II-6 that mandates: 'in estimating the value of a procurement (…) a procuring entity shall: neither divide a procurement into separate procurements nor select or use a particular valuation method (…) with the intention of totally or partially excluding it from the application of this agreement'. The post-award modification, nonetheless, would not be a division of procurement stricto sensu (under Art. II-6 meaning), and for that reason, Article XV-7 is necessary to encompass this and similar circumstances.

Also, the contract subject-matter could be altered in order not to fall within covered procurement and later altered to a subject matter that falls within the offered coverage. That would also be unlawful under Article XV-7.

More examples could be provided; notwithstanding, it is considered that the examples above suffice to demonstrate the point. Moreover, examples can be obtained from other chapters and sections of this thesis that amply demonstrate via country analysis and case-law inspection how this can occur. Nonetheless, it is important to regard that the prohibition exists and that similar principles and rules as the ones developed in EU law and national jurisdictions could also, at least theoretically, arise in the GPA framework.

However, as Arrowsmith has pointed out: "It is rather unlikely that any principles of interpretation will develop through panel rulings because of the very limited number of disputes that are referred to panels".[170]

[169] Sue Arrowsmith, 'The Revised Agreement on Government Procurement: changes to the procedural rules and other transparency provision' 285-336 in Sue Arrowsmith and Robert D. Anderson, eds. *The WTO regime on government procurement: challenge and reform*. Cambridge University Press, 2011, 319
[170] Ibid, 319

As Arrowsmith has also highlighted, the issue could be addressed before national review bodies dealing with challenges procedures under the GPA.[171] In that case, national Courts will apply Article XV-7 and enforce it whenever a modification is used to circumvent the Agreement. In this regard, it is submitted, national rules on modification to public contracts and particularly the rules limiting alterations may inform the interpretation of Article XV-7. In other words, a Court may be prone to find an Article XV-7 violation if the same modification is prohibited under its national law. This may be so since all analysed legal systems in this thesis limit modifications to guarantee respect for the procurement procedures, rules, and principles; this is, with similar purposes that GPA limits modifications. Therefore, if the underlying principle is the same, Courts may find it easier to apply their own national rules to GPA claims.

Moreover, national rules on alterations could also find their way into the GPA 'system' via the non-discrimination provisions. National rules on alterations must apply equally to all contracts falling under GPA in order not to violate National Treatment and Most Favourite Nation provisions. In other words, modifications prohibited under national law cannot be granted to national contractors without violating NT and MFN standards of protection. Similarly, if national competitors are protected by national law from alterations that undermine their interests, bidders from signatory parties to the GPA must be granted the same protection under those provisions.

Chapter 4: The OECD rules on alterations of Public Contracts

The third system to be analysed is the OECD. The first rule that arises from the OECD documents that have an impact on procurement comes from the OECD Convention on Combating Bribery of Foreign Public Officials in International Business. The convention, as an international treaty, is aimed at creating obligations to its signatory countries. However, indirectly it affects procurement and alterations of public contracts.

Article 1 of the convention obliges to take measures to establish that it is a criminal offence to offer, promise or give any undue pecuniary advantage to a foreign official. This "in order that the official act or refrain from acting in relation to the performance of the official duties, in

[171] Ibid, 319

order to obtain or retain business or other improper advantages in the conduct of international business".

This Article contains a negative limit to alterations since the norm aims at deterring companies from giving or offering "undue pecuniary advantages" to foreign officials in order to obtain or retain business or "improper advantages". Alterations, it is submitted, fall within this broad description. For instance, bribing to get a contract extension (retain business) or to obtain better economic terms by varying the economic balance via an adjustment (improper advantage) are conducts that fall within the article. On this basis, it might be argued that the Convention presents a negative substantive limit to alterations: they cannot be obtained via bribery.

Once this has been mentioned, attention should focus on the OECD Recommendation and other supporting documents. As an anticipated conclusion, it must be mentioned that in the Recommendation no provision expressly addresses alterations. However, from the scope of the Recommendation, it can be concluded that some obligations might arise, as will be explained below. Additionally, the checklist that supports implementation and other OECD documents expressly mention alterations and some limits to them.

4.1. Recommendation on Integrity

Most rules limiting alterations to public contracts derive from the treatment of integrity in different OECD documents. Due to the place that the Recommendation has on the "OECD procurement system", the analysis will start from there and then pass on to other documents.

This document "RECOMMENDS that Adherents preserve the **integrity** of the public procurement system through general standards and procurement-specific safeguards".

Given the scope of the Recommendation, it might be ascertained that the principle of integrity must be respected throughout the whole procurement cycle, including alterations to public contracts. Additionally, if the Convention on Bribery as interpreted above is considered, it seems persuasive that integrity shall also encompass alterations within the OECD procurement system.

However, no further guidance is found on these topics. Some other soft-law rules are relevant and seem to present more precise parameters for alterations. For instance, Recommendation III.ii. reads, "Implement general public sector integrity tools and tailor them to the specific risks of the procurement cycle as necessary". This means that integrity tools must be implemented and tailored to the specific risks to integrity that are present in alterations of public contracts.

The types of risks present in the alterations of public contracts are indicated in another OECD document. In the "Tool: Corruption risks associated with the different phases of the procurement cycle"[172], risks associated with the post-award stage are the "Substantial change in contract conditions to allow more time and/or higher prices for the bidder" and "Product substitution or sub-standard work or service not meeting contract specifications".

Although no precise rules can be derived from these two "risks", it seems clear that their inclusion in that document reflects the need for tools tailored to address them.

An argument might be made that a rule to tackle the first risk might be the prohibition of substantial alterations in contract conditions to allow more time and/or higher prices for the bidder. In the first place, it seems relevant to point out that the OECD uses the wording "substantial changes", which resembles the EU substantial modification standard. In this line, it is important to consider that not all alterations can be proscribed since this will hinder flexibility in a way that can make the contract impossible to perform and consequently will force termination and re-procurement. Thus, the OECD seems to be drawing from EU law experience on how to strike a balance to limit alterations and allow efficiency.

The second risk about substitution or sub-standard performance falls within the concept of alterations adopted in this thesis. Again, appropriate tools should be tailored to tackle this risk. It might be argued that transparency on the performance of the contract, a wide concept of alterations, and the right procedural rules might help tackle it.

[172] OECD, *Tool: corruption risks associated with the different phases of the procurement cycle*, <http://www.oecd.org/governance/procurement/toolbox/search/corruption-risks-associated-different-phases-procurement-cycle.pdf> accessed 25 November 2021

In this manner, a rule might exist limiting alterations, which shall include product substitution and sub-standard performance, even if those are a consequence of acceptance by the contracting authority and not formal agreements. This rule shall be accompanied by adequate transparency and procedural rules allowing competitors to challenge these implicit alterations. Again, EU law offers a good example of how this might be dealt with.

Other pieces of literature reinforce the findings of the OECD in terms of the risks to integrity in the alterations to public contracts. For instance, evidence has shown that alterations to public contracts might be a good proxy to detect corruption in public contracts since through elimination of competition and post-award alterations, a cap of money to finance corruption can be created.[173]

Additionally, there are other risks that arise out in relation to alterations of public contracts. For instance, opportunistic behaviour by the parties to the contract, including lowballing with the expectation that they will be able to renegotiate.[174]

To conclude, it might be argued that integrity tools must consider all these factors associated with alterations of public contracts. Amongst the several tools provided in the Checklist there are some that are considered of core importance:

- "Mechanisms that ensure the independent responsibility of at least two persons in the decision-making and control process - the four-eye principle (double signatures, crosschecking, separation of duties and authorisation, etc.),

- "Systems of multiple-level review and approval of procurement process stages (reviews by independent senior officials independent of the procurement and project officials or by a specific contract review committee process)"

- The systematic recording and tracking of key decisions (e.g. through electronic systems)"

[173] Mihaly Fazekas, I.J. Tóth and L.P King, 'An objective corruption risk index using public procurement data' [2016] European Journal on Criminal Policy and Research, 22(3), 369, 373
[174] Luis Guasch, *Granting and renegotiating infrastructure concessions: doing it right*. (The World Bank 2004)

It might be argued that there is a strong case in the sense that soft-OECD-law requires the existence of mechanisms that ensure independent responsibility of at least two persons in the decision making and control process of adopting alterations to public contracts. Also, it might be argued that it provides for a system of multiple-level review and approval of alterations.

This conclusion is reinforced by another OECD document published in 2008 "Enhancing Integrity in Public Procurement: A Checklist". This document does include certain "precautionary" measures relating to "control change in the contract".

Although this was published in 2008, before the 2016 Recommendation and the implementation checklist, it is arguably still relevant since it is still available on the Relevant tools on the OECD website[175], and it provides further elaboration of integrity specifically on alterations.

This document identifies risks to integrity in each phase of the procurement cycle and presents some precautionary measures to face them. Relating to alterations, the document reads:

Control change in the contract by:

a) Ensuring that contract changes that alter the price and/or description of the work are supported by a robust and objective amendment approval process;
b) Ensuring that contract changes beyond a cumulative threshold are monitored at a high level, preferably by the decision-making body that awarded the contract;
c) Allowing contract changes only up to a reasonable threshold, and changes that do not alter the quality of the good or service. Beyond this threshold, a review system could be set up to understand the reasons for these changes and consider the possibility to re-tender;
d) Clearly tying in the variation with the main contract to provide an audit trail; and
e) Recording changes to the contract and possibly communicating them to unsuccessful tenderers as well as other stakeholders and civil society.

The first measure is to ensure a robust and objective amendment approval process for changes that alter: i) the price and/or ii) the description of the work.

[175] OECD, *enhancign integrity in public procurement: a checklist,* <http://www.oecd.org/gov/41760991.pdf> accessed 26 November 2021

Thus, the measure seems to be addressing the two risks identified by the OECD: increase in price and product substitution or sub-standard work. Changes allowing more time are not included. Moreover, it is important to highlight that the OECD does not rely on substantive rules limiting alterations to face these risks. Unlike the EU, the OECD relies on institutional and "procedural" rather than substantive rules. Namely, the existence of a robust and objective amendment approval process for these changes.

This does not mean that the OECD approach is incompatible with the existence of substantive rules limiting alterations. First, the OECD published this document in 2008 based on a workshop held in 2006. Therefore, most likely, Pressetext, which was decided in 2008, was not considered. Second, the existence of a robust and objective approval process almost presupposes the existence of substantive rules. These rules would then be taken into consideration by the authority to approve or reject the alteration.

It might also be argued that the only aim of this approval process is to give transparency to the alteration and deter public officers from corrupt practices. Therefore, the only role of authorities would be to verify that there is no suspicion of integrity concerns. Nonetheless, such a process destituted of substantive rules, and with "corruption suspicions" or integrity concerns as only standards would open the door for arbitrary decisions and would impact legal certainty. Against the background, it is submitted that substantive rules are not only compatible with institutional or procedural rules, but it might be argued that they are a good practice to be combined with the procedural limits.

The second measure to tackle integrity concerns in alterations is high level monitoring of cumulative changes beyond a certain threshold. Again, this monitoring does not provide the substantive reasons that the "monitory body" must take into consideration, but only the existence of such monitoring. Again, these rules seem to require further guidance as to what kind of alterations shall be allowed "beyond that certain threshold", or, more clearly, what type of monitoring should the authority undertake. And even what the cumulative threshold is. It is submitted that the type of monitoring might consider substantive rules like avoidance of substantive changes or sub-standard performance. In this case, arguably, the OECD uses this general approach to leave a wide regulatory space for adherents.

Perhaps the strictest measure included in this document is the one referred to in letter C. It requires changes to be limited by a "reasonable threshold". This threshold is not set up by the OECD. EU law offers such a threshold for a certain type of modifications, i.e., 50%. This might be an "indicative" threshold taking into consideration an experienced system.

However, unlike EU law, this threshold is not an unmoveable limit. The measure provides for the possibility of a review system for changes beyond this threshold. This review system would allow considering the reasons for these changes and the cost of re-tendering.

The criticism pointed out in the EU section for the 50% limit as arbitrary would disappear by having this kind of "beyond threshold" flexibility. Thus, a general rule granting legal certainty would be in place: i.e. a 50% limit, but flexibility would be enhanced in exceptional cases.

Although legal certainty might be affected, it is considered a desirable measure, especially under exceptional cases where re-tender might not be justified or might not be necessary. As mentioned, this might be the case: i) when there is no other tenderer in the market; ii) no other tenderer would be interested in the contract as altered; iii) there is no impact on the economic balance of the contract in favour of the contractor as to create integrity concerns; iv) the costs of termination and re-tender are not reasonable in the face of the value of the adjustment and the contract as a whole.

The OECD "model" is more flexible than the EU one in this sense and provides a very important an innovative solution: a review system. Against the background, it is submitted that for the review system to guarantee efficiency in a manner that respects other objectives of the system, it is necessary to consider re-tendering. In deciding this re-tender versus alteration, several factors can be taken into consideration: the possibility to independently re-tender the alteration; the transaction costs of both methods of provision; the effects on competition of the adjustment; the compatibility needs between the original project and the "altered" one; the existence of competition "subrogates" like benchmarking, amongst other. Another very important element to consider is the potential existence of low-balling occurring via the alteration.

Measure C also prescribes that there should be control by allowing only changes that do not alter the quality of the good or service. Therefore, sub-standard or substitution shall also be

generally prohibited. Nonetheless, it is submitted that minor deviations from the contract conditions might be permitted, and only "substantial" alterations shall be restricted. An over-zealous control by tenderers or competitors might turn the contract management into a battlefield against the interest of the authority, including efficiency, timely delivery, and value for money.

D and E are "transparency/publication" controls to adjustments and will not be analysed for being beyond scope of this thesis. However, it is worth noting that the OECD demands a clear trail and record of contract variations, which, as mentioned, is a fundamental requisite for the correct functioning of other rules.

4.2. Recommendation on Efficiency

Regarding Efficiency, it is recommended, "that Adherents develop processes to drive efficiency throughout the public procurement cycle in satisfying the needs of the government and its citizens". It continues in Paragraph VII.ii that to this end, Adherents should "implement sound technical processes to satisfy customer needs efficiently" and "take steps to ensure that procurement outcomes meet the needs of customer".

Amongst the steps to meet procurement outcomes, the Recommendation mentions "ensuring adequate resources and expertise are available for contract management following the award of a contract". This is interpreted as covering the whole management stage, including alterations.

When elaborating on this requirement, the Checklist states that this can include: "Applying the provisions of the legal framework with regard to contract management, including penalties for delays, termination of contracts".

As mentioned, the OECD is concerned with avoiding substantial changes to allow higher prices or more time, as well as with product substitution or sub-standard works or services. Those integrity concerns have equally an impact on a different objective of the system: efficiency.

Thus, when extensions are granted, more time would be required to meet the public need. Similarly, when the legal framework is not fully applied to contract management and sub-standard performance is accepted, efficiency is affected since the lower quality of the performance necessarily implies that there is a lower quality of public services or of public needs' satisfaction, provided that the lower quality performance does meet the public need altogether.

This is a case when the same measure can impact different objectives, and the protection of one objective might imply the achievement of others.

It must be mentioned that there is an assumption in these 'rules': that by implementing the contract as agreed, efficiency would be achieved. This assumption arises, it is submitted, from the fact that the contractual terms are generally a consequence of a competitive award procedure. Therefore, the best available terms, VfM including time, and the most efficient solution that the market can offer are presumed to have been contracted.

Chapter 5: The World Bank Rules on alterations to public contracts

The involvement of MDBs in public contracts creates a multi-layered relation or several relations. Thus, there is an agreement between the respective MDB and the borrower country or state agency and a different relation between borrower and contractor.

The scope of this thesis is the alteration of public contracts concluded between contracting authorities and contractors. Consequently, the relation that is relevant for the purposes of this thesis is that of the borrower and the contractor. However, the elements that deal with the alteration to that agreement arise directly from the documents that govern the relation between MDBs and authorities.

It is necessary to proceed to investigate the content of the World Bank Regulations to observe whether and how they deal with alterations to public contracts. The current World Bank framework includes a full document on contract management that contains the Contract Changes principles. Furthermore, the Current World Bank Regulations include Annex IX on Contract Conditions in International Competitive Procurement. Annex IX says: "the Borrower

shall use the applicable Bank SPD". Standard Procurement Documents (SPD) are held, and regularly uploaded and amended by the Bank on its website.[176]

In that manner, attention should focus on the SPDs. However, before embarking on the analysis of the SPDs, attention will be devoted to Annex IX (5.1) and the Contract Management Guidance (5.2).

Once these two documents have been examined, attention will then focus on the SPDs. The Bank has several SPDs for different types of contracts. As will happen with other systems, attention will focus on a few of these documents in order to extract their main features and the overall policy of the institution. Otherwise, this thesis will become an in-detail analysis of contract clauses that slightly vary depending on the type of work, object, or contract. For these reasons, attention will be focused exclusively on the Contract Conditions for Works (as opposed to work-specific contract conditions) and for Goods contract.

5.1. Procurement Guidance: Contract Management Practice in the World Bank[177]

In the document entitled Contract Management Practice the World Bank recognises the need for changes and explains that "[a] one-off straightforward purchase of Goods, for example, is unlikely to require changes to the contract (unless there has been an error) compared to a complex infrastructure contract which may require a number of changes as works progress".[178]

The World Bank adopts a procedural approach to alterations, in its view "the key to managing change is to establish robust change management procedures and to ensure that these procedures are followed". Thus, in the procedural/substantive spectrum of approaching contract alteration, the world bank leans towards the former.

Moreover, the Bank identifies some good practices on the matter. It recommends establishing a formal and documented change management process that is consistent with the scope of the

[176] World Bank, *Project Procurement - Policies, Guidelines, Documents for Projects Before July 2016*, <https://www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-policies-and-guidance> accessed 26 November 2021

[177] World Bank, *Procurement Guidance: Contract Mangement Practice* <http://pubdocs.worldbank.org/en/277011537214902995/CONTRACT-MANAGEMENT-GUIDANCE-September-19-2018-Final.pdf> accessed: 26 November 2021

[178] Ibidem, 37

contract and contractual change management procedures as early as possible. It also states that appropriate forms and clear procedures for requesting a change proposal, issuing a change order, estimating the change, and approving the proposal shall exist. It also recommends for people involved in contract management to be familiarised with the procedures, documents, etc, relating to contract alterations. Parties to the contract are also recommended to ensure timely communication of change information to the relevant people and to identify areas susceptible to change, evaluate risk, and manage those sensitive-to-change areas.

On more 'technical matters' the Guidance recommends to "make sure all relevant factors are considered when assessing change proposal (e.g. in terms of technical, quality, impact and risks (including on ESHS, if applicable), time and cost); monitor the change management process to ensure that proper procedures are being followed; ensure that changes are captured as Addenda to the contract, and approved at the appropriate level specified in the contract; do not order or execute changes without the appropriate documentation. The parties shall also comply with the Bank's requirements for prior review to changes, and "adhere to the Bank's requirements where the changes relate to a contract with a firm that has been sanctioned by the Bank".

Records of all changes and their reasons shall be kept, and at contract close-out, an evaluation shall be made assessing the changes and their impact on the contract cost, schedule, and performance for future use as lessons learned.

All mandates set out above are important and reveal the increasing importance of contract alterations in international regulatory frameworks. The World Bank, in sum, requires legal certainty, clear procedures, standard forms, and recording of changes as well as post-contract evaluation of the contract changes.

An interesting practice spelt out in the document is the identification of areas susceptible to change. This is the only time in this thesis where this practice is expressly covered by any regulation and as such, is relevant to stress it since it may be a good practice to follow for other regulatory frameworks both national and international.

Finally, there is an independent section dealing with contract changes with sanctioned firms and individuals. This section reads:

> (…) the Bank does not finance any new contract, or any amendment introducing a material modification to an existing contract, where the contract is with a firm or individual that has been suspended or debarred by the Bank. This applies on or after the effective date of suspension or debarment. The key phrase for such contract amendments is "material modification." What constitutes a material modification needs careful assessment on a case-by-case basis.

This is relevant for several reasons. First, the Bank ranks new contracts and amendments introducing a material modification to an existing contract in the same category and consequently in none of those cases the Bank will finance it.

Moreover, the Bank is clear by ascertaining that the key phrase for such contract amendments is 'material modification'. Thus, the Bank introduces EU parlance into the World Bank regulatory framework on Contract Alterations. Furthermore, it stresses that what constitutes a material modification needs careful assessment on a case-by-case basis.

It is likely that EU law may be relevant in orientating the World Bank approach to Contract Alterations. This may be so due to the similar wording of the standards. Moreover, for its location and tradition US law and particularly Cardinal Changes cases may also inspire the Bank's approach.

Before concluding this sub-section, a commentary must be made relating to the material modification test. Material modifications are not generally forbidden in the World Bank regulatory framework, unlike EU or US law. In the World Bank framework, material modifications are forbidden just when they are concluded with a sanctioned firm or individual.

In this manner, a similar standard as the one used in other frameworks is transposed by the Bank for different purposes (a frequent phenomenon in this area of law, as will be seen throughout this thesis). Thus, the test is not aimed at protecting competition or competitors, nor the award procedure, but to make enforceable and more robust the sanctions system of the World Bank.

5.2. Annex IX of the World Bank Regulations on modifications and adjustments to Public Contracts

The World Bank regulations foresee that when no Standard Procurement Document has been issued, another internationally recognised standard condition of contracts acceptable to the Bank shall be used. Moreover, if neither SPD nor other internationally recognised documents acceptable to the bank are available, the borrower shall include at least the provisions contained in Annex IX.

Although it is unclear how often no SPD or other internationally recognised documents acceptable to the bank are available, it is submitted that the clauses included in Annex IX are relevant since they reveal what are the objectives of the Bank regarding alterations of contracts when they do not refer that decision to other bodies, e.g., FIDIC.

Annex IX to the Regulations order that Contract Conditions shall stipulate, amongst others, Force Majeure, Value Engineering, Liquidated Damages and Bonus Clauses. However, more important for the purposes of this thesis, the Regulations order that "[t]he contract shall clearly indicate the procedure to address change orders or contract variations".

Although short, Regulations aim for the borrower (the contracting authority) to keep the right to unilaterally modify the contract. This explains the use of the American terminology "change orders". This provision, as the Guidance analysed above, adopts a procedural approach to contract Changes and does not impose any limitation on the right of the parties to modify.

In a different provision, Regulations deal with Price Adjustments. Provision 2.17-2-19 includes the rules to deal with them. Thus, provision 2.17 simply refers that the contract shall state either that: "a. contract prices shall be fixed; or b. the contract price adjustments will be made to reflect any changes in major cost components of the contract, such as labour and materials". The latter will be the FIDIC choice, as explained below.[179] More could be said about price alterations, but as mentioned in the introduction, they are not part of this thesis.

[179] See section 5.3

In general, it may be said that Regulations do not go into the details on how to deal with contract alterations. However, it is important to point out that they are clear that borrowers must deal with contract alterations. Thus, in the decision on whether to deal or not with contract alterations, the World Bank decided that contracting authorities shall deal with them. This decision seems to be inspired by legal certainty considerations. That would explain the laconic character of the provisions: it simply orders to deal with contract changes without imparting further instructions, and with Price Adjustments simply stating that the formula, indices, and base date shall be included without determining what elements the formula shall comprise, or the precise types of indices. From which it can be deduced that the most important circumstance is to deal with them and create legal certainty letting authorities the freedom to decide the way they will be governed.

Another element of remark is the means by which they must be dealt with, via contract clauses. However, this may not be a principled-based decision but simply a consequence of the fact that MBDs have no different legal instrument to "interfere" in the relation between borrower and contractor.

5.3. The FIDIC documents on contract alterations applicable because of the World Bank SPD

Once the analysis on the Regulations and the Guidance have been concluded, it is necessary to proceed to the examination of the SPD; this is, the first option for the Bank to govern the borrower-contractor relation. Although there are several SPDs, the only reference to a full Contract Standard Form is the one on Works Contracts. This SPD reads as follows.

> "This revision dated July 2019 applies the "General Conditions" which form part of the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Second Edition 2017) published by the Fédération Internationale des Ingénieurs – Conseils (FIDIC)."

Therefore, the analysis must turn attention towards the FIDIC standard conditions of contract, and particularly towards their clauses devoted to alterations of public contracts. The FIDIC Conditions of Contract for Construction (hereafter the Red Book) dedicates an entire section

to Variations and Adjustments. This document specifies that variations may be initiated by the Engineer by instruction or request for the contractor to submit a proposal. Thus, the FIDIC contract adopts a procedural approach to alterations and gives the Engineer (a person appointed by the Employer to act as such) the faculty to request or instruct the contractor to submit proposals to variate the contract.

Moreover, the FIDIC Conditions indicate that the "Contractor shall execute and be bound by each Variation". Thus, it may be said that this Standard Document guarantees the right to unilaterally modify the contract. Nonetheless, as with other standard documents analysed further below,[180] the contractor may be excused from performance.

The FIDIC Conditions allow the following path: "the Contractor gives notice (…) stating (…) that the Contractor cannot readily obtain the Goods required for the Variation. Upon receiving this notice, the Engineer shall cancel, confirm, or vary the instruction".

Therefore, the contractor, under certain circumstances, may be excused from performance. However, the Engineer may also confirm the Variation even after such notice. Nonetheless, it seems clear that the Engineer should only confirm the Variation when the notice and rationales are not enough to excuse performance; otherwise, the Engineer or the Employer may be exposed to a breach of contract claims, or, at least, the contractor can be excused from performance (discharged) due to force majeure/impossibility reasons.

Condition 13 sets out the type of changes permitted under a contract concluded using the FIDIC Conditions for Construction Contracts. They include quantity and quality changes, changes to other characteristics of any item of work, etc. Condition 13 encompasses a wide range of possibilities for the Engineer to order variations to the contract. It allows changes to the timing of the execution and additional works or services necessary for the work.

The conditions also restrict the ability of the contractor to undertake varied work to the approval of the Engineer since it "shall not make any alteration and/or modification of the Permanent Works, unless and until the Engineer instructs or approves a Variation".

[180] See Chapter 7.1.

The FIDIC contract includes a Value Engineering clause. This type of clause aims at encouraging and incentivising the proposal of Changes to the Contract (including works or method of performance). This Clause is required since cost-savings changes may be disincentivised because they may, absent this clause, entail a profit drop for the Contractor. Although interesting, they do not fall within the thesis scope.

Condition 13.3 determines a Variation Procedure. The condition states that if the Engineer requests a proposal, the contractor shall respond in writing as soon as practicable. The Contractor's response may be either giving reasons why he cannot comply or submitting a response that contains: a description of the proposed work and a programme for its execution; the Contractor's proposal for any necessary modification to the programme (…), and to the Time for Completion; and the Contractor's proposal for evaluation of the Variation.

As soon as practicable, the Engineer shall respond with approval, disapproval, or comments to the proposal. The clause also orders the Contractor not to delay any work whilst awaiting a response. Furthermore, the instruction to execute a Variation, with any requirement for the recording of costs, shall be issued by the Engineer to the Contractor. Thus, the unilateral seems a possibility if the text of the Standard form is observed.

Finally, Condition 13 stipulates that each Variation shall be evaluated in accordance with Clause 12 (Measurement and Evaluation) unless otherwise instructed or approved by the Engineer. This as well as conditions 13.5-13.8 fall within the economic consequences of alterations in the law that are not part of this thesis' scope.

Finally, Condition 13.9 determines the way changes in cost must be faced. This provision states that if it applies, "the amounts payable to the Contractor shall be adjusted for rises or falls in the cost of labour, Goods and other inputs to the Works, by the addition or deduction of the amounts determined by the formulae prescribed in this Sub-Clause".

The clause also foresees that if full compensation for any rise or fall in Costs is not covered by that or other clauses, the Contract Amount shall be deemed to have included amounts to cover the contingency of other rises and falls. This means that Clause 13.9 only applies to the cases and risks there stated, and any other risk shall not be compensated since they are deemed to have been included in the Contract Price.

However, it must be said that the clause has a wide range of applications; the price will be adjusted for the rises or falls in the cost of labour, Goods "or other inputs to the Works". The actual meaning and width of "other inputs to the Works" would be determined on a case-by-case basis, and, it is submitted, it highly depends on the applicable national law. Nonetheless, from a grammatical perspective, it can be argued that it is a clause aimed at covering most price-fluctuation situations, and therefore, it assigns this risk to the Employer who will bear both positive and negative effects arising out of it.

Clause 13.9 also establishes a formula to determine the price adjustment. However, price-adjustment formulas are not part of this thesis.

In sum, the FIDIC contract includes a detailed regulation of different aspects of alterations to the contract that aim to introduce further legal certainty and, consequently, reduce the likeliness of disputes and the associated costs of litigation/arbitration. This seems to be in line with the postulates of the World Bank expressed in its regulations.

5.4. The clause for Contract Variations SPD for Goods Contracts

The World Bank has three different Standard Procurement Documents for Goods; two of them have the same clause dealing with Contract Alterations. The other one, the SPD for Framework Agreements for Goods does not have a specific clause devoted to contract alteration. Consequently, attention will focus on the clause used in the other two SPD (Request for Bids-Good-1 envelope process and two envelopes process). Additionally, it is important to mention that the same Changes Clauses can be found in the General Conditions of Contract for the Health and Education sectors.

The US system on Contract alterations has not yet been analysed. Nonetheless, it is relevant to say that the US Changes Clause for Supply contracts is in many respects similar to the World Bank Changes Orders and Contract Amendments Clause for Goods Contracts. This precision is made since the World Bank Clause is clearly inspired by the US system; this conclusion can be easily reached by observing the content of both clauses and the chronological precedence

of the US over the World Bank system. Clause 33 of the General Conditions of Contracts for Goods reads:

> "The Purchaser may at any time order the Supplier through notice in accordance GCC Clause 8, to make **changes within the general scope of the Contract**".

An important consideration of this clause is that it clearly recognises a unilateral power for the Purchaser. It may, at any time "order the Supplier". However, those changes must be within the general scope of the contract. This clause limits contract alterations by using a standard stated in the same terms as the US legal system. In the US, as explained in detail further below,[181] this Standard has given rise to the concept of Cardinal Changes.

Although it cannot be ascertained that a similar concept to Cardinal Changes will be applicable in World Bank financed contracts, neither it can be guaranteed that similar outcomes to the ones reached in the US will be extended to World Bank financed-contracts; it is relevant to point out that both are valid possibilities given the system that inspired this standard.

Therefore, it is possible that the World Bank would interpret it in a manner similar to US authorities. Consequently, it may be hypothesised that only changes that fall within the scope of the contract in the US sense will be permitted by the World Bank as amendments or changes orders for contracts that it finances. Moreover, as in other situations, it must be said that the actual meaning and latitude of the "scope of the contract" for contractual purposes, between the contractor and the borrower, may vary and depends on the applicable national law and its tradition of limiting contract alterations.

Another coincidence between the US and the World Bank Framework is the type of changes permitted. The first three types of changes permitted are:

(a) drawings, designs, or specifications, where Goods to be furnished under the Contract are to be specifically manufactured for the Purchaser;
(b) the method of shipment or packing;
(c) the place of delivery;

[181] See section 9.1

These are the same type of changes permitted for supplies contracts in the US FAR. The analysis displayed in the US chapter applies entirely to this clause and will not be anticipated in this section.

In addition to these permitted changes that are identical to the US system, the World Bank SPD foresees an additional type of permitted changes:

(d) the Related Services to be provided by the Supplier.

This recognises that Contracts for the supply of goods may include the provision of related services, and in this sense, this clause is wider than the US Changes Clause, that does not explicitly recognise them. After stating the scope and type of permitted changes, Clause 33 of the General Conditions for Goods contracts reads:

> "If any such change causes an increase or decrease in the cost of, or the time required for, the Supplier's performance of any provisions under the Contract, an equitable adjustment shall be made in the Contract Price or in the Delivery/Completion Schedule, or both, and the Contract shall accordingly be amended. Any claims by the Supplier for adjustment under this Clause must be asserted within twenty-eight (28) days from the date of the Supplier's receipt of the Purchaser's change order".

The Bank relies, once again, on American legal categories. It brings into the regulatory framework of the Bank the concept of equitable adjustment and Excusable delays: this is price and time adjustment as consequences of changes. Moreover, Clause 33.3 of the SPD permits adding related services not included in the Contract and at the same time establishes the parameters on the prices to be charged for those related services not foreseen in the contract: i.e. agreed upon in advance and shall not exceed the rates charged to other parties by the Supplier.

Clause 33.4 of the General Conditions of Contract for Goods relates to Value Engineering, that is not part of this thesis.

Another important detail relates to the inclusion of Changes in law and Force Majeure clauses. Changes in law are not part of this thesis.

Clause 32 on Force Majeure excludes liability for the Supplier (in the form of Performance Security, liquidated damages or termination for default) if and to the extent that the delay in performance or other failures is a result of an event of Force Majeure (event beyond the control of the Supplier and not foreseeable, unavoidable, and not originated in negligence or lack of care; e.g. war, revolution, fires, floods, epidemics, quarantine restrictions, freight embargoes).

As mentioned above, the World Bank has several other General Contract Conditions that are particularised depending on the type of work; nonetheless, they will not be analysed for length constraints and because it suffices to analyse the documents above in order to reveal the Bank's policy on contract alterations.

As a general comment to the analysed Documents, it is important to state the importance given to legal certainty, the procedure to modify the contract, the recognition of unilateral powers to modify the contract, and the apparent US influence on the Bank's policies and Changes Clauses to the extent that the 'within the scope standard' and the 'type of changes permitted' are very similar to the US concepts.

Chapter 6: The UNCITRAL instruments with rules on alteration of public Contracts

The last international regulatory framework that will be analysed in this thesis are UNCITRAL instruments. They include on the one hand the general public procurement documents, and, on the other, the PPP related ones. This section will analyse separately both.

6.1. UNCITRAL instruments on Public Procurement

UNCITRAL, as mentioned in the introduction, has a Model Law on public procurement. Nonetheless, the topic of contract management and the issue of contract alterations are completely absent from the Model Law. There is no reference to modifications, adjustments, or alterations of contracts in the UNCITRAL Model Law on public procurement, nor in the Guide to Enactment.

Although the Model Law does not contain provisions for alterations to public contracts, the Model Law does have some insights into the principles that have led other systems to develop such rules (e.g., the EU). In other words, it can be argued that the principles that have led to restricting modifications in other legal frameworks exist in the UNCITRAL Model Law, and therefore rules on modifications may be derived from there or may be introduced in future texts without altering its principles.

The first rule that seems important to the development of Contract alterations rules is in Article 15 of the Model Law. Articles 15 reads:

> "If as a result of a clarification or modification issued in accordance with this article, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate, the procuring entity shall cause the amended information to be published in the same manner and place in which the original information was published and shall extend the deadline for presentation of submissions(…)"

To elucidate the meaning of this Article, it is necessary to refer to the Guide to Enactment of the UNCITRAL Model Law on Public Procurement. The first concept explained by the Guide is the concept of "material inaccuracy". In the commentary to Article 9, applicable to Article 15, the Guide defines:

> A "material" inaccuracy or incompleteness is based on a threshold concept: it refers to inaccuracies or omissions that affect the integrity of the competition or procurement process generally.

It is relevant to pinpoint that the two preoccupations of material inaccuracies as a concept are "the integrity" of the competition and the procurement process in general. Therefore, this concept, as the material modification concept used in other systems, aims at protecting competition and the procurement procedure. Commentary to Article 14 reads:

> In the context of article 15(3), the threshold would be met if the information, as a result of changes made, became sufficiently inaccurate to compromise the integrity of the competition and the procurement process.

This reiterates the fundamental principle that no changes shall be made that affect competition or the procurement process. There are close similarities between the abovementioned preoccupations and principles and the ones on which rules limiting modification to public contracts and procurement conditions are based. A closer enquiry is necessary to avoid arriving at hasty conclusions.

In effect, the commentary on Article 15 clarifies that "as stated in the commentary to article 14, changes as regards the manner, place and the deadline for presenting submissions would always make the original information materially inaccurate without necessarily causing a material change in the procurement". Therefore, Article 15 re-publication due to material inaccuracies proceeds for changes in the manner, place, or deadline for submitting tenders. Nonetheless, "[t]his situation should be differentiated from a material change in the procurement".

Thus, "if as a result of such changes, the pool of potential suppliers or contractors is affected (e.g., as a result of changing the manner of presenting submission from paper to electronic in societies where electronic means of communication are not widespread), it may be concluded that a 'material change (…) has taken place. In such a case, the measures envisaged in paragraph (3) of the article would not be sufficient-the procuring entity would be required to cancel the procurement and commence new procurement proceedings. A 'material change' is also highly likely to arise when, as a result of clarifications and modifications of the original solicitation documents, **the subject-matter of the procurement has changed so significantly** that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the procuring entity".

A relevant circumstance in this excerpt refers to the adoption of the "material change" concept. This standard (phrased in different manners) is a constant in several of the analysed regulatory frameworks. Hence, it is important to highlight that this concept is used by UNCITRAL even if it does so for purposes different than limiting alteration to concluded contracts. Moreover, the concept is adapted to the needs of the Model Law. A material change is not only the alterations to the contract-to-be (as may be the case in other systems), but it also encompasses changes to the procurement procedures that may affect the pool of potential suppliers: an element as important as the subject matter of the contract for competition purposes.

Another component that deserves attention is the link between material change and 'subject matter of the procurement'. For the former to arise, the latter must be "changed so significantly" that the original documents no longer put suppliers of the true requirements of the procuring entity. In other words, the standard seems close to the EU one: this is when other offers or tenderers would have been admitted.

Although this cannot be ascertained, UNCITRAL seems to introduce a scale of alterations by differentiating between 'material inaccuracies' and 'material changes'. This scale allows assigning different legal consequences to each category. In that manner, material inaccuracies would require re-publication under Article 15 (3) transcribed above, whereas material changes would require cancellation and re-procurement. This seems to be based on the idea that the 'offence' against competition and the procurement procedure is more serious when a material change occurs.

The UNCITRAL Model Law has other relevant provisions for the purposes of analysing the principles that may give rise to limits to public contract alterations. Articles 48 (Two-stage tendering), 49 (Request for Proposals with Dialogue) and 50 (Request for Proposals with Consecutive Negotiations) of the Model Law forbid "during the course of the negotiations" or "in revising the relevant terms and conditions" to "modify the subject matter of the procurement".

Moreover, Article 49 adds that the entity shall not modify "any qualification or evaluation criterion, any minimum requirements (…), any element of the description of the subject matter of the procurement or any term or condition of the procurement contract that is not subject to the dialogue as specified in the request for proposals". Article 50 includes the same texts with the clarification than the alteration to term or condition of the procurement contract is "other than financial aspects of proposals that are subject to the negotiations as specified in the request for proposals".

As mentioned above, a material change requires cancellation and re-commencement. Articles 48, 49 and 51, by forbidding the modification of the subject matter of the procurement, any element of its description, or any term or condition that is not subject to the dialogue or

negotiation, are simply extending the same principle for the second stage of those procedures. This is once tenders have been submitted.

Furthermore, the Guide to Enactment contains for Article 49-9 the following statement:

> The provisions of paragraph (9) seek to achieve the required balance by preventing the procuring entity from making **changes to those terms and conditions of the procurement that are considered to be so essential for the advertised procurement that their modification would have to lead to the new procurement**. They are the subject matter of the procurement, qualification and evaluation criteria, the minimum requirements established pursuant to paragraph (2) (f) of this article and any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that the procuring entity explicitly excludes from the dialogue at the outset of the procurement.

The Guide reveals the fundamental idea behind the three Articles referenced above: those alterations are so essential that their modification would have to lead to the new procurement.

It is relevant to refer that EU rules first emerged as the UNCITRAL rules for pre-award alterations and were only later taken within the law on modifications to concluded contracts.[182] Based on this, it is possible to hypothesise that UNCITRAL Model Law could evolve from these fundamental, scattered, and scarce rules to modify pre-award alterations toward limiting contract alterations based on the same principles and rationales.

Moreover, if UNCITRAL does adopt some rules on contract alterations, similar or not to the ones hypothesised above, the introduction into national legal systems depends on the countries' will to enact them. Similarly, the precise meaning, scope, and reach of these rules would depend on the national legal system, other rules and the judicial authorities interpreting the law.

[182] Arrowsmith (n. 42) 128-137

6.2. UNCITRAL instruments on PPP

The UNCITRAL documents include some devoted to PPP. The Model Legislative Provisions on Public Private Partnerships and the Legislative Guide on PPP Projects. Both documents will be analysed concurrently since several considerations presented in the Guide justified the Model Provision of the Model Legislative Provision on PPP.

The Legislative Guide recognises that contracting authorities act as the employer under a construction contract and retain "extensive monitoring and inspection rights, including the right to review the construction project and request modifications to it".[183] In line with this, Recommendation 82 reads:

> "The PPP contract should set forth set forth the specific circumstances under which the contracting authority may order variations in respect of construction specifications and the compensation that may be due to the private partner".

This Recommendation specifies that contracting authorities shall, under certain conditions, have the right to order variations regarding construction specifications. There is no doubt that a unilateral power to modify the contract shall be recognised to the authority in the Agreement.

This reflects the considerations of the Guide that contains a full section on "Variation in the project terms".[184] In that section, the Guide explains that "it is common for situations to arise that make it necessary or advisable to alter certain aspects of the construction", for that reason the authority "may therefore wish to retain the right to order changes". [185] A similar wording was introduced in Model Provision 28 on content and implementation contract. Model Provision 33 reads that the contract shall provide for "(j) the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of services (…)". The justification for this provision may be found in the Guide. The Legislative Guide on the matter reads: "given the complexity of most infrastructure

[183] UNCITRAL, *Legislative Guide on Public Private Partnerships,* 179 < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10872_ebook_final.pdf> available 29 November 2021
[184] Ibid, 180 and ss
[185] Ibid, 180

projects, it is not possible to exclude the need for variation in the construction specifications or other requirements of the project"[186].

Although the Guide recognises the importance of Variations, it also advises to implement measures to control the possible need for variations. The need to control variations result from the potential consequences of extensive variations; particularly because extensive variations may "exceed the private partner's own financial means, thus requiring substantial additional funding that may not be at an acceptable cost". High-cost extra-funding to the concessionaire is translated into extra costs for the authority or the public (users). This is an undesirable outcome for both parties to the contract since they enter into the agreement based on certain financial understandings.

To avoid extensive variations, the Guide highlights the importance of feasibility studies. The Guide also recommends for the Agreement to include variations and compensation mechanisms to cover the additional costs (potentially reducing the need for outside funding and its associated costs). Those compensations, the Guide notes, may include a combination of different forms of payments: lump-sum, tariff increases, or extensions in the period of the contract. In that manner, if the concessionaire may fund the variation itself, tariff increases or extensions may be considered. In contrast, if it cannot do so, the lump-sum option shall be considered.

Model Provision 33-l gathered these preoccupations and prevented that the contract shall include:

> Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (i) and (j) above, including any compensation to which the private partner might be entitled (…)

Nonetheless, the Guide and the Model Provisions do not determine the mechanisms to deal with the additional costs, but only set forth the need for them and certain guidance as to what mechanisms can be considered under certain circumstances. This seems to respond to the fact

[186] Ibid, 181

that each country and project are different, and no single answer is correct to deal with the peculiarities of every project. Furthermore, the Guide recognises that the Agreement shall state grounds for the concessionaire to object to variations. It also acknowledges that the concessionaire may be discharged from its obligations in certain legal systems when the amount of additional costs caused by variations exceeds a certain threshold.

The Legislative Guide adopts the term variation for all alterations. This is in line with other instruments dealing with construction/works contracts. Moreover, the Guide clarifies that tariff adjustments or revisions made due to cost changes or currency fluctuations are not included in the term variation. "Likewise, renegotiation of the PPP contract in cases of substantial change in conditions is not regarded in the Guide as a variation"[187].

The Guide deals independently with changes in conditions.[188] The Guide recognises that PPP agreements normally last for a long period, and during that time circumstances may change. The change of those circumstances requires the contract to be adapted to the new reality. This adjustment to the new circumstances may take the form of financial arrangements agreed in the contract (e.g., indexation clauses) or the assumption of risk by either party.

The Guide acknowledges the existence of changes that might not be easily included in the automatic adjustments provided for by the contract or that parties may prefer to exclude from that mechanism. Two categories are devoted special attention by the Legislative Guide: legislative or regulatory changes and unexpected changes in economic conditions.

Relating to the first category, legislative changes, they are not part of the scope of this thesis.

Relating to changes in circumstances of economic conditions, the Guide starts by recognising that some legal systems have rules that "allow a modification of the PPP contract following changes the economic conditions that (…) render the performance of those obligations financially hazardous compared to what was originally foreseen (…)". Those revision rules may be generally implied in all Government Contracts or expressly provided for by legislation. The Guide acknowledges that PPP agreements are negotiated, and obligations accepted, "in the light of assumptions based on the circumstances prevailing at the time of the negotiations and

[187] Ibid, 181
[188] Ibid, 182

the reasonable expectations of the parties as to how those circumstances will evolve during the life of the project".

This excerpt resorts to various concepts that will come into the analysis in the Chapters devoted to National Jurisdictions. UNCITRAL accepts that agreements are concluded considering certain assumptions on the relevant circumstances, and the evolution of those circumstances based on "reasonable expectations". These expectations may be breached by "certain events" (…) "that the parties could not reasonably have anticipated" and that "had they been taken into account, would have resulted in a different risk allocation or considerations for the private partner's investment".

As will be seen, the foreseeability or the possibility for the parties to reasonably anticipate events demarcates the definition of unforeseen circumstances that merit contract alterations to be made. In this manner, it can be anticipated that UNCITRAL resorts to national practices[189] that determine that certain events may be beyond the parties' foreseeability and as such, they may also be beyond the contract scope since "had they known" other would have been the agreement.

Furthermore, UNCITRAL regard as important to devise "mechanisms to deal with the financial and economic impact of such events" and indicates that revision rules have been applied in several countries in a successful manner. These rules ensure economic and financial viability and henceforth avert disruptive failure by the concessionaire.

In short, UNCITRAL recommends having mechanisms in place to deal with unforeseen circumstances that could have been anticipated and, had they been known, would have resulted in a different agreement. However, the Guide recognises, changes in economic conditions are risks "to which most business organizations are exposed without having recourse to a general guarantee of the Government (…)".[190] Thus, an "unqualified obligation of the contracting authority to compensate the private partner for changes of economic conditions may result in a reversion to the public sector of a substantial portion of the commercial risks originally allocated to the private partner and represent an open-ended financial liability".[191]

[189] See national jurisdictions below
[190] Ibid, 201
[191] Ibid, 201

In other words, if compensation mechanisms are too wide, consequences of risks transferred to the private partner in PPP may revert to the public entity via changes in conditions claims, e.g., imprevision claims.[192]

Moreover, "excessively generous recourse to renegotiation of the project may stimulate unrealistically low proposals being submitted during the selection procedure in the expectation of tariff increases once the project has been awarded"[193]. To use the specialised terminology: using renegotiations or accepting changes in conditions changes as a cause for compensation too readily may lead tenderers to lowball. To avoid lowballing, UNCITRAL Legislative Guide says that "the contracting authority may have an interest in establishing reasonable limits for modifications of the PPP contract following changes in economic conditions"[194].

UNCITRAL supports one of the fundamental arguments of this thesis: that establishing limits to revision is a good practice. Or, to adapt this statement to the parlance of this thesis, contracting authorities may have an interest in limiting contract alterations, in this instance, when those alterations follow changes in economic conditions. In this case, the rationale for establishing such limits is grounded on the need to avoid lowballing by tenderers. This is one of the several rationales found and presented throughout this thesis and extracted from the analysis of several regulatory frameworks to pay closer attention to public contracts alterations and establish limits to them.

Nonetheless, the need for limits cannot be a synonym to completely limiting the ability to alter the contract since this will result in extreme rigidity to changing circumstances. It is based on the acknowledgement of this circumstance that the UNCITRAL Legislative Guide on PPP indicates that:

> "It may be desirable to provide in the PPP contract that a change in circumstances that justifies a modification of the PPP contract **must have been beyond the control of the private partner and of such a nature that the private partner could not reasonably**

[192] This is precisely the argument that we have presented somewhere else. Sebastian Barreto Cifuentes. 'La pérdida de protagonismo del Estado: la administración vista en un escenario de globalización', in Jorge Iván Rincón Córdoba, *XX Jornadas de Derecho Admnistrativo, Las transformaciones a la administración pública y al Derecho Administrativo*, Tomo I, (Universidad Externado de Colombia, 2019)
[193] UNCITRAL, (n. 183) 201
[194] Ibid, 201

be expected to have taken it into account at the time the PPP contract was negotiated or to have avoided or overcome its consequences"[195].

In other words, it is necessary to qualify the change in economic conditions that impact the cost structure of the contract in order not to compensate for circumstances that were in control of the contractor or were foreseeable, or the consequences could have been avoided. In that manner, compensation for changes in economic conditions would not imply a reversion of transferred risk, nor would it create open-ended liabilities for the authority, but it would preserve the contract from unforeseeable events by guaranteeing financial stability on the one hand (for the contractor-investor) and continued performance on the other (in the interest of the authority).

Finally, the Legislative Guide considers it "desirable to provide in the PPP contract that a request for modification of the PPP contract requires that the alleged changes of economic and financial conditions amount to a certain minimum value in proportion to the total project cost (…) or the private partner's revenue. Such a threshold might be useful in order to avoid cumbersome adjustment negotiations for small changes until the changes have accumulated to comprise a significant figure".[196]

For this reason, the Guide acknowledges that some countries rely on ceilings for cumulative changes to avoid an alteration of the overall financial balance of the contract. However, this may result in dramatic cost increases that have to be bear by the concessionaire, and for that reason, the Guide recommends carefully assessing the desirability of such ceilings and their appropriate amount. There is, so to speak, no final saying as to the desirability of those ceilings. Nonetheless, it is important to conclude that the Guide puts forward the kind of reasoning that underline alteration limits in most regulatory frameworks. In that manner, it constitutes a sort of abstract for all the rationales and rules that are aimed at being discovered and presented throughout this thesis.

The UNCITRAL concerns expressed in the Legislative Guide are reflected in Model Provision 45 of the Model Provisions document. Provision 45 prescribes that:

[195] Ibid, 202
[196] Ibid, 202

> "[T]he PPP contract shall further set forth the whether and to what extent the private partner is entitled to request the amendment of the PPP contract in the event that the cost of the private partner's performance of the PPP contract has substantially increased or that the value that the private partner receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:
>
> (a) Changes in economic or financial conditions; or
>
> (b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;
>
> provided that the economic, financial, legislative or regulatory changes:
>
> • Occur after the conclusion of the contract;
>
> • Are beyond the control of the private partner; and
>
> • Are of such a nature that the private partner could not reasonably be expected to have taken them into account at the time the PPP contract was negotiated or to have avoided or overcome their consequences".
>
> (…)
>
> 3. The PPP contract shall establish procedures for amending the terms of the PPP contract pursuant to paragraphs 1 and 2.

In this manner, the Model Provision authorises revisions in the event of substantial cost increases or income reductions. It introduces both types of changes in economic and legal conditions. This is so despite that Provision 44 deals explicitly with changes in legal conditions.

Moreover, to avoid re-transfer of risks to the authority, the Model Provision qualifies the changes in circumstances by demanding for them to occur "after the conclusion", be "beyond control", and voicing the rebus sic stantibus principle since they "could not reasonably be expected to have been taken into account (…) or to have avoided or overcome their consequences".

Finally, Provision 45 orders for the contract to establish change procedures for the revision of terms when the conditions above are met. Thus recommending a procedural approach to alterations, possibly to facilitate their agreement for efficiency, legal certainty and transparency reasons.

Part III: Analysing the rules on alterations of public contracts in the selected national jurisdictions

The analysis for international regulatory frameworks has proven useful since it has provided several insights as to the objectives and rationales on whether to deal or not with alterations to public contracts and, if so, how to deal with them from different perspectives.

The analysis of the second part was general and included most of the rules in each regulatory framework. However, such an effort cannot be replicated for the selected national jurisdictions since they have a more elaborate and detailed system of rules on alterations to public contracts. Legal categories, as has been seen, vary between legal systems. Factual circumstances might be regarded differently depending on the point of view of the legal source or the legal regime assigned to it. Thus, for instance, the risk of different soil conditions is dealt with via risk allocation included in regulations in the USA, and via a case law-created category in France; this is sujetions imprevues.

There are two legal categories common to all national legal systems: unilateral and bilateral modifications. The rationale for this distinction may be the need to impose limits on unilateral modifications, to prevent the party with authority from abusing its rights.[197] Similarly, the reasoning may be that unilateral modifications are somehow contradictory to the contractual "mutual agreement" logic since one party can impose its will on the other.[198] Moreover, the reason might be historical and be based on an old European/Roman law distinction. However, the cause of this categorisation is irrelevant for this thesis; it is simply worth noting the existence of this distinction and that they will both be included in this thesis.

Having said that, due to the need to narrow down the scope of analysis for this part. As mentioned in the introduction, the scope of this thesis are bilateral and unilateral modifications, and alterations caused by changes in economic and physical conditions.

Thus, each chapter will have one section for unilateral modifications, one for bilateral modifications, one for alterations due to changes in technical/physical conditions, and one for changes due to changes in economic conditions.

[197] See section 7.1
[198] See section 8.1

Chapter 7: UK law on alterations to public contracts

Unlike the other two systems analysed in this thesis, the legal system of the UK has been characterised by the unified regime of its contracts regardless of the public or private nature of the parties. This is reflected in the modifications rules, whether unilateral or bilateral and their limits. Therefore, case law from what could be regarded as private law is included in this section as part of the analysis of the UK law on alterations to public contracts. As mentioned section 7.1. refers to unilateral modifications, and 7.2. to bilateral modifications, 7.3 to limits to both arising from procurement concerns, whereas section 7.4. is devoted to ground conditions related risks and 7.5. to economic risks.

7.1. Unilateral Modifications

There is a long-standing common-law principle that parties might, under the umbrella of the freedom of contract, modify the terms of the contract.[199] Thus, there are no generally major issues regarding the validity, authority, or limits to modify an agreement or replace it from a contract law perspective. However, public contracts in most of the analysed legal systems additionally also include the possibility for contracting authorities to unilaterally modify the contract. The UK has also dealt with unilateral modifications; nonetheless, it has done it in its own fashion.

7.1.1. Existence of a right to unilaterally modify the contract

Perhaps the most distinctive characteristic of UK contract law is that there is no rule providing for a general power for contracting authorities to modify the contract unilaterally. It has been said that "Without express authority there is no power to order the contractor to carry out extra work".[200] In a clearer and more general manner, and specifically for public contracts, Craig and Trybus have said:

[199] Robinson v Page, Ct of Chancery, 17 December 1826, (1826) 3 Russell 114, 38 E.R. 519; Royal Exchange, Assurance v Hope., Court of Appeal, 9 December 1927, [1927. R. 229.] [1928] Ch. 179, Lord Hanworth M.R., Sargant , and Lawrence L.JJ. Tomlin J., 1927 Oct. 18 Divisional Court, 6 June 1929, [1929] 2 K.B. 316, SWIFT and ACTON JJ., 1929 June 5, 6

[200] Chitty (n. 131), Chapter 37, section 4

> "The general principles of **the law of contract do not give the public body any unilateral power to modify the contract**, impose sanction on the contracting partner or unliterally terminate the contract. The general principle of contract law is that modification of a contract requires consent and consideration by both parties, and this principle precludes *a fortiori* the public body from terminating the contract unliterally or unilaterally imposing sanctions on the other party. **If the public body wishes to be able to exercise such unliteral power then it can, in principle, only do so if such power is provided for in the terms of the original contract**".[201]

As Craig and Trybus anticipated, the lack of a legal rule on the matter does not mean that contracting authorities cannot be endowed with such a power; in case they wish to undertake unilateral courses of action, they must include it in the contract terms.

This lack of legal bases granting unilateral powers to contracting authorities has been countered via contractual clauses and the acquiescence of Courts at enforcing such provisions. Although this is not expressly said in case law, the assumption seems to be: that if parties can agree to a contract and its terms, they can generally consent to any term unless it is against common law or statute. Terms allowing unilateral courses of action are generally regarded as falling within the freedom to contract and not against common law or statute.

One of the main difficulties of doing comparative analysis lies in the fact that legal categories that have similar or identical names, or even legal phenomena that at first sight are extremely similar but might have different scopes of analysis from system to system. For example, the issue of consideration in modification law is not considered as a main issue in the analysed civil law jurisdictions. However, it is precisely consideration that constitutes the focus of analysis of contract modifications in the UK.[202]

On the other hand, unilateral modifications that are highly problematic and highly theorised in the analysed civil law jurisdictions barely have had any attention devoted to them by the UK doctrine. Based on a freedom of contract logic, it is almost assumed that unilateral modifications are allowed, provided they are authorised by a contract clause.

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[201] Paul Craig and Martin Trybus, "England and Wales", in H Schröder, R Noguellou and U Stelkens, *Comparative Law on Public Contracts* (Bruylant 2010) 341

[202] Mindy Chen-Wishart, *Contract law*. (OUP 2012) 125; Chitty on Contracts (n. 131) Volume I - General Principles, Part 2 - Formation of Contract, Chapter 4 – Consideration, Section 9

The 'assumption' that elements to the contract might be left to be determined by one of the parties without affecting the validity of the Contract was recognised in May and Butcher, Limited v The King.[203] In this case, Viscount Dunedin said:

> it is a perfectly good contract to say that the price is to be settled by the buyer. I have not had time, or perhaps I have not been industrious enough, to look through all the books in England to see if there is such a case; but there was such a case in Scotland in 1760, where it was decided that a sale of a landed estate was perfectly good, the price being left to be settled by the buyer himself.

Although this case refers to the determination of one of the elements of the contract by one of the parties, rather than technically an alteration to the original terms, it has been cited to support that "[a]t common law a contract may validly give to one contracting party the power unilaterally to vary the obligations of the parties to the contract".[204] Moreover, it is interesting to notice the Viscount's assertion that no case allowing this unilateral course of action was found in England, to the point that he quoted a Scottish case instead, aligns with the 'assumption' that they are valid and case law does not generally analysed its enforceability.[205]

Against this background, it might be concluded relating to the existence of a unilateral right to modify the contract that in the UK such power only exists if provided for by the contract. Due to the contractual origin of the power, contract clauses also determine the scope and limits of these powers.

7.1.1.1. History of clauses allowing unilateral modifications

Writing a brief history of the right to unilaterally modify the contract granted to public authorities in the UK is slightly more difficult than undertaking the same task for the other national systems analysed in this thesis. The main reason for this lies in the general lack of

[203] May and Butcher, Limited v The King, King's Bench Division, 22 February 1929 [1934] 2 K.B. 17
[204] Chitty (n. 131) Volume I - General Principles, Part 2 - Formation of Contract, Chapter 4 – Consideration, Section 9
[205] Wilken and Ghaly consider that the principle that "unless there is a specific provision which permits it, a party cannot unilaterally vary the terms of a contracts dates back to: Paul Felthouse v Bindley CCP 8 July 1862 (1862) 11 Common Bench Reports (New Series) 869 142 E.R. 1037 1862"; Sean Wilken and Karim Ghaly, *The law of waiver, variation and estoppel* (OUP 2012)

attention to the topic by British legal scholars. Moreover, this right does not generally arise from case law, Acts, or Regulations but contractual clauses. It is not easy to find former versions of these clauses or know their variances and rationales. Notwithstanding, the topic of clauses allowing unilateral modifications is not a blind spot. Thanks to the works of the few legal scholars that devoted attention to public contracts before EU law was introduced in the Country, mainly Turpin, and thanks to some decisions of the Courts adopted in cases involving unilateral modifications of contracts, some 'legal archaeology' can be done.

Most examples included in this section of the UK relate to clauses in Construction contracts. The reader must be aware that this does not respond to an *a priori* decision to identify and research clauses allowing unilateral modifications in the context of construction contracts, but rather to the 'fact' that these types of clauses seem to have been more widely used, and perhaps consequently more commonly litigated. Before embarking on the analysis of each of these clauses, a general assertion must be made courts by ruling on unilateral modification clauses tacitly accepted their validity and enforceability since these aspects are not generally questioned.

Bearing this in mind, it is possible to mention that the case Alexander Thorn v the Mayor and Commonalty of London, a case from 1876 concerning a contract concluded in 1864, already included clauses allowing and regulating unilateral modifications. The contract had as an object "taking down and removing the present bridge at Blachfriars, and erecting a new bridge in the lieu thereof". In a deed concluded between the parties, the following, the House of Lords reported, was agreed:

> "Sect. 13 gave the engineer power " at any time or times, during the progress of the works **to vary the dimensions or position of the various parts of the works to be executed under these presents**, without the said contractors being entitled to any extra charge for such alteration, provided the total quantity of work be not increased or diminished thereby." Any alteration should be valued according to the schedule of prices accompanying the deed. And whenever the engineer gave notice of any such alteration or variation the contractors were to execute the work according to his directions".[206]

[206] Thorn v London Corp (1876) 1 App. Cas. 120

This clause from the XIX century includes several elements that will be found at different times and across different jurisdictions. In the first place, the clause, under the basic "no clause no unilateral right to modify" common law rule, enables the engineer to vary the dimensions or position of the various parts of the works to be executed. The contract clarified that this power did not require the acquiescence of the contractor since "whenever the engineer gave notice", "the contractors were to execute the work according to his directions".

Second, the clause provided for some conditions under which the right might be exercised. Thus, it clearly foresaw that it could be exercised at "any time or times, during the progress of the works". The 'contracting authority' reserved the right to modify the contract at any time, and in more than one occasion. The clause by including the wording "or times" seems expressly drafted to avoid an interpretation in the sense that the authority would be curtailed from ordering further modifications once the right has been exercised for the first time. Furthermore, the wording also indicates the scope of the right since it allows to "vary the dimensions or positions of the various parts of the works to be executed".

Third, the consequences of exercising such a right were stipulated. Thus, the contractor is not entitled to any extra charge for alterations "provided that the total quantity of work be not increased or decreased". Moreover, the contract also deal with the consequences in terms of pricing since there was a schedule of prices accompanying the deed that would be used to calculate the value of any alteration. Finally, although not related to the content of the clause, there is a relevant sentence expressed by Lord Cairns in this case, as follows:

> "The contract referred to the specification, and, for the purpose of what I have to say, I will assume that the specification must be read into the contract. **The specification provided, as is usual in cases of the kind, with regard to extra or varied work, that extra or varied work should be certified and accounted for, and paid for at certain specification prices**".

From this excerpt, it can be concluded that clauses with the content analysed above were by 1864 "usual in cases of the kind". However, it is sadly unclear what exactly Lord Cairns meant by 'cases of the kind'. He might have been referring to construction contracts, 'public construction contract', or simply contracts concluded by 'public bodies'. It is submitted that

due to the lack of a legally relevant category of contracts concluded by "public bodies" during that period, the most likely content of the expression "cases of the kind" in this context is construction contracts. As an extra piece of evidence, it might be worth noting at this point that the characteristics identified above were also referred to by private contractors.[207]

Another example can be observed in Parkinson v Commissioner of Works.[208] The contract between Lindsay Parkinson and H.M. Commissioner of Works and Public Buildings was dated January 6, 1937. The contractor agreed to build an ordnance factory "according to general conditions, specifications and bills of quantities and drawings annexed, for the contract sum of 3,500,000/".

It is worth noting that by 1937 general conditions for contracts were already in use for public contracts, at least those concluded by the Commissioners. Moreover, it was within these general conditions that the unilateral right to modify the contract was recognised. Indeed, Condition 33, the Court of Appeals reports, reads:

> "The Commissioners shall have power from time to time by written instructions to the contractor from the architect at their absolute discretion to modify the extent, character, sections, quantities or dimensions of the work shown or described in the contract or the levels or positions of any of the works or to order any portion or portions of the works to be omitted with or without substitution of any other works in lieu thereof or to order any work or any portion of any work executed or partially executed, to be removed, changed or altered, or to order additional works, or to change the nature of the materials with which the works are intended to be constructed, without vitiating or in any way making void the contract and the contractor shall upon the receipt of written instructions before mentioned make such alterations and changes or as the case may be perform such extra and additional works in the same manner as nearly as the circumstances will admit as if the same had originally formed part of the works. The value of all alterations, omissions or abandonments ordered as aforesaid shall be ascertained in accordance with condition 35 hereof and shall be added to or deducted from the contract sum as the case may be".

[207] In this sense see the clauses reported by the Court of Appeal in *Dodd v Churton [1897] 1 Q.B. 562*
[208] Parkinson v Commissioner of Works [1949] 2 K.B. 632

The wording provides in unequivocal terms for the right to unilaterally modify the contract. There shall be no doubt that the right exists, and the contractor is obliged to comply with the written orders as if they had originally formed part of the works.

It is also interesting to observe that this general condition seems to be shielding the validity of the unilateral modifications and of the modified contract. Thus, it explicitly says that all the alterations can be ordered "without vitiating or in any way making void the contract". No case law could be found relating to any challenges to this or similar clauses that might have led to this wording. However, it is interesting to observe that there is a difference compared to the version used in 1864 that did not include any prevision as to the validity of the contract in the light of unilateral modifications.

General Condition 33 also set forth the condition for exercising the power to modify the contract unilaterally. In a similar spirit to the 1864 clause, this general condition expresses that the power can be exercised "from time to time". This clarifies that the unilateral power can be used on more than one occasion.

Another condition, not clearly set out in the previous version, requires this power to be exercised "by written instruction". The inclusion of this expression introduced a formality for issuing unilateral modifications and, consequently, for the validity of this type of variation. Although it is impossible to determine with certainty the rationale for this addition, it can be hypothesised that it introduces certainty as to how the power can be exercised and having a written order might reduce the potential for disputes regarding the existence of modifications of this kind.

Also, relating to the conditions of exercise, it is worth mentioning that the Condition enumerates several types of alterations. In addition to dimensions or position, included in the 1864 version, the one used in 1937 expanded, amongst others, to include character, sections, quantities, level, omissions, etc. The new wording, it can be hypothesised, had the purpose of granting the Commissioners a whole-encompassing power to alter the work.

Finally, the General Conditions included the economic consequences of exercising this power. The specific content of that provision and its analysis will not be included since they are not part of the scope of this thesis.

From the content of those cases, it seems clear that General Conditions were already in use by public bodies, at least for construction contracts.

The first piece of legal literature devoted to the topic of government contracting in the UK was the 1954 book by Mitchell: "The contracts of Public Authorities: A comparative study".[209] However, this book does not devote any attention to the issue of unilateral modifications.

In 1974 Turpin reported that "[p]rovision for variation of specifications is made in all the principal contract form used in government procurement".[210]

For instance, he mentions Standard Condition 3 (1) of form GC/Stores/1, which "reserves to the procuring authority the right to 'alter from time to time' the specifications, plans, drawings and 'as from the date specified by the Authority the Articles shall be in accordance with the specifications, plans, drawings, Patterns and Samples so altered'".[211]

The right to unilaterally modify the contract, more specifically the specifications, is clearly granted to the authority. However, it is very relevant to observe, relating to the conditions of this right that, as Turpin points out:

> "This clause does not confer an unlimited power upon the department. If the contract includes a general description of the type of article to be supplied, which is described in greater detail in specifications or plans, the clause does not empower the department to substitute a different article that does not comply with the general description: only the specifications of an article of the *general type stipulated by the contract* may be varied. The power to alter specifications would not to give a fanciful example, permit a department to substitute a frigate for a field wireless set as the article to be supplied under the contract. Nor does the clause quoted empower the department to vary the number of articles to be supplied".

[209] JDB Mitchell, *The Contracts of Public Authorities: A Comparative Study* (The London School of Economics and Political Science 1954)
[210] Colin Turpin, *Government Contracts* (Penguin Books 1972) 202
[211] Ibid, 202-3

First, it is worth remarking that the drafting of this clause resembles the American Changes Clauses analysed below.[212] Moreover, it is noteworthy that the alterations that Turpin considered out of the scope of this variation clause raised legal issues in the American system. Notably, a similarly drafted clause gave rise to the issue of whether the authority could change the number of items and what "alteration to the specifications" meant.

Similar case law does not exist in the UK. This, might be hypothesised, responds to the cooperative and non-litigious nature of the relations between the government and its contractors. At this point, it is interesting to observe that a similar clause gave rise to litigation and case law on one side of the Atlantic, whereas it did not create a sizable body of case law on the other.

The Works contract form provided for wider powers. "SC 7(1) provides that the officer appointed to superintend the construction may from time-to-time issue further drawings or instructions in regard to (inter alia)

> (a) The variation or modification of the design, quality or quantity of the Works or the addition or omissions or substitution of any work".[213]

This clause preserved two of the main features found in previous versions. First, it seems drafted to guarantee that the power can be used multiple times. Second, it seems to have the purpose of being whole encompassing by including, in a simplified manner compared to the 1937 version, alterations to the design, quantity, quality, additions, omission and substitutions.

By 1989, the year in which Turpin published a new version of his book, it is worth noting that slight changes were introduced to the Store form standard clause on variations, whereas this clause remained unchanged in the Works form.

Standard Condition 3(1) of the store form, Turpin reports, "reserved to the authority (designated by the contract to act for the department) the right to 'alter from time to time' the specifications etc., and 'as from the date and to the extent specified by the authority after consultation, where appropriate, 'with the Contractor on the effect of such proposed alterations,

[212] See section 9.1
[213] Turpin (n. 210) 203

the Articles shall be in accordance with the … specifications, plans, drawings or other documents as so altered…"[214]

The main change in this version is the introduction of consultation, where appropriate, with the contractor. In Turpin's terms, "Although this condition confers a unilateral power upon the department to direct variations, the requirement of consultation enables the contractor to advise the department of any apprehended technical difficulties and of the impact of the proposed variations on the cost and duration of the contract".[215]

Thus, the change in the condition does not pretend to limit or eliminate the unilateral nature of the right to variate the contract. However, by introducing the consultation, it does create, or reflects, an environment of collaboration between contractor and authority.

It must be said that more analysis could be done on the history of clauses allowing unilateral variations. However, this thesis is not devoted to historical analysis, and the history is used only to understand and analyse the scope, source, and approach of a legal system towards alterations of public contracts.

7.1.1.2. Current clauses on unilateral Modifications

Unlike the US, the UK model contracts are not part of any regulation or similar legally binding document. Moreover, the tradition of using different model contracts for different types of contracts remains in place. The way variations are dealt with in each of these documents varies considerably. Four of them will be analysed to portray a general panorama of the different variation clauses.

The choice of the model contracts analysed was made based on one main substantive criterion: the type of contract. First, due to the historical and practical importance of the construction contract, the clause in the current works model contract will be observed. Second, two services contracts used by the British government will be analysed due to the importance of services and particularly complex services in the modern world. Finally, to observe the historical

[214] Colin Turpin, *Government Procurement and Contracts* (Longman 1989) 187
[215] Ibid, 187

evolution of the supply contracts, formerly called store contracts, and analysed above, the analysis of one contract for goods will be included.

(i) Construction Contracts

The Standard Conditions for construction of works issued by the Central Government in the UK constituted the form used for many years by central government authorities. Nonetheless, the Government General Conditions for works are no longer updated, and the government has moved towards using industry documents.[216]

The Government has endorsed the New Engineering Contract since the Latham report in 1994, a joint public/industry review of the construction sector.[217] The NEC 4 family of contracts is expressly endorsed by the Infrastructure and Projects Authority for its use by the public sector.[218] Moreover, the Chief of this authority has stated that it is expected for the NEC 4 to deliver further savings "in the order of 1.7bn across the Government estate".[219]

The UK model contract for construction contracts prefers bilateral over unilateral modification. Thus, clause 12.3 reads: 'No change to the contract, unless provided these *conditions of contract*, has effect unless it has been agreed, confirmed in writing and signed by the Parties'. Unilateral modifications are not permitted unless "provided for" by the conditions of the contract. The main clause in the conditions allowing some flexibility to 'order' changes is clause 14.3, which provides: "The *Project manager* may give an instruction to the contractor which changes the Scope or a key date". In turn, Scope is defined by clause 11(16) in the following manner:

> "Scope is information which
>
> - Specifies and describes the *works or*

[216] RM3741 CCS and NEC form of contract guidance v2, Project Management and Full Design Team Services, https://www.crowncommercial.gov.uk/agreements/RM3741;
GC Works contracts, https://www.designingbuildings.co.uk/wiki/GC_Works_contracts; Crown Commercial Services, Guidance Short form terms and conditions, https://www.gov.uk/government/publications/short-form-terms-and-conditions
[217] Sir Michael Latham, *Constructing the Team: Final report of the Government/industry review of procurement and contractual arrangements in the UK Construction Industry*, July 1994, HMSO. Available: http://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf, accessed 3 December 2021
[218] See foreword of the NEC 4 contracts, v, NEC 4, June 2017
[219] Ibid

- States any constraints on how the Contractor Provides the Works

And is either

- In the documents which the Contract Data states it is in or
- In an instruction given in accordance with the contract."

Thus, indirectly, clause 14.3 gives authority to change the information which specifies and describes the works and the "constraints on how the contractor provides the Works". First, this clause grants an indirect power because it redirects to the scope and key dates instead of directly granting a right to modify. Second, it is indirect since it does not give the power directly to the authority but the Project manager. This should not create any issues as to the instruction changing the scope or key dates when they come from the authority and via the project manager.

There might, however, be a minor concern in this regard. In Costain v Betchel,[220] the High Court clearly established the duty of the project manager to act impartially, as between the parties, in matters of assessment and certifications. If this duty is construed widely as requiring the project manager to generally act in an impartial manner, it might create issues if a change to the Scope is pursued by the authority but not passed onto the contractor by the manager because it is considered harmful to the contractor. Notwithstanding, this situation seems unlikely for several reasons. First, the duty as construed by the Court was only regarding matters of certification and assessment. Second, the authority remains the client of the work, and it seems difficult to conceive that the project manager will oppose a change to the scope. Third, NEC4 considers these changes to be 'Compensation Events'; therefore, any change that increases the price will be paid for. Fourth, most construction contracts will be limited by the requirements set out in Regulation 72 of the Public Contracts Directive; these are the same EU limits.

Considering the above, it seems difficult to imagine an event that is intrinsically harmful to the contractor as to compromise the duty of impartiality of the manager.

NEC 3 used the term 'works information' instead of Scope. For this reason, NEC 3 authorised a change to the Works information. It was said relating to the former edition:

[220] Costain Ltd V Bechtel Ltd: TCLR 6 and [2005] BLM Vol. 22 No.8 p.1 TCC

> ‘it is not clear whether these clauses apply only to ‘changes’ in the works information or whether they apply also to additional information – which then creates new obligations. For example, if there is nothing in the works information requiring the contractor to design parts of the works is the project manager empowered to give instructions which impose design obligations on the contractor? Would such an instruction be a ‘change’ in the works information or a completely new category of works information? Would such an instruction be an instruction given in accordance with the contract?’.[221]

Perhaps taking this into consideration, NEC 4 changed the term works information for Scope and defined it as including both descriptions and specifications. Moreover, the Scope might be in “an instruction given in accordance with the contract”.

Therefore, the power to modify the description and specifications is unbounded. This, Eggleston refers “because NEC 3 [also applies for NEC 4] has none of the usual provisions fixing the scope and limitations of variations which may be ordered under the contract by reference to necessity, desirability or value”.[222] Notwithstanding, this unbounded power has a limit since the instruction must be given ‘in accordance with the contract’. Although this is not a clear limit, this wording could be construed in a similar manner as ‘within the scope of the contract’ used in the US Federal Acquisitions system, or ‘the change of the contract’s object’ of the French administrative law system. Moreover, this limit could be construed in a more restricted manner, allowing only instructions/variation provided for in other contract clauses.

Moreover, and perhaps more relevant for this thesis, this term could be construed as meaning, in addition, subject to the limits arising out of EU law. Thus, the legal limitations imposed by EU regulations will be inserted into the contract via this provision found in Clauses 14.3 and 11(16). It must be said that the EU limits might not apply to the contract. (e.g., they might not apply if the contract does not fall within the directive’s thresholds or limits might stop applying with the new UK law post-EU)

[221] Briand Eggleston, *The NEC 3 Engineering and Construction Contract*, (John Wiley & Sons 2006) 67
[222] Ibid, 67

Where EU limits do not apply, it is likely that, as Eggleston suggests, "[c]learly some practical, if not contractual, limitations have to apply otherwise every NEC 3 [applies for 4] contract is completely open-ended so far as the contractor's obligations are concerned. A contract to build a school could theoretically be turned into a contract to build a hospital. No one, of course, would attempt to argue that such an extreme change was valid, but that does not remove the scope for argument on lesser changes".[223] The limits to these powers arising out of case law will be analysed further below.[224]

Another situation that must be mentioned relating to the NEC 4 Contracts is that the change to the scope is considered one of the 'Compensation Events' under Clause 60 of the contract. Therefore, changes to the scope may require a price or time adjustment under the terms specified in the contract.

(ii) Services contracts

The UK Central Government continues to issue its own forms for services contracts. There are several model contracts, and their use depends on the type of services to be delivered and the contract value. To have a general understanding of the current approach to alterations of public contracts, the content of two different contracts will be analysed. First, the contracts for services used by the Transport Department and then the contract for major services for above 20 million contract value contracts will be studied.

The Department for Transport relies on its General Conditions for its services contracts. This department has published two different General Conditions for services contracts, one for contracts below 5 million and the other for contracts above that value.[225] Although there are two different documents, the Variation clause remains the same. Thus, the Variation Condition is condition F.3 of the General Conditions for contracts below 5 million and Conditions F.4 for contracts above 5 million.

[223] Ibid, 68
[224] See section 7.1.3
[225] Department for Transport, DfT general conditions of contract for services, available: https://www.gov.uk/government/publications/general-conditions-of-contract-for-services accessed 27 November 2021

These conditions read, “the Authority may request a variation to the Specification provided that such variation does not amount to a material change to the specification. Such change is hereinafter called a ‘variation’”.

Under these General Conditions, the authority is not entitled to ‘order’ a variation but only to ‘request’ it. The condition limits the variations since they cannot ‘amount to a material change’. In this manner, the EU legal limits seem to become an *intra-contracto* limit through this clause.

Conditions F.3.2. and F.4.2. stipulate that the authority may request the variation “by notifying the Contractor in writing of the “Variation” and giving the Contractor sufficient information to assess the extent of the Variation and consider whether any change to the Contract Price is required in order to implement the Variation” (…) “If the Contractor agrees with the proposed Variation it shall confirm the same in writing”.

The condition states a procedure for the request and ‘acceptance’ of the variation. Thus, it becomes clearer that unilateral modifications are not an option in Services Contracts concluded by the Department of Transport. Finally, the fact that the authority might not order modifications can be corroborated in Condition F.3.3 or F.4.3, which read:

> In the event that the Contractor is unable to accept the Variation to the Specification or where the Parties are unable to agree a change to the Contract Price, the Authority may; (a) allow the Contractor to fulfil its obligations under the Contract without the variation to the Specification; or (b) terminate the Contract with immediate effect, except where the Contractor has already delivered all or part of the Services or where the Contractor can show evidence of substantial work being carried out to fulfil the requirements of the Specification; and in such case the Parties shall attempt to agree upon a resolution to the matter. Where a resolution cannot be reached, the matter shall be dealt with under the Dispute Resolution procedure detailed at Clause I2.

Thus, the contractor might be “unable to accept the variation” to the Specifications, or the parties might be unable to agree on a change to the contract price. In those circumstances, the authority has two courses of action. First, it might continue with the contract without the variation, or, second, it might terminate the contract or try to resolve the contractual link amicably.

Conditions F.4.3 and F.3.3 do not provide for the third 'traditional' course of action in which the contractor is obliged to perform the contract as modified by the authority even if it does not want to do so.

The second services contract is for "complex and high-risk contracts" services with an average annual value above 20 million.[226]

There are several clauses in the Model Contract on changes. Moreover, the Model Contract contains a procedure for Contract changes. This procedure also applies to changes that can be categorised as unilateral changes.

The Change Control Procedure is set out in Schedule 8.2 to the Model Contract. In short, the procedure allows both parties to request changes; the supplier must assess the potential impact of the proposed change, based on the assessment, the authority might approve or reject the Contract Change, finally, under very specific grounds, the supplier has the right to reject the Contract Change.

Schedule 8.2 does not expressly include limits to the Contract Changes that might be requested under this procedure. Therefore, the authority and contractor have an unbounded right to modify their agreement.

Moreover, the contractor is obliged to accept all changes requested by the authority. Except for Condition 7 of Schedule 8.2. which reads:

> "Following an Impact Assessment, if:
> (a) the Supplier reasonably believes that any proposed Contract Change which is requested by the Authority would:
> (i) materially and adversely affect the risks to the health and safety of any person; and/or
> (ii) require the Services to be performed in a way that infringes any Law; and/or

[226] Cabinet Office, Model services contract, available: https://www.gov.uk/government/publications/model-services-contract accessed: 27 November 2021

(b) the Supplier demonstrates to the Authority's reasonable satisfaction that the proposed Contract Change is technically impossible to implement and neither the Supplier Solution nor the Services Description state that the Supplier does have the technical capacity and flexibility required to implement the proposed Contract Change, then the Supplier shall be entitled to reject the proposed Contract Change and shall notify the Authority of its reasons for doing so within 5 Working Days after the date on which it is obliged to deliver the Impact Assessment pursuant to Paragraph 4.3".

Based on the content of this clause, it is possible to say, based on an *expressio unius est exclusio alterius* argument, that the only grounds allowing a supplier not to implement a change requested by the authority are the ones mentioned above. Thus, it is clear from the content of the contract that the authority reserves the right to request changes even against the contractor's will.

Contracts concluded using this form will most likely be covered by the EU limits to modifications. However, the clause above does not seem to expressly include them. Although condition (a)(ii) does allow the contractor to refuse changes that require the Services to be performed in a way that infringes the law, it seems that the Condition refers to the substantive regulation of the service, e.g., data protection regulations, rather than procurement law concerning not to the service as such but the limits to the change. Notwithstanding, it is relevant to mention that the Governance Schedule 8.1. establishes that the Change Management Board (the board in charge of approving or rejecting all proposed changes) shall "raise any risks or issues relating to the proposed Change". Thus, the issues that can be raised relating to the proposed Change should include any legal limits imposed by EU law or similar.

There are other provisions dealing with unilateral rights. For instance, section 7 of the Model Contract reads:

"7.7 Not more than once in each Contract Year the Authority may, on giving the Supplier at least 3 months' notice: (a) change the weighting that applies in respect of one or more specific Key Performance Indicators; and/or (b) convert one or more: (i) Key Performance Indicators into a Subsidiary Performance Indicator; and/or (ii) Subsidiary Performance Indicators into a Key Performance Indicator (…) 7.8 The

> Supplier shall not be entitled to object to any changes made by the Authority under Clause 7.7, or increase the Service Charges as a result of such changes provided that: (a) the total number of Key Performance Indicators does not exceed 20; (b) the principal purpose of the change is to reflect changes in the Authority's business requirements and/or priorities or to reflect changing industry standards; and (c) there is no change to the Service Credit Cap".

This type of change is discretionary for the authority and does not have to follow the Changes Control Procedure explained below.[227] It is clearer in this case, compared to the clause analysed above, that the authority can unilaterally modify the contract's Key Performance Indicators and that, generally, the Contractor cannot "object to any changes" or "increase the Services Charges". The contractor could object to or increase the Charges only if the total Key Indicators exceed 20, does not reflect the Authority's business requirements and/or priorities or the changing industry standards, or there is a change to the Service Credit Cap.

Therefore, although the clause does provide for a unilateral right to modify the contract, it still authorises, under certain circumstances, the contractor to refuse them. These grounds are limits to the authority's right to modify the contract.

(iii) Supply contracts

The UK central government does not use a single Standard Term and Conditions form. However, attention will focus on the NHS terms and conditions for contracts for the supplies of goods. This responds to the drafting of the clause on variations and the fact that other Standard Terms do not include clauses on unilateral modifications,[228] or cooperation duties as the one analysed below.

The NHS Standard Terms do not have a clause allowing unilateral modifications. The policy of the central government is also to use bilateral modifications. Term 21.2 reads, "any change to the Goods or other variation to this Contract shall only be binding once it has been agreed in writing and signed by an authorised representative of both Parties".

[227] See section 7.2
[228] This is the case of the Department for Work and Pensions: https://www.gov.uk/government/publications/dwp-general-terms-and-conditions-of-contract-for-the-supply-of-goods accessed 27 November 2021

This drafting seems to preclude the possibility of unliteral changes. Although this situation is not changed by Term 21.1, it imposes a 'duty of cooperation' on the contractor that might amount to a similar result in practice. This term reads:

> "The Supplier acknowledges to the Authority that the Authority's requirements for the Goods may change during the Term and the Supplier shall not unreasonably withhold or delay its consent to any reasonable variation or addition to the Specification and Tender Response Document, as may be requested by the Authority from time to time".

It is very interesting to observe that the authority does not expressly have a right to unilaterally modify the contract, as it does not either in the case of services over 20 million. However, similarly it imposes a legal obligation to cooperate with the authority and forecloses the contractor to withhold or delay its consent to any reasonable variation. Thus, the contractor could only refuse a change when it is unreasonable. This 'reasonability' standard is vague when compared to the clearer grounds for refusal given in the services contract analysed above; however, it might be argued that the case law analysed below may inform Courts as to where reasonability lies.

It is interesting to observe that the structure of the right/obligation has been inverted. Thus, authorities do not have an express contractual right to unilaterally modify the contract and contractors an obligation to implement it. Authorities have the right to request variations, and contractors have the right to refuse to comply with them. Nonetheless, by limiting the grounds on which changes requests might be refused, the contract, it might be argued, achieves a similar result to a right to modify the contract unilaterally. This is so since, provided that the change does not fall within the refusal grounds, the contractor is bounded to consent.

Nonetheless, a theoretical/legal difference remains. When the contractor fails to agree, he is not obliged to perform the contract as modified since he is obliged to agree but not to perform it. This differs from other Standard Conditions and other systems where the contractor is obliged to perform the contract as modified. It is true that in both cases, the contractor will be exposed to a breach of contract claim. However, the breach in a 'unilateral change' clause will be for not performing the contract as modified. In contrast, the breach in the term under analysis will be for refusing unreasonably and against the contract terms to agree to a modification.

Moreover, it might be noteworthy that the limit of the right to "refuse modifications" might be given in a specific fact-based manner as in the Services contract above, or in a more open-ended manner as is the case of this supplies Terms.

7.1.2. The rationale and characteristics of this right

The most salient feature of UK law relating to unilateral modifications is its contractual nature. Absent a clause allowing unilateral courses of action in the UK; authorities will be deprived of such a right. There are, however, some exceptions to this rule. This includes the power to terminate the contract as an implied term, Regulation 73-3 of the Public Contracts Regulation.

The main consequence of the contractual origin of the right is that its scope, limits, and characteristics depend on the clause. Moreover, the lack of a unified standard form, as in the USA, makes it hard to identify general features of the right as granted in Model Contracts. Therefore, systematisations and general assessments are difficult or simply irrelevant.

However, it is interesting to observe that the UK has progressively eliminated or softened clauses allowing unilateral modifications. In previous versions of the Standard forms, it was clear that the authority had a right to impose changes on the contractor and that the contractor was obliged to perform them. However, there has been a change towards a more cooperative approach in the contract terms. This, as mentioned, has been done via the adoption of clauses limiting the right of the contractor to refuse to perform requested variations. Although the practical result of not agreeing to or not performing an alteration is similar, the legal difference of the "breaching conduct" remains. It is difficult to identify the exact reason that has led to this shift; however, this may be related to the limits of unilateral modifications explained below.

Another characteristic of the Contracts analysed above is that they contain clauses regulating the economic effects of unilateral modifications. The economic consequences and their rationales are not part of this thesis.

The inclusion of Terms dealing with the economic consequences of unilateral modifications might be related to the scope of analysis of contract modification law in the UK. As mentioned, consideration is the primary concern in contract modification law in the UK and other common law jurisdictions. Therefore, if a clause for unilateral modifications does not foresee any advantages for the contractual party obliged to perform additional work, the modification will be one-sided in the sense that it provides consideration only for one party. Hence, the issue of consideration in unilateral modifications is dealt with through the inclusion of economic advantages or economic benefits for the contractor or reductions of price when the modifications reduce the amount of work.[229]

In that manner, both parties will be providing consideration: the additional work ordered by the authority on the one side and the higher payment received by the contractor on the other. The pre-agreed additional payment prevents the unilateral modification clause, and its use, from becoming unenforceable due to lack of consideration.

7.1.3. Scope and limits to the right to unilaterally modify the contract

The focus of this sub-section is on limits to unilaterally modifying contracts that are inherent to this type of modification. Therefore, the application of EU law and other competition and award procedure concerns that generally cover both unilateral and bilateral modifications will be analysed in a different sub-section.

Bearing this in mind, the question of whether there are limits to unilateral rights to modify the contract can be asked. Of course, the answer to this question is to be found in the clause itself. Therefore, it is difficult to make general assertions about limits and scope when they vary from clause to clause. Moreover, the scope and content of the clauses in the UK have already been analysed in the previous section.

Therefore, the question to be answered in this sub-section is whether there are limits arising from common law, statute, or any other non-contractual source. On this topic, there are two

[229] "We observed in these cases an economic explanation of the presence of a discretionary power might assert that it is a governance mechanism for dealing with problems of adaptation, the convenience of which is paid for by come corresponding consideration such as price reduction or incentive payments". Hugh Collins, 'Discretionary Powers in Contracts', in David Campbell, Hugh Collins, and John Whitman (eds), *Implicit Dimensions of Contracts*, (Hart Publishing 2004), 250

strands of relevant authorities. The first strand of authorities refers specifically to the power of unilateral modification/variation, whereas the second strand relates generally to the exercise of discretion in contract law.

7.1.3.1. The first strand of case law limiting the right to unilaterally modify the contract

There are some relevant authorities suggesting that some limits to the power to unilaterally modify the contract exist even if not explicitly stated by the clause.

An example of, what seems to be, an implied limit to unilateral modifications can be traced back to Alexander Thorn v the Mayor and Commonalty of London.[230] As mentioned, the clause provided a wide scope for the power since it included the right to "vary the dimensions or positions of the various parts of the works to be executed". However, Lord Cairn seems to have found a limit to this right. He considered that there were two types of additional or varied work, either it was "the kind of (…) work contemplated by the contract, or it is not". The work contemplated by the contract, following his ruling should be paid "according to the prices regulated by the contract". On the other hand, it could be "additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all". In such a case, "two courses might have been open to him; he might have said: I entirely refuse to go on with the contract—- Non haec in faedera veni: I never intended to construct this work upon this new and- unexpected footing. Or he might have said, I will go on with this, but this is not the kind of extra work contemplated by the contract, and if I do it, I must be paid a quantum meruit for it".

It is submitted that Lord Cairn recognised a limit to the right to unilaterally modify the contract even if not provided for by the clause. He demarcates the standard to establish the limit. The wording is set forth by differentiating between work within the contract and 'not within the contract'. Furthermore, the standard to determine whether the work was within or without was for the work to be 'so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all'.

[230] Thorn (n. 206)

There are several elements that are worth highlighting; they are relevant in themselves and comparatively since they will appear, at least in a similar manner, in other systems that have no apparent connection amongst them.

Lord Cairn presents a distinction between alterations within and outside the contract. This distinction does not have express origin in the contract terms since no clause created it. However, this seems to be an 'implied' limitation based on the content of the contract or a limitation construed based on the contract.

Although this case seems to limit the modifications allowed under a unilateral modification clause, a later authority seems to be slightly distanced from this approach. In Lindsay Parkinson,[231] which clause was also analysed above, Lord Asquith said:

> "Under general condition 33 of the original contract, read literally, the Commissioners were entitled to require the contractor to carry out "extras" without limit of quantum or time. They could require him to erect a series of buildings on the site, pull them down, and put them up again, with or without alterations, as often, and for as long, as they chose. When the original contract alone was concerned, this was not such an unreasonable stipulation as on its face it appears, since two factors would in practice militate against the abuse by the Commissioners of their strict legal rights. First, under that contract they would have to pay for all extras under either sub-clause (a) or sub-clause (b) of condition 35 and, secondly, pay for them out of public funds. The contractor might feel some legitimate confidence that, whatever their strict rights, the Commissioners would not in practice choose, or perhaps in a democratic country be allowed, to waste the taxpayers' money wantonly".

It is relevant to point out that in this, in principle, the King's Bench Division accepted an unbounded right to modify the contract. Moreover, Lord Asquith considered that this right was not unreasonable based on the factors that these works were to be paid for and they will be paid for with public money. It is worth noting that no limits were originally found to the clause due to circumstances beyond its content: the payment and its public nature. This is interesting since

[231] Parkinson (n. 208)

it appears to create a kind of 'public law' rules via interpretation. Nonetheless, it is hard to assert whether the answer would have been different in a private law case.

This might be seen as a reasoning beyond the contract text; the terms are not unreasonable because there are practical/external limits. Nonetheless, this can be regarded as a contractual and legal consideration since the contract is interpreted not only literally but also considering the context in which it is immerse.

This is perhaps a unique piece of legal reasoning that will not be found in other systems. It might be argued that the reasoning is a pragmatic approach to the contractual right and its limits: no limit will be imposed by the judge since, practically, it would not be required. It also fits within the UK approach to contract law of enforcing contractual right/obligations even if harsh on one party. A different result will be observed in civil law jurisdictions less prone to enforce harsh contractual terms to achieve 'fairer results.'[232]

Nonetheless, this is the answer in principle and considering only the initial conditions. However, LJ Asquith had to consider additional factors to conclude over the issue. In this case, a deed of variation was concluded, agreeing that the sum eventually to be paid "should not be less than the actual cost" to the contractor and a net profit or remuneration of 150.000 and not greater than 300.000. Taking this into consideration, Lord Asquith continued:

> "To deal with these in turn, first, if the original contract plus the deed are read without any implied limitation on their literal meaning, the result, as indicated above, is that after 300,000/., profit has been earned by the contractor, he can be compelled to labour like the Danaids without reward or limit, on any further "extras" which the Commissioners may elect to exact from him, "till the last syllable of recorded time". The restraining practical factor that such "extras" will have to be paid for, and paid for out of the taxpayers' funds, no longer operates, because of the proviso to clause 4 of the deed imposing a maximum profit. Only the most compelling language would induce a court to construe the combined instruments as placing one party so completely at the mercy of the other".

[232] Jack Beatson 'Good Faith and Fault in Contract Law' [1995] 263, 267

It is interesting to observe that the possibility of enforcing terms 'placing one party so completely at the mercy of the other' is not completely ruled out by the Bench. However, it is clarified that construing the contract in such a manner will be done "only [in face of] the most compelling language". Thus, this corroborates that UK Judges might be inclined, or were by then, to enforce harsh contractual terms if language imposes it.

It is also worth noting that the removal of extra-text limits (payment+public money) to the unilateral modification power was taken into consideration to narrowly interpret this power.

Moreover, LJ Asquith considered that the limits he could originally found to this power no longer operated since a maximum profit was agreed upon. The reasoning seems to be that since there was a maximum profit, the Commissioners could indefinitely benefit from the contractor's work, arguably also contributing to value for money, by only paying the cost incurred plus a profit fixed at a maximum of 300.000.

Taking this into consideration and the fact that 150.000 and 300.000 were exactly 3 and 6 per cent of 5.000.000 (the parties allegedly considered this figure as potential total cost in concluding the deed, but did not mention it in it), the Bench adopted a more restricted and fair-based approach and Lord Asquith concluded:

> "If so, the conclusion seems justified that the parties to the varying deed contracted on the basis of a maximum and minimum profit directly related and limited to a total quantum of work measured approximately by 5,000,000/. and on the basis that the Commissioners should not be entitled under the contract to require work materially in excess of this quantum. Hence no claim to exact an extra quantum of work measured by about 2,000,000/. can be sustained under the contract and, such extra work having been in fact requested and performed, the contractor is entitled to claim in respect of it, not under the contract, but dehors the contract, for a reasonable remuneration".

In this manner, surrounding circumstances were considered to limit the unilateral right to modify the contract. In this case, the circumstance was the existence of a maximum profit that was a percentage to a maximum potential total cost considered when concluding the deed. The limits in the original contract were also surrounding circumstances rather than *intra-contracto* limits. In that instance, the limits were that the additions had to be paid for, and the payment

involved public money. This, nonetheless, is not a limit strictly speaking since it does not limit the power of the authority contractually, but it is regarded as a limit since under rational and democratic systems contracting authorities are not expected to act unreasonably in spending public money.

It is interesting to observe that no general and whole-encompassing limit is recognised by UK Courts. They seem to prefer identifying limits on a case-by-case basis. This is also true even within the same contract/case since one 'limit' was observed for the original contract and a different one for the contract as modified.

Nonetheless, subsequent cases seem to draw upon Thorn v. Mayor Commonality of London in recognising a general limit to unilateral modification based on the content of the contract and not allowing the erect-pull-them-down-erect approach allowed, at least theoretically, in Lindsay Parker.

The leading modern authority on the limits to variations is Blue Circle Industries Plc v Holland Dredging Co (UK) Ltd.[233] In this case, where no public body was involved, the Court of Appeal recognised that not all variations could be regarded as within the variation clause of the Contract. The legal issue in this case, as explained by the Court, "has centered upon the terms and co-relation of these two "agreements" and whether the "island agreement" was in truth and effect a variation of the "dredging agreement". Dependent upon this, further questions arise as to the extent and effect of the arbitration clauses". Thus, the issue of variation/separate agreement was used to determine the extension of an arbitration clause; however, the legal reasoning is perfectly applicable beyond the restricted area of arbitral clauses and for the purposes of determining the limits to unilateral modification powers.

Lord Purchas clearly stated that limits to the right of variation exist, and he delineated them. The limit, and standard, was once again the contract. He accepted that there are variations within the contract's variation clause and others that cannot be considered as such but must be regarded as separate agreements. The limit/standard to differentiate between one and the other was, according to this judgement, "the scope of the original contract".[234] This resembles the American and French approaches that impose limits to variation powers and place the original

[233] [1987] 37 BLR 40, [1988] WL 622798
[234] Ibid

contract as the scope to examine them. Moreover, this is also similar to the standard and wording presented in Thron v London. Nonetheless, other factors highlighted in the analysis to Thorn are not present here since this case related to the extension of the arbitration clause to the separate agreement/variation rather than to a party not respecting the power's limits.

To finalise the analysis of this first strand of case law, the content of Halsbury's Laws of England on extra work and variations can be analysed. Halsbury's Law refers only to building contracts, and although it is not law, strictly speaking, it allows concluding on the limits delineated by case law with a certain degree of confidence. Halsbury's Law reads:

> "**272. Extra work and variations.**
> Unless the building contract expressly provides that the contractor is obliged to comply with the requirements of the employer to change the works contracted for (whether by way of addition, alteration or omission) the contractor is not obliged to do so. They must form the subject of a new contract or be a variation of the original contract. If a contractor carries out unauthorised work he is not entitled to be paid in the absence of special circumstances. Even where the contract does contain express provisions for the contractor to make changes, it is a matter of interpretation whether the changes fall within the power. If the **work falls outside** the scope of the contract the employer may be liable to pay if a promise to pay can be found".

First, it is clearly stated that unless the contract expressly provides for unilateral changes to the works, the contractor is not obliged to perform them. Second, even where the power exists, this power has limits. Those limits are expressed in Halsbury's Law as "a matter of interpretation whether the changes fall within the power". Moreover, the concept of "work" that "falls outside the scope of the contract" is introduced and accepted as current law. In case the power falls outside, the employer will be found liable to pay if a promise to do so can be found. Although this is not expressly said, it seems reasonable to conclude from the text that this payment will be outside the contract, and possibly for quantum meruit, and not merely based on the methodology agreed by the parties.

The arguments presented in this section suffice to demonstrate that common law does recognise some limits to the right to modify the contract unilaterally and that this limit seems to be, mainly, the contract itself and its scope.

7.1.3.2 The second strand of case law relevant to limiting unilateral rights to modify the contract

The second strand of case law relates to the limits recognised by Courts to the exercise of discretionary powers granted by the contract. UK Courts were historically more willing to recognise limits to discretionary powers in fiduciary contractual relationships, e.g., agency.[235] However, current case law seems to show that discretionary powers are limited even beyond fiduciary contracts.

It is submitted, that this line of reasoning is relevant since it has been used for a varied array of discretionary powers. Thus, it can be argued that this applies to any discretionary power granted by the contract to one party; this includes the power to modify the contract unilaterally.[236]

Under the premise that this law applies to unilateral modification, the following analysis can be undertaken. First, it is worth noting that "[o]ne of the hallmarks of English common law is that it does not have a doctrine of abuse of right: if one has a right to do an act then, one can, in general, do it for whatever reason one wishes".[237] However, scholars seem to agree, nowadays, that discretion in contracts under common law has limits regarding their exercise.[238]

This arises from a group of decisions that have recognised that limits do exist and apply as a matter of implied terms or construction to different types of contracts and different types of powers. However, this has not always been the case. For instance, In Lombard Tricity Finance Ltd v Martin Shaun Paton, Lord Staughton said:

> "A power to vary the rate is conferred in plain terms, there is no other express restriction upon it, and we can see no sufficient basis for any implied restriction.
>
> The second question is whether such an agreement is lawful. At common law it is."[239]

[235] Collins (n. 229) 250; Richard Hooley 'Controlling contractual discretion' [2013] *The Cambridge Law Journal* 72.1, 65
[236] Collins (n. 229)
[237] Beatson (n. 232)
[238] Chen-Wishart, Mindy (n. 238) 91; Beatson (n. 232); Terence Daintith, 'Contractual Discretion and Administrative Discretion: A Unified Analysis' [2005] MLR 68, 554; Hooley (n. 689); Stephen Kós 'Constraints on the exercise of contractual powers' [2011] *Victoria U. Wellington L. Rev.* 42, 17
[239] *Lombard Tricity Finance Ltd v Martin Shaun Paton* [1989] WL 649881

This judgement accepted that where terms are clear enough as to exclude any limit to the powers, UK judges are willing to enforce them without finding any implied limit, and that these terms are not prohibited at common law. However, a different conclusion was reached in Geoffrey Nash and others v Paragon Finance Plc.[240] The Court held:

> There are two strands to the argument that found favour with the court in *Lombard* : (a) it is implicitly accepted that the lender should not act capriciously; but (b) there is no need to impose an obligation on the lender not to act capriciously, because there is no realistic possibility that he will do so.

Thus, to the eyes of the Court in Paragon, the argument in Lombard seems similar to that observed in Lindsay Parkinson, where no implicit term was accepted since there was no need to impose it. This was so because there was no realistic possibility that the party would act arbitrarily. In Lindsay, this was given by the payment + public money equation, whereas in Lombard, the Court relied on the fact that "one would hope that the Director General of Fair Trading would consider whether he should still have a licence under the 1974 Act".

Nonetheless, when practical circumstances showed that parties invested with unilateral rights might act arbitrarily, Courts were willing to recognise implied limits. In the words of Lord Dyson:

> "I can see that there may be no need to impose such an obligation on a lender where it would be impossible for him to act in breach of it. But it is inter alia for the very reason that lenders can act unfairly and improperly that the Director General has the power to withdraw licences from those who provide credit to consumers. In my judgment, the existence of the Director General and the fact that he has certain regulatory powers is not a good reason for holding that the power to set rates of interest is absolutely unfettered".[241]

In this sense, it was accepted that the power to vary interest rates was not unfettered, and it was ruled that an implied term existed. LJ Dyson expressly distanced from the approach in Lombard

[240] *Geoffrey Nash, Jennifer Valerie Nash, William Staunton, Mary Staunton v Paragon Finance* Plc (Formerly the, National Home Loans Corporation) [2001] EWCA CIV 1466, 2001 WL 1135217
[241] Ibid

and said that "I do not agree with the obiter dicta expressed by this court in Lombard (…)" and concluded that:

> "I would hold that there were terms to be implied in both agreements that the rates of interest would not be set dishonestly, for an improper purpose, capriciously or arbitrarily. I have no doubt that such an implied term is necessary in order to give effect to the reasonable expectations of the parties".[242]

Thus, the common law is willing to imply terms to limit the power to change interest rate even if provided for in unlimited terms by the contract. It is interesting to note that the Court starts from a similar reasoning to the one held in cases from the 19th century, namely Thorn: the parties concluded the contract under certain assumptions, including reasonable expectations as to the behaviour of the other party, therefore in using unilateral powers the other party should not be taken by surprise.

More evidence from different types of contracts seems to support the general implication of limits. Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd[243] concerned a reinsurance contract that granted the right to the reinsurer to approve any settlement or compromise between the insurer and insured. In this case, Mance LJ found an implied term that the reinsurer could not withhold approval unless there were reasonable grounds to do so. He went further and presented the limit in terms of good faith.

The legal construct follows a line of thought based on reasonableness: no party would have agreed to those unreasonable terms having the discretion to refuse them, or, in slightly different wording, no party would accept unilateral powers being exercised unreasonably. However, in Gan, the limit was stated in terms of good faith, an approach that was rejected in Mallone, where the Court expressly returned to reasonableness and rationality tenets.[244] Lord Rix said that he adopted:

> "a less restricted limitation analogous to unreasonableness in the Wednesbury sense (…) or what Mance LJ in the latter case called "unreasonableness in the sense of

[242] Ibid
[243] [2001] All ER (D) 33
[244] *Giovanni Mallone v BPB Industries Plc* [2002] EWCA Civ 126

conduct or a decision to which no reasonable person having the relevant discretion could have subscribed" (at para 64)".

The use of reasonableness in the Wednesbury sense highlighted by LJ Rix allows introducing some relevant commentaries. First, it seems clear that despite resistance[245] there is a clear influence of public law on private contract law, as Beatson suggested,[246] since reasonableness is understood in the Wednesbury sense.

Second, this reveals a paradoxical situation. Courts in the UK were somehow reluctant to apply judicial review principles to public contracting activities unless there was a clear public law element.[247] Nonetheless, these principles are now applied to public contracts even if lacking a public law element but for contract law and not public law reasons. This is true, nonetheless, only for the restricted field of discretionary powers granted for by the contract, and for concluded contracts rather than the whole contracting activity.

Moreover, LJ Rix also returned to the reasoning that the power must not be exercised in a way that no reasonable person having the discretion could have subscribed. This resembles the idea of "I did not agree to these terms" and "do not surprise me" found in other cases.

Similarly, in Socimer[248], it was said that "[w]hen a contract allocates only to one party a power to make decisions under the contract which may have an effect on both parties, at least two questions arise. One is, what if any are the limitations on the decision-maker's freedom of decision?"

It is interesting that unlike previous decisions, in this case, the question was not asked only regarding the type of contract or the contract sub judice but generally relating to contractual discretion/unilateral powers. Thus, it is possible to make an argument in the sense that these limits are not contract or clause-specific but part of the law of contracts. In relying on Paragon and other authorities, Cooke LJ commented:

[245] Jonathan Morgan, 'Against Judicial Review of Discretionary Contractual Powers' [2008] L.M.C.L.Q. 230; Jonathan Morgan, "Resisting Judicial Review of Discretionary Contractual Powers" [2015] L.M.C.L.Q. 483
[246] Beatson (n. 232)
[247] Eleanor Aspey, 'The Search for the True Public Law Element: Judicial Review of Procurement Decisions' [2016] 1 Public law 35, 2
[248] [2008] EWCA Civ 116

> "It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused".

In this ruling, the Court used the concept of reasonableness and re-adopted the good faith approach expressly rejected in Mallone. This double standard of good faith plus reasonableness was used again in *WestLB AG v Nomura Bank International Plc*..[249] The parties, it appears, did not dispute that there was an implied term for exercising discretion in good faith and reasonably or that the contract must be construed in this fashion. Thus, by 2010 the High Court seems to start from the understanding that this limit generally exists under the law of contracts. This, it is submitted, seems slightly different from former approaches where the term is implied in fact but not in law. This does not mean that in this case the limit is implied in law but seems to be construed from the contract rather than implied in the contract.[250]

Based on the case law reported above, several conclusions can be reached. First, Courts in England and Wales are willing to impose limits on discretionary powers granted in an unlimited manner in the contract. This limit can be implied or construed as just mentioned.[251]

Second, the limit imposed on discretionary powers is, despite Mallone, stated in unreasonableness, in the public law sense, and in good faith terms. Some authors have even gone on to saying that "[a]lthough it has been argued that *Wednesbury* should not be applied to control contractual discretion, it is clear that this technique *has become* part of contract law doctrine and is here to stay".[252]

Third, although Courts do not express that the policy is to protect the party subject to unilateral powers, this might be extracted from the reasonable expectations approach. It can be counterargued that it is not the same to have the effect of protecting the contractor that the intention to do so. The main argument stated by the Courts is to protect the contract, the original terms, and the expectation of both parties to the contract, not so much directly to protect one

[249] [2010] EWHC 2863 (Comm)
[250] Hooley (n. 235) 68 and ss
[251] Ibid
[252] Ernest Lim and Cora Chan, 'Problems with Wednesbury Unreasonableness in Contract Law: Lessons from Public Law' [2018] 135 Law Quarterly Review, 2019, Forthcoming, University of Hong Kong Faculty of Law Research Paper No. 2018/010

contractor. Although this is a valid line of thought, it can then be argued that even if not a central argument, Courts at least consider this policy, i.e., protecting the contractor subject to the power, in implying the term or construing the limit into the contract. Only this consideration, it is submitted, explains the use of a public law concept, i.e., unreasonableness, aimed precisely at protecting citizens from public powers.

Furthermore, both limits and both strands of case law could be used jointly to determine the current limits to the power of unilateral modification. In other words, the use of the power to unilaterally modify the contract finds a limit in the contract itself. This, the court has said, means that it cannot be used outside the scope of the original contract. The argument that could be made is that good faith and unreasonableness can be used as standards to inform the analysis of whether the power was used outside the scope of the original contract.

This is a reasoning that could be applied by English judges based on the case law and arguments above and might be a relevant consideration for regulators and judges beyond UK borders.

7.2. Bilateral Modifications

The right of the parties to bilaterally modify the contract arises directly from the freedom of contract principle.[253] Parties have the right to enter contractual relations and subsequently modify them. For this reason, unlike unilateral modifications, no special clause is required. Generally, it suffices for the parties to agree on a certain alteration for it to be valid and enforceable.

However, there are limitations to the enforceability of bilateral modifications. Courts in the UK have set forth certain requirements for variations to be enforceable, i.e., offer, acceptance, and consideration. This entails that without the elements mentioned above variations will not be enforceable, and parties will generally be bound by the initial terms of the contract. The reason for this is that Courts have historically analysed variation of contracts in the same fashion as the entry by the parties into a new contract, which explains the requirements mentioned above.[254]

[253] See note 199
[254] Wilken and Ghaly (n. 205) 13

Although issues of contract formation are relevant for the analysis of alterations in the analysed legal systems, contract formation issues, as mentioned in the introduction, are excluded from this thesis' scope. Consequently, it suffices to say that when concluding bilateral modifications to public contracts, authorities must be especially aware of the limitations imposed by contract formation requirements and particularly by contract consideration, which constitutes the main scope of analysis for contract modifications in the UK.

The issue of consideration is generally outside this thesis' scope. However, there are some comments that will be presented since they can be directly linked with public procurement objectives.

The rules on consideration of contract variation imply that modifications are not enforceable unless supported by consideration. One corollary of this is that "where a party has performed its obligations, it cannot utilise those performed obligations as any form of consideration supporting a variation of another party's obligations".[255]

This common law rule might provide contracting authorities with a legal ground to refuse sub-standard performances that might be prejudicial to competition and award procedures. Although acceptance of sub-standard performance is not a variation to the terms of the contract, it might have the same practical effect since it alters the way contracts are performed.

Moreover, it is possible to present the hypothesis that clauses on payment reduction included in certain contracts, and pre-agreed payments for unilateral modifications are based on the common law consideration requirement for variations. The argument is as follows: Only if the contract foresees payment for additional or varied work, variations imposed unilaterally will be supported by consideration from the contractors' perspective. Otherwise, it will be a case of more for the same, and the unilateral modification will be unenforceable for want of consideration.

Similarly, there would be no consideration to accept sub-standard performance from the perspective of the authority since it will be a case of less for the same. Consequently, reduction

[255] Ibid, 18

of payments operates as a manner to introduce consideration to accept sub-standard performance.

Against the background, it might be argued that the design of these clauses responds to the scope of analysis of variation under common law, i.e., from a consideration standpoint. However, a detailed analysis of these issues, as mentioned, does not belong to this thesis.

Another consideration in UK law in the analysis of variations is whether they are rescissions or implied discharges plus a new agreement.[256] It is submitted that these subtle theoretical distinctions are not relevant considerations for national or international regulators when deciding whether and how to deal with alterations to public contracts. Regardless of the theoretical underpinning, they are given in the common law, and the important consideration is that bilateral modifications are generally permitted and enforceable, provided they fulfil the contract formation requirements.

As mentioned, the law in the UK does not require contracts to explicitly include clauses allowing bilateral modification. It generally suffices for the parties to agree to alter the original contract. However, UK authorities sometimes introduce clauses explicitly regulating bilateral modifications, as elaborated further below.

From a legal or contractual perspective, there are several ways in which contract alterations can be treated. First, there is the option of imposing specific legal substantive rules limiting modifications. There is also a second approach that relies on a more 'procedural'/institutional approach to contract modifications.

This 'procedural approach', it can be argued, was preferred by the UK government, where substantive rules limiting bilateral modifications did not exist. This is true at least until the introduction and interpretation of the EU directive on procurement, as explained in the subsequent section.

This institutional/procedural approach to certain issues can be traced back in the UK, at least, to the Review Board set up in 1969.[257] The Board consisted of 4 members and one Chairman.

[256] Ibid, 26
[257] See Turpin (n. 214) 278

Two members were nominated by the Treasury, and two by the Confederation of British Industry. These nominations, as well as the nomination of the Chairman were consulted between the parties to ensure that they were acceptable.[258]

Amongst other, this Board had to "reviewing and giving rulings on individual contracts and sub-contracts, the Review Board will consider only Government profit formula risk contracts or sub-contracts (…). When a reference is made to it, the Review Board shall assess whether the price negotiated was fair and reasonable, and (…) determine whether any payment should be made by one of the two parties to the reference to the other and, if so, how much".[259] It is important to point out that this Board was set up to review pricing in non-competitive contracts and this is still the case for contracts reviewed by the Single Source Regulation Office.[260]

Moreover, the Standard Conditions for this type of contract incorporated Terms allowing both parties to refer the contract to this Board under certain conditions. Such a reference might be made "if it appears from post-costing that a profit of or exceeding 27 ½ per cent on capital employed or a loss of or exceeding 15 percent on capital employed (…)". However, these levels of profit/loss do not "involve any presumption of whether any payment should be made" since "it is not practicable to define a level at which profit automatically becomes excessive or loss unconscionable". It can be interpreted that these figures acted as a 'de minimis' limit below which a loss/profit does not authorise reference to the Review Board. In addition, even if the conditions above were not met, a party might be authorised to refer provided that the achievement of a fair and reasonable price was frustrated because the information "on which it was based proved to be materially inaccurate or incomplete".

This approach to pricing is another proof of the UK's reluctance to have legal hard law rules for procurement contracts and the general prevalence of institutional over rule-based solutions. The principle was not to allow excessive profit or unconscionable losses. The Government, in agreement with the industry, was willing to set up a body to review this and went further as to establish a 'de minimis' rule. However, this rule was not hard enforceable law since it was established in a Memorandum of Agreement. Moreover, these thresholds authorised reference to the Board, but did not ensure a favourable ruling.

[258] Ibid, 281
[259] Ibid, 281
[260] Single Source Regulation Office, 'About us', available: <https://www.gov.uk/government/organisations/single-source-regulations-office> accessed 28 November 2021

In other words, the Board would have to review on a case-by-case basis, and no general limit to profit or losses was introduced when the board was set up. This resembles the historical approach of common law. Instead of codifying and divining what the best law would be, it was preferred to set up common law courts, or a Review Board, in order for them to decide on a case-by-case basis the best law for the particular factual circumstances. Principles of the law might emerge from (or be 'discovered' by) decisions, but they are the point of arrival, not of start. The law as a point for starting is (used to be?) the preferred means of intervention of international organisations. This might prove more difficult to function in common than in civil law jurisdictions.

There is still evidence in public contracts practice of this institutional/procedural approach to alterations in the UK. The first example mentioned in passing was the Single Source Regulation Office that replaced the Review Board for Government Contracts. This body still gives opinions and makes determinations on questions referred by the Ministry of Defence and Defence contractors clarifying how the framework on control of the prices applies.

Another example mentioned above in the Unilateral change section was that of services for over 20 million pounds. In this contract, changes are dealt with in a procedural and institutional manner. For a start, it is important to highlight that there is an independent schedule on Change Control Procedure,[261] and the Model Contract provides for the "Change Management Board".[262]

Paragraph 6 of the Schedule 8.1 on Governance determines the role of the Change Management Board. The Board is a contract-specific body chosen by the parties for the contract. This Board "shall assess the impact and approve or reject all Change Request. Changes which will have a significant impact on the Services shall be escalated to the Programme Board". In addition, the Board have to "(a) analyse and record the impact of all changes" and especially whether the proposed Change " (i) has an impact on other areas or aspects" of the contract; "(ii) has an impact on the ability of the Authority to meet its agreed business needs within agreed time-scales; (iii) will raise any risk or issues relating to the proposed Change; and (iv) will provide value for money (…) (c) approve or reject all proposed Changes".

[261] Schedule 8.2 to the Contract Service (n. 216)
[262] See Model Contract services (n. 216) Schedule 8.1. on Governance

As it can be observed, the contract does not establish substantive limits to Contract Changes, but it sets up a body in charge of reviewing the changes, their value for money, and other related issues. This, as was suggested in the unilateral modification section,[263] includes substantive limits arising from EU law since the Board must analyse and record "any risk or issues relating to the proposed Change".

Moreover, the Schedule of the contract provides that "both the Supplier and the Authority shall be represented" in the Boards, including the Changes and Programme Boards. Annex I to the schedule 8.1 simply left blank the space for members representing each party, including a Chairman (included in the Authority's members). Thus, the number and balance between parties remain to be decided by the authority and the contractor.

Section 13 stipulates that "any requirement for a change shall be subject to the Change Control Procedure". Regarding this procedure, Schedule 8.2 stipulates that either party may request a change, which shall initiate issuing a Change Request,[264] the supplier shall then assess the potential impact of the proposed change, the authority has the right based on this to request amendments to the proposed change, approve it or reject it. The supplier may reject a change based on certain grounds, i.e. risk to health and safety of any person or infringement of the law. If the authority agrees to the proposed Change, it shall issue a "Change Authorisation Note", and only then it can be implemented by the supplier.

This contract also provides for the "Required Changes Register", defined as "a register which forms part of the Risk Management Documentation which records each of the changes that the Supplier has agreed with the Authority shall be made to the Core Information System and/or the Risk Management Documentation as a consequence of the occurrence of any of the events set out in Paragraph 6.13.1 to 6.13.8 together with the date on which each such change shall be implemented and the date on which each such change was implemented". This record is a precondition to complying with transparency requirements since only a clear register of changes allows to have a logical and transparent alterations system for third parties and other suppliers to identify potential changes against the regulations.

[263] See section 7.1
[264] Cfr 7.3. Below

These are the "general" provisions on changes included in this Model Contract. However, the Model also contains several particular changes provisions. For example, section 6.3. to the contract establishes that any Changes to the Quality Plans shall be agreed upon in accordance with the Change Control Procedure. The same is provided for Services Improvements (section 8.3); variations in the Charges or relief from the Supplier's obligation resulting from a Specific Change in Law (section 13.4); reducing Charges by exercise of a contract option (section 15.19); Baselined Security Requirements (20.10-20.11) Changes to the Implementation Plan or the Charges (31.6); partial terminations (33.5); Changes to the Standards (Section 2.1 Schedule 2.3); Changes to the component parts and/or boundary of the Core Information Management System (Section 4.3 Schedule 2.4).

There are other model contracts with similar approaches to bilateral modifications. However, it is submitted that this example suffices to demonstrate that the institutional/procedural approach is still used in the field of contract alterations in the UK. Moreover, the Model does not include substantive limits to the right of the parties to bilaterally modify the contract. The only limits arise from EU law principles and limitations, as explained in the next sub-section.

7.3. Limits to unilateral and bilateral modifications arising out of competition concerns and respect for the procurement procedure

Before the transposition of the EU directives on public procurement, the UK did have in place competitive tendering and public procurement procedures. However, UK law did not conclude that alterations of public contracts should be substantially limited to respect and protect award procedures. This might be a consequence of the fact that tendering procedures and rules on the award were not necessarily law but practice followed because of Treasury guidelines and other non-legal documents. Therefore, it would not be expected for modification rules to arise as enforceable legal rules when tendering procedures were not law either. In other words, it was not conceivable for legal rules limiting modifications to arise from competition and award procedure concerns when the latter were not enforceable legal rules. Therefore, it was necessary for EU law preoccupations and principles to be in place in the UK for this system to reach that conclusion.

A leading authority on the topic of limits to alterations of public contracts in the UK is the Legal Services Commission case.[265] In this case, the legal issue was, as the Court framed:

> "Provisions in the new Unified Contract between the Legal Services Commission ("the LSC") and solicitors wishing to undertake publicly funded work contain extensive powers of unilateral amendment on the part of the LSC. This appeal concerns the compatibility of those provisions with general principles of public procurement law and with (…) ("the Public Sector Directive") and United Kingdom regulations dealing with public sector procurement, the Public Contract Regulations 2006".

Focusing on the right to amend the contract, it is important to present the content of the right to modify the contract. Clause 13 of the Terms of the Unified Contract provided that subject to Clause 13, "we have the right to amend the contract documents from time to time" if it was considered necessary or desirable to do so in order to facilitate legal aid, or if the amendments have been approved by the Consultative Bodies, or if they are permitted under clause 13.2 or any other provision of the Contract. Clause 13.2, in turn, provided for an array of changes following changes in law or judicial rulings, and in a numerus apertus manner several changes were enunciated including amendments to any schedule, to the payment provisions, new controls, excluding any description of the work, or amending the specifications.

Clause 13.3-6 provided for a consultation procedure with the affected supplier, or the Consultative Bodies if more than one supplier was affected. After consultations were held "we will explain what decision we have made, and why". Following an amendment, suppliers had the right, according to Clause 13.13, to terminate the contract by giving notice.

In the first instance ruling, Beatson J. summarised that:

> "The main change is an alteration to the payment structure from a system based on hourly rates towards one based on fixed and graduated fees. The LSC has also indicated that there will be further changes. The Unified Contract will be extended to cover publicly funded criminal work from 1 April 2008. The LSC may wish to introduce a minimum contract size so that publicly funded work will be restricted to firms

[265] R (on the application of the Law Society) v Legal Services Commission, High Court (Queens Bench Division, Administrative Court) judgment of 27 July, Beatson J; Court of Appeal [2007] EWCA Civ 1264

> undertaking more than that minimum amount of work. The standard to be achieved by firms in peer review may be raised from "competence" to "competence plus".[266]

Following these changes, at least one supplier decided not to accept the amendments. The main argument of the applicant relied both on the power to unilaterally modify the contract, and the way it was used, to argue that the provisions render it impossible to determine with certainty what will be required and on what terms, which rendered the power unlawful under the light of the transparency principle.

The first instance decision of J Beatson ruled that the powers were lawful regarding the principle of Transparency since the identification and publication of the information about the parameter of the programme of reform enabled to interpret the scope of the amendments which were contemplated. It was decided that the power was clearly stated by the contract. Additionally, this power was wide but not unlimited since it was to be limited by the principles governing discretionary powers. However, the power was found not to comply with regulation 9(7).

To decide the appeal, the Court analysed Succhi di Fruta and said:

> "70. It is plain, however, from the facts of the case, and the context, that (contrary to the submission of the LSC and the Secretary of State) in speaking of the "relevant detailed rules" the European Court was not speaking exclusively of procedural rules. The whole point in that case was that all tenderers needed to know the conditions under which they were entitled to withdraw other fruits. That was not a procedural matter".[267]

The conclusion of the High Court is, it is submitted, aligned with the EU approach to modifications.[268] However, it is worth mentioning that EU law is not in this regard aligned with the traditional UK approach to modifications. As explained, the approach followed at least since the Review Board for pricing has been a procedural/institutional rather than a substantive-rules-limits approach. This decision, accurate from an EU law perspective, rules out that

[266] Ibid
[267] Ibid
[268] Cfr. Chapter 2

institutional/procedural rules could be the exclusive means of controlling alterations to public contracts.

Moreover, it is worth mentioning that the UK approach has become more legalised since limits are now substantive and legally enforceable. Consequently, the competence of reviewing modifications (whether unilateral or bilateral) is no anymore exclusively the Board's competence, but it also becomes the Courts' competence. In this manner, it might be argued, UK Courts "gained jurisdiction" in the field of public procurement formerly reserved to the Boards.

The Court agreed with the first instance judgement in the sense 'that the LSC could not make arbitrary or improper amendments. This was found to be grounded in several sources: first, the general principles of public law, second, the regulations, third, the express term in the contract that the LSC will act as a "responsible public body", and fourth, an implied term to that effect. Thus, the Court found an implied term limiting the unilateral power to modify the contract in a similar manner as it has been found to control other discretionary powers in contract law. This reinforces the argument presented above in the sense that limits to discretionary powers apply to unilateral modifications.

However, the Court rejected the first instance approach and instead considered that these limits "would not achieve the transparency of the contractual terms, any more than it achieved the transparency of the Commission's actions in *Succhi di Frutta*".[269] It was said that "The power of amendment is so wide in this case that it amounts to a power to rewrite the Contract".

Another circumstance of this case is that EU law is relied on by a current supplier that does not wish its contract to be modified. This contrasts with other EU cases and cases in other jurisdictions where transparency and other procurement principles concerns are brought before the Court by competitors rather than current suppliers. This, notwithstanding, was expressly considered a valid path by the Court.

Moreover, the Court considered that the principle of transparency would not be satisfied in this context of uncertainty since it may deter some potential service providers from entering the

[269] Legal Services Commission (n. 265)

contract. “The reservation of such a unilateral power to amend the contractual terms on such short notice creates an unjustified obstacle to the opening up of public procurement to competition. The uncertainty involved will necessarily deter service providers”. It was also said that “[w]e further consider that a power to amend will infringe the principle of equal treatment if it permits amendments that may favour some contractors but not others”.

This ruling directly evaluates a contractual clause, and not its exercise, against public procurement objectives. This might be controversial since the clause was analysed as creating potential, rather than actual, impacts on transparency and equal treatment principles. In this manner, the principle of transparency was used as a legality framework to establish whether the clause was valid or not.

This, it is submitted, is a valid approach since there does not seem to be any reasons to conclude that Transparency cannot be used as a legal framework to analyse contractual clauses. This is especially true when observing the way review clauses were dealt with in the 2014 Public Contracts Directive. However, an argument could be made in the sense that EU law on procurement shall be concerned with actual rather than potential violations and breaches of the law. For instance, the arguments of the Court in the sense that the clause was against equal treatment because it allowed differential treatment/modifications as between suppliers completely disregarded that this treatment might have been justified for differing factual circumstances.

Moreover, the potential power to re-write the contract was analysed as a potential threat deterring competitors from entering the market/contract. This is a strong argument since unbounded powers might, in fact, deter competitors and especially cross-border competitors to enter the market. However, the question is whether external substantial-modification limits suffice not to deter them when facing wide unilateral powers.

Furthermore, the extended use of unilateral modification clauses in private contract law in the UK makes it hard to argue that the same power granted to authorities, in similar ways, might deter competitors from entering the market. In other words, the argument fails to explain how a contract clause widely used in private markets would deter competitors in public markets. This is reinforced when considering that, unlike private law, the law of public contracts, but not by then, does have statutory limits set forth by Regulation 72 of the 2016 Regulations.

Similarly, an argument could be made in the sense that the analysis of the clause against transparency without knowing the actual impact of the exercise makes it impossible to determine whether the specifications were substantially changed as to amount to a new contract or is a material modification against this principle. The Court basically said that the amplitude of the power may act as a deterrent for certain suppliers and shall therefore be prohibited.

A question that arises at this point is whether the CJEU and the EU legislator agree with this approach. This might be argued based on the way review clauses were dealt with in the 2014 directive. On this basis, it could be argued that unilateral modification clauses are only permitted if they comply with the requirements set forth by the directive and are otherwise prohibited.

Nonetheless, ruling out the unilateral power to modify the contract or treating it as a review clause under clause 72-3 might be problematic for several reasons. First, because directly analysing the clause and not its impact might render unilateral powers as the one granted in this clause or as conceived in France generally illegal in the face of EU law. This is a sensitive practical issue but not a major legal blow for EU law that will prevail over national laws. Second, in concrete cases as in the analysed one, the authority might, absent this clause, not have the power of unilateral modification. This is problematic in practice since authorities will be bounded by a contract with no power to modify it even though both parties agreed to it, and as demonstrated above, this power is generally reserved for by authorities for several reasons.

Moreover, it is submitted that it will be a better approach to evaluate not the power but its exercise on a case-by-case basis and with EU law limits as a background. This approach was not necessarily available in the case under analysis because it was pre-Pressetext and prior to the 2014 directives. However, currently, EU law has clear limits to modifications of public contracts. Therefore, it might be argued that the power can be granted in an unbounded manner since transparency and equal treatment requirements are met by respecting EU limits set forth by Article 72 for modifications other than review clauses. This will allow authorities to have an unlimited power to modify the contract and be bounded to respect EU public procurement principles by respecting Article 72.

This approach, it is submitted, also aligns better with the different national approaches of the jurisdictions analysed in this thesis that belong to the EU.

The second topic that has been dealt with in the UK as a limit to alterations arising out of competition concerns is the inclusion of a new service. In Edenred, a Tax Free Childcare[270] was included in an existing for services outsourcing concluded between the NS&I and Atos.

As framed by the Court:

> "At the heart of the challenge is the assertion that the proposed amendment (…) involve the direct award of a valuable public contract without conducting a tender procedure contrary to the requirements of the EU procurement regime that was implemented by the Public Contracts Regulations 2006 and their successor regulations, the Public Contracts Regulations".

The Court clarified that the amendment will be governed by the 2015 Regulations.[271] The challenge against the contract modification was based on two different grounds. The first referred to Article 72-4(c) and the extension of the contract's scope considerably. The second charge was brought under Article 72-1(a).

The first charge was dismissed because the Court considered that the contract was to provide the authority with "the operational services that would enable it both to perform its established retail banking and investment functions and also to expand its B2B services up to the £2 billion maximum envisaged in the OJEU notice (…)". The procurement and the envisaged expansion were "the object of the contract; [and] it was clearly stated in the OJEU notice".[272]

On the second charge relating to review clauses, the Court of Appeal considered that the amendment provisions were "sufficiently clear, precise and unequivocal when construed in their context".[273] The Supreme Court agreed on the point, despite it was not an acte clair,[274]

[270] Edenred (n. 107)
[271] Ibid, 30
[272] Ibid, 34 and ss
[273] Ibid, 43
[274] Ibid, 45

because the restrictions in the Schedule 2.11 confined the B2B opportunities to those within the scope of the OJEU notice, set out the principles that governed the incorporation of a new B2B service into the agreement, inter alia restricting any increase in Atos' profit margin and prohibiting the alteration of the risks allocation.[275]

As mentioned in the EU section, the fact that the Supreme Court analysed first whether the modification was substantive or not seems to assume that substantial modifications are not generally permitted even if in the framework of review clauses. This, it is submitted, imposes an interpretation of Article 72 that is more restrictive from the Authorities' perspective that allows substantial modifications provided that they were foreseen by review clauses. However, such an interpretation of the Supreme Court seems to align with EU concerns by curtailing a *carte blanche* in modifications for authorities and contractors when allowed by review clauses.

Finally, it is important to mention that the UK transposed Article 72 into the national legal system in the 2015 Public Contract Regulations. No further analysis will be undertaken of the national transposition since it introduces EU law into the national system: no change to the substance of the Article was made. Therefore it can be said that the transposition is correct and simply re-organises Article 72.

7.4 Physical Conditions in work contracts

As mentioned in the introduction, ground conditions in works contracts is one circumstance that frequently gives rise to alterations of public contracts. Bearing this in mind, the analysis of physical conditions currently used in the UK will be explained.

The general common law answer to risks in contract law is as clear as harsh: If the contractor promises to build a structure, then that is what he must do. This disregards, for instance, whether the design was produced by the employer,[276] or there are physical conditions that require an increased effort or time additions.[277]

[275] Ibid, 43
[276] Thorn (n. 206)
[277] In this sense: Bottoms v York Corporation, (Hudson, Building Contracts, 4th edn, 1914, p.208.) (Hudson's Building Contracts (12th Ed., 3-069); *R. v Paradis and Farley Inc* (1942) S.C.R. 10; Worksop Tarmacadam Company Ltd (Plaintiffs/Appellants) v Mr M Hannaby and Others [1995] EWCA Civ J1010-2.

For instance, *R. v Paradis and Farley Inc*[278] concerned a contract concluded by the Minister of Public Works and the respondent who submitted the lowest tender for furnishing and diving into the soil several steel piles of interlocking type. The respondent presented a petition for damages and additional compensation on the ground that the unit price tendered would have been sufficient to cover the work if the soil "had been as described in the plans and specifications". The Court concluded that the tenderer agreed to investigate, and the appellant did not guarantee but merely indicated, with reservations, the soil nature. This sufficed to say that:

> The risk was upon the suppliant, and having assumed it, it must necessarily bear all the consequences, financial and others, if it misjudged the works to be performed and miscalculated the cost of the enterprise. Expenses incurred for unforeseen difficulties must be considered as being included in the amount of the tender, and the respondent has the legal obligation to execute the contract for the price agreed upon, in the same way as would have been its undisputable right to benefit, if the soil had been more favourable and easier than foreseen.

The UK, similar in this sense to the USA, has relied on the use of contract clauses due to the harsh construction of contracts by the Courts. This has, it might be argued, forced parties to foresee the desired consequences within the contract, including consequences arising out from unforeseen circumstances in general and unforeseen physical conditions in particular.

For construction contracts, it has been said that "Underground construction risk tends to be allocated to contracting parties through standard forms of contract".[279] This risk may be fully borne by the employer, i.e., the authority, shared between authority and contractor, and fully borne by the contractor.[280]

In this continuum of possibilities, NEC4, the Standard Form currently in use by the UK government, allocates physical conditions related risks to the authority.

[278] (1942) S.C.R. 10
[279] Lukas Klee, *International construction contract law* (Wiley-Blackwell 2015) 356
[280] Klee (n. 279) 357

Although it is impossible to ascertain the rationales for the authorities to keep this risk, it is possible to hypothesise that authorities generally prefer not to pay a premium in all construction contracts in order for the contractor to bear the risk and prefer the approach of not transferring the risk and bear its consequences if the risk is in fact realised in a contract.[281] This is the approach in the USA as explained below.[282]

NEC4 deals with different circumstances by including a list of 'compensation events' in Clause 60. Moreover, Clauses 61 and ss establish a procedure to be followed to deal with these events. Having said that, it is necessary to point out that Clause 60.1(12) lists as a compensation event:

> "(12) The Contractor encounter physical conditions which:
>
> - Are within the Site
> - Are not weather conditions and
> - An experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for them
>
> Only the Difference between physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event".

An important circumstance relating to this clause is the fact that NEC 4 does not have a definition of physical conditions. Thus, it is submitted that this concept must be construed by adjudicators on a case-by-case basis. Notwithstanding, the lack of a definition might be understood as the intention of parties to have a wide interpretation of it. Moreover, this makes sense from a risk-allocation perspective. Thus, it is submitted that unless otherwise indicated in the contract, a phenomenon that can semantically be considered a physical condition shall be construed as such.

An example of a wide interpretation of this term can be found in *Humber Oil Trustees Ltd v Harbour and General Public Works LTD*[283] where although the soil conditions "were foreseeable in general, a very unusual combination of soil strength and applied stress

[281] In this sense see Briand Eggleston, T*he NEC4 Engineering and Construction Contract: A Commentary* (3 ed, Wiley Blackwell 2019) 234
[282] See section 9.4
[283] (1991) 59 Build. L.R. 1

constituted a physical condition within the "scope" of the ICE clause 12 and hence the contractor was entitled to additional payment for the additional costs incurred".[284]

In the same line, physical conditions are not constrained to underground or natural conditions.[285] It is perfectly possible that conditions other than underground and other than natural fall within this type of clause. A man-made, not underground, condition can be a physical condition. This was the case in Obrascon, where contamination was regarded as a physical condition in a FIDIC contract. However, as seen below, in that case, compensation was not granted but for reasons that concerned foreseeability and not the concept of physical conditions.

Furthermore, for a physical condition to be considered a compensation event in a Clause 60 sense, it must be within the Site. In turn, the Site is defined by Clause 10(17) in the following manner: "The site is the area within the boundaries of the site and the volumes above and below it which are affected by work included in the contract".

The boundaries of the site are to be defined by the parties in the Contract Data annex. Therefore, it is for the parties to determine the Site, the Site Boundaries, and consequently the lieu where unforeseen physical conditions might give rise to a compensation event.

Similarly, NEC excludes weather events as compensable under the physical conditions clause. The same occurs in the FAR clause and the French sujetions imprevues theory. However, unlike the other two, NEC does have an independent clause dealing with weather as a compensable event under extreme circumstances.

The third requirement for physical conditions to qualify as compensation events is a "foreseeability" condition set out in a very precise manner.

First, the situation must be analysed through the lens of an "experienced contractor".[286] This standard of review has been analysed by UK Courts. Although in the context of a FIDIC

[284] M.M Kumaraswamy, K Yogeswaran, and D.R.N Miller, 'A construction risks "underview" (of ground conditions risks in Hong Kong), [1995] Const. L.J., 11(5), 334, 336
[285] Eggleston (n. 281) 234
[286] David Kinlan and Dirk Roukema 'Adverse physical conditions and the experienced contractor test' [2010] Terra et Aqua, vol. 119, p. 3-13.

contract, *in Obrascon Huarte Lain SA v Attorney General for Gibraltar*, the High Court analysed a contract termination, following the suspension of works and completion delays, due to the failure of the contractor to foresee the extent of the ground contamination. Relating precisely to the standard under analysis, the Court ruled, based on an expert opinion, that "An experienced contractor would not slavishly accept the figure of 10,000m3 in the Environmental Statement." The first instance judge said that "an experienced contractor would make its own assessment of all available data". And the Court said that "In that respect the judge was plainly right". (…)

Moreover, the High Court held that "[T]he contractor must draw upon its own expertise and its experience of previous civil engineering projects. The contractor must make a reasonable assessment of the physical conditions that it may encounter. The contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable."[287]

The Court also took cognisance that the historical material provided that very extensive contamination was foreseeable across the site. Although the findings of the Court also relied on FIDIC conditions, it is submitted that the 'experienced contractor' test requires from contractors a certain degree of diligence in relying on the information provided for the authority/client. The extent to which this test requires re-assessing the data provided is, however, unclear.

In this instance, it seems important to consider that data interpretation is not the same as data. From this case and the way in which contracts on construction are generally designed, it seems that contractors can generally rely on data provided by the Client, but this cannot be extended to relying on the interpretation of that data.

In this sense, FIDIC expressly provides that the contractor shall be responsible for its own interpretation of the data, but this does not necessarily mean that he cannot generally rely on the data. Against the background, as an abstract standard of evaluation, the contractor cannot simply accept the interpretation of the data. It is submitted that the Contractor should assess the reliability, for instance, by attending to the data collection provided that is authorised by

[287] Obrascon Huarte Lain SA v Attorney General for Gibraltar [2015] WL 4041949.

the Client, and by corroborating what the company who undertook the data collection, etc. was[288]

Nonetheless, it is important to point out that Clause 60.2 of the NEC4 does shed some light on the issue under analysis. This clause expressly foresees that in judging the physical conditions for the purpose of a compensation event, the contractor is assumed to have considered:

- The site information
- Publicly available information referred to in the Site Information
- Information Obtainable from a visual inspection of the Site and
- Other information which an experienced contractor could reasonably be expected to have or to obtain

Thus, NEC4 does expect the experienced contractor to have or to obtain other information. Notwithstanding, it is submitted that the experienced contractor test does not necessarily require contractors to undertake a full new data collection since this will trigger unnecessary cost duplication, increases in tender prices, and wary tenderers. In other words, a stringent application of this test might undermine contractual risk allocation of the physical conditions to the authority. This is so since, via the obligation to obtain information, the risk might in practice be born by the contractor despite the clause providing otherwise, and the aim of avoiding premium payments could be undermined.

Moreover, the issue of wrong data will not necessarily fall within this clause but might rather be treated as an issue of representation by the Client if Courts are willing to find a warranty as to the reliability of the data.

To conclude on this test, it might generally be said that the experienced contractor test requires a certain degree of diligence that will be analysed by adjudicators on a case-by-case basis observing the quality of the information provided, potentially the company that did the data collection, as well as the degree of diligence in relying on data or data interpretation by the contractor.

[288] Kinlan et al (n. 286) p. 3-13

The second element to be pointed out from the NEC clause is the temporal element: Contract Date. The substantive test, the third element analysed below, shall be assessed from the moment of the Contract Date. This temporal element coincides with other standards of assessments, including the test for limiting unilateral powers to modify the contract in the UK explained above. The reasoning seems sensible since it requires the adjudicator to place himself in the same temporal mindset and position as the contracting party that agreed to that contract.

The third element is the substantive test for a situation to qualify as compensable. NEC4 does not require the physical to be 'unforeseeable'. The situation might be foreseeable. The test focuses instead on two different circumstances: first, the chance of occurring, and second the reasonability of allowing for them.

Relating to the chance of occurring, the clause says that it must be "a small chance of occurrence". The consequence of which is that "it would have been unreasonable to have allowed for them". For this reason, it has been said that the test for entitlement is a "probability test rather than an unforeseeability test".[289] It has also been argued that the contract is not clear as to whether the test is a commercial or technical test or a combination of both.[290]

These two elements depend completely on the factual circumstances of the project, and it makes little sense to assess in-abstracto what kind of events would classify as such. Notwithstanding, it is important to underline that NEC4 has overcome the 'foreseeability' stage of risks and has instead relied on the 'chance and reasonability of allowing for it'. An argument can be presented in the sense that the latter two concepts are more commercially oriented since they may consider the usage and practice in construction contracts or in the construction subsector. Just to give an example, it seems that it would not be reasonable to allow for contamination risks in housing development contracts unless data provided by the client expressly advises to do so. On the other hand, in projects like the one in Obrascon, the contamination risk was present and included in the data provided by the Client. Therefore, the reasonable course of action is to review the data and allow for the physical condition.

A different issue is whether the level of contamination was foreseeable or not (or rather if it should have been allowed for that level of contamination), which is precisely the legal issue in

[289] Eggleston (n. 281) 235
[290] Eggleston (n. 281) 235

Obrascon. This, it is submitted, might also be informed by custom and commercial/sectorial practices. This seems to have been the Court's approach in Obrascon since they rely on experts' opinion to conclude that the level of contamination was not beyond cognisance of the contractor based on the available data.

Finally, it is important to mention that the clause provides that the compensation event must be assessed based on the "Difference between physical conditions encountered and those for which it would have been reasonable to have allowed". Thus, the compensation considers only the actual extra costs created by the unexpected physical condition and as from what was reasonable to allow for. Therefore, even if the contractor allowed for less than what was reasonable, he will not be compensated for anything below that standard. It has been argued that this is not an easy task since what exactly must have been allowed for is a variable standard.[291]

As a final commentary to this section, it must be noted that no public procurement concerns have yet arisen in this field of physical conditions. However, if rules limiting alterations remain in place, especially after Brexit, it is a possibility for these clauses to be analysed as review clauses and the consequent limitations would apply. Moreover, it seems also likely for these *intra-contracto* alterations to be analysed against other substantive limits and the procurement principles. Nonetheless, this enters the realm of speculation, and no further comments will be made in this or the following section on the matter.

7.5. Facing unforeseen economic circumstances

UK law has different forms to respond to unforeseen economic circumstances. The fundamental principle is that facing unforeseen circumstances, parties must perform their obligations as agreed without any right to receive additional payments. However, under certain circumstances, parties might be relieved from performance provided that the circumstances fall within the scope of frustration of the contract. Another exception is not to be found in the common law but in contract clauses. Parties may agree for different reasons, including avoiding frustration, ensuring continued performance, etc., to hardship/force majeure and other types of risk-allocation clauses[292].

[291] Eggleston (n. 281)
[292] Chitty (n. 131) para 23-058

7.5.1. The common law principle

The existence of unforeseen circumstances of an economic nature are deal with in the same manner than unforeseen physical conditions. Generally, if the contractor promises to perform certain obligations, he is bound to deliver what he promised; otherwise, he may be at risk of breaching the contract.

This is precisely the 'traditional approach' in English common law that can be found in Paradine v Jane[293] the King's Bench analysed a plea for relief from rent payment in a lease contract caused by an enemy invasion that drove the claimant out of the premises.[294] In that case, it was held that:

> "[B]ut when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it".

The authority is clear in the sense that the party to the contract is bound to make the duty or charge good notwithstanding "any accident by inevitable necessity, because he might have provided against it by his contract" The fundamental principle was that performance is due if you did not have enough foresight to include a contract clause dealing with the emerging circumstances.

7.5.2. Frustration of Contract

Common law has moderated this approach. Taylor v Caldwell is regarded as the first case in the development of the doctrine of Frustration.[295] In this case, the contract concerned the use of a Concert Hall for certain days. The hall was destroyed, and the King's Bench considered that the parties were exonerated from performance.

[293] Paradine v Jane [1647] EWHC KB J5
[294] War events and economic events related to war are also at the root of the French Imprevision theory.
[295] Mindy (n. 202) 283

Thus, it might be said that an exception to the rule that unforeseen circumstances do not 'excuse from performance' is the doctrine of Frustration in English common law. However, this doctrine excuses from performance, and the contract is discharged. Thus, rather than an alteration, it constitutes a form of discharge/termination and is in principle outside of this thesis' scope.

Nonetheless, it is important to mention that the underlying reasoning for frustration closely resembles the reasoning for alterations arising out of unforeseen circumstances in other jurisdictions, and this allows to introduce some insightful considerations as to the way alterations are dealt with by lawmakers.

Although it has been argued that Frustration is based on a just and reasonable solution, it seems that it is generally based on a lack of consent argument as follows. The performance has changed in such a manner that consent has run out. Thus, the 'radical change' test seems to inform Courts' decisions on whether the contract shall be discharged or not.[296] In Davis Contractors v Farenham, the House of Lords held that relating to the principle underlying frustration: "the question is one of construction. One must look at the contract to see what the parties intended in the events which supervened; one must construe it to see whether it was meant to apply to what happened".[297]

In this manner, it might be said that the issue of frustration is an issue of construction of the contract, and if the contract cannot be construed as to encompass the new situation, the contract is frustrated and at an end. Similar conclusions have been reached in other cases.[298]

The test has been labelled as a 'radical change' test.[299] And the change in circumstances must be so radical; it must render performance so fundamentally different from the original circumstances as to allow concluding that the new performance cannot be regarded as the same thing that was originally agreed. Some commentaries about the similitudes of this with other tests will be presented in the final chapter of this thesis.

[296] Mindy (n. 202) 283
[297] Davis Contractors v Fareham Urban DC, [1956] A.C. 696.
[298] British Movietonews v London and District Cinemas, [1952] A.C. 166
[299] Mindy (n. 202) 283

It must be said that facing unforeseen circumstances, the natural path for UK authorities seems to bilaterally agree to modifications to avoid successful claims for frustration of contracts. It is important to point out that in that case, consideration is given precisely by the new circumstances, and the contract would be enforceable since it would not be a case of more-for-the-same strictly speaking due to the practical benefit obtained by the authority.[300]

7.5.3. Contract Clauses dealing with Unforeseen Circumstances

Frustration is one possible scenario for unforeseen circumstances; however, it is also possible that unforeseen circumstances render the contract considerably more expensive but without giving rise to frustration. This is possible because the effect of hardship or force majeure clauses may be "to shut out the doctrine of frustration because the contract (…) will be held to have covered the event which has occurred".[301]

Thus, as with physical conditions, the principle seems to be that the contract must be performed even when facing unforeseen circumstances, and frustration of contract is the exception. Otherwise, the contract must provide the type of events that will excuse from performance or will require a new arrangement or alteration for the obligations to be performed.

For the purposes of this section, force majeure clauses are those that allow discharge from the contract's obligations or excuse from a breach, whereas hardship clauses are those that would enable continued performance in face of unforeseen circumstances via alterations.[302] Due to this thesis' scope, no attention will be devoted to the force majeure clauses since they will give rise to discharge and not an alteration as defined in this work. Therefore, attention will solely focus on the function and content of hardship clauses as here defined.[303]

After careful examination of several Model Contracts published or used by the UK government, it was found that the only contract that contained a hardship clause, as here defined, is the NEC 4 for construction contracts.

[300] Williams v Roffey Bros & Nicholls (Contractors) Ltd, 1989 WL 649764
[301] Chitty (n. 131) para 25-058
[302] Adrian A Montague 'Hardship Clauses' *Int'l Bus. Law.* 13 (1985): 135
[303] Dietrich Maskow 'Hardship and force majeure' *The American Journal of Comparative Law* 40.3 (1992): 657-669

NEC4 deals with circumstances that impact the economics of the contract in various clauses and in a multi-step and procedural manner. The first relevant clause for these purposes is clause 15 on "early warnings". According to this clause:

> "15.1 The *Contractor* and the *Project Manager* give an early warning by notifying the other as soon as either becomes aware of any matter which could
>
> - Increase the total of the Prices
>
> (…)
>
> - Impair the performance of the *work* in use
>
> The *Project Manager* or the *Contractor* may give an early warning by notifying the other of any other matter which could increase the *Contractor's* total cost. The *Project Manager* enter early warning matters in the Early Warning Register. Early warning of a matter for which a compensation event has previously been notified is not required".

Clause 15.2 mandates that the Project Manager must prepare a first early register and then instructs the Contractor to attend a first early warning meeting. Later, early warning meetings are held if either party instructs the other to attend it, and at no longer interval than the interval stated in the Contract Data until Completion of the whole works.

The purposes of these meetings are clearly stated in Clause 15.3, that reads:

> "At an early warning meeting, those who attend co-operate in
>
> - Making and considering proposals for how the effects of each matter in the Early Warning Register can be avoided or reduced.
> - Seeking solutions that will bring advantage to all those who will be affected,
> - Deciding on the action which will be taken and who, in accordance with the contract, will take them,
> - Deciding which matters can be removed from the Early Warning Register and
> - Reviewing actions recorded in the Early Warning Register and deciding if different actions need to be taken and who, in accordance with the contract, will take them".

The early warning clause has been defined as the "mechanism introduced to encourage participants to apply foresight and to share that foresight with the rest of the team".[304] This clause, it is submitted, is an elaboration on the general attitude expected from the parties in the performance of the contract.[305] Clause 10.2 demands the parties to "act in spirit of mutual trust and cooperation". In this context, it is understood for potential or actual unforeseen events to be faced, primarily, via this type of meetings. It is important to point out that failure to give an early warning notice may result for the contractor in sanctions against him and for the Project Manager in loss of opportunity[306] to consider mitigation that could minimise the impact of an event. This provides incentives to both parties to act cooperatively.

The clause, broadly speaking, provides for a mechanism to manage via a contingency plan any matter that may cause a performance issue. This mechanism seems to be designed to anticipate troubles before they can impair the success of the project.[307]

The second relevant clause in this multi-step and procedural approach is clause 19, that states:

> "Prevention 19
>
> "19.1 If an event occurs which
>
> - Stops the *Contractor* completing the whole of the *works* or
> - Stops the *Contractor* completing the whole of the *works* by the date planned for Completion shown on the Accepted Programme,
>
> and which
>
> - Neither Party could prevent,
> - An experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it,
>
> The *Project Manager* gives an instruction to the *Contractor* stating how the event is to be dealt with."

[304] Michael Rowlison, *a Practical Guide to NEC 4* (John Wiley & Sons 2018) p. 51
[305] Eggleston (n. 291) 118
[306] Ibid; Rowlison (304) 51; Eggleston (n. 285) 119
[307] Ibid; Rowlison (304) 57

Eggleston[308] and Rowlison[309] agree that the term "prevention" in this clause is equivalent to the term *force majeure.* Therefore, it may be hypothesised that it is aimed to reduce the space for non-performance.[310]

The events shall stop the *Contractor* completing the whole of the *works or* doing so by the planned date for completion. Moreover, it indicates that neither party could prevent the event, and the clause refers to the "reasonable allowance test" that was commented above.[311] This, in short, implies that the "stoppage events can include foreseeable events".[312] Under such conditions, the Project Manager shall give instructions stating how the event is to be managed.

No further instruction as to the procedure or compensation is found in that clause. The economic consequences of these events can be found in the Compensation Events Clause. In clause 60-19 the content of clause 19 is replicated with the addition that the event cannot be "one of the other compensation events stated in the contract". Therefore, circumstances for which it was not reasonable to have allowed for are treated as compensation in NEC 4 contracts. This, as was explained, activates a procedure to calculate the cost impact of the compensation event for the contractor.

Therefore, it may be concluded that in construction contracts, the Government retains the risk for circumstances that would not be reasonable to have allowed for. This principle, can be hypothesised, may respond to the same idea that the Government prefers to retain those risks rather than paying primes in every contract for events that are not likely to arise during its performance.

As mentioned, alterations that occur following a change in conditions and within the framework of a contract clause may be limited by rules limiting alterations to public contracts, including review clauses requirements, but no further comments will be made since they will be mere conjectures.

[308] Eggleston (n. 291) 237
[309] Rowlison (n. 304) 58
[310] See section 8.5.3
[311] See section 7.4
[312] Eggleston (n. 291) 238

Chapter 8: French law on alterations to public contracts

The French system is an interesting case-study for the analysis of alterations to public contracts. First, its large tradition of administrative law regulating public procurement gave rise to special rules for alterations of public contracts, which is precisely the focus of this thesis. Second, although the creation of special rules was based on a very specific idea of public service and general interest, it is also interesting to observe how these rules have evolved within the EU framework.

Furthermore, the French system anticipated several conclusions that were later reached by EU law and other systems. Thus, as will be explained, French law introduced substantive limits to alterations to protect the award procedure some years before EU law followed that path. Similarly, the French system introduced transparency procedures for alterations before it was recommended by the OECD. In both cases, it is hard to conclude whether the French system served as inspiration or simply reached the same conclusions, given the coincidence of objectives and legal mindset. Also, this might have been a consequence of the litigious tradition in the field of procurement in France and the existence of special and independent judicial bodies that created rules.

Historically, public service as an objective and its principles, mainly continuity and regularity in the delivery of public services, were the basis of the whole system, including the rules on alterations.[313] These rules, however, were balanced by the Courts to protect contractors' and third parties rights.

Second, based on the EU legal framework further rules on alterations were independently developed by the French system to protect competitors. Later, different and further rules were adopted by EU bodies and then transposed into the national system.

8.1. Unilateral modifications

The first type of alterations systematised both in case law and literature was unilateral modifications. This can be explained by considering that administrative law as a legal

[313] Gaston Jèze, L*es príncipes Generaux du droit administrative, le fonctionnement des service publics* (Dalloz 2002) tome 1, p, XX. And tome 3, p. 161 and 297

discipline was a rising field. Therefore, it was reasonable to focus on the differences with other disciplines, namely from private law, where unilateral powers were not generally allowed.[314]

This allows us to introduce the first difference between the contract law of France when compared to other legal systems, like the UK: the power to unilaterally modify the contract was not allowed in private law, at least at the moment of emergence of the theory of administrative contracts. Moreover, it is important to remember that this is a public law power that exists even without a clause stating it and non-renounceable via contractual agreements.

8.1.1. Existence of unilateral powers to modify the contract

The first decisions recognising the unilateral power to unilaterally modify the contract date back to 1902-1910.[315]

In *Compagnie nouvelle du gaz de Deville-lès-Rouen*,[316] Deville-lès-Rouen concluded a concession contract with that company. In this agreement, the "exclusive privilege of gas lighting" was granted. As electric lighting developed, Deville-lès-Rouen tried to persuade the company to ensure lighting via the new technology. Facing issues in reaching an agreement, Deville-lès-Rouen authorised lighting to another company. On that basis, the gas company considered that it had the exclusive right to lighting via gas and that the new arrangement with another company affected its interests. Consequently, it brought proceedings against the municipality suing for damages.

The original agreement was concluded in 1874 before electricity was in use. There was a second agreement dated 1897 extending the original contract. In 1897, other municipalities were already using electric lighting and contemplating these means within their contracts.

The Council of State recognised that the agreement between the parties was silent with respect to lighting by other means. Therefore, it considered that the company had grounds to claim the

[314] Article 1134 Code Civil
[315] Conseil d'État, *Compagnie nouvelle du gaz de Deville-lès-Rouen (10 janvier 1902)* (1902) Req. No. 94624; *Conseil D'Etat Compagnie générale française des tramways (21 mars 1910, p 216)* (1910) Req. No. 16.178
[316] Cfr. Conseil d'etat, '10 janvier 1902 - Compagnie nouvelle du gaz de Deville-lès-Rouen: Mutabilité des contrats administratifs' <https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/ce-10-janvier-1902-compagnie-nouvelle-du-gaz-de-deville-les-rouen> accessed 28 November 2021

privilege of lighting regardless of the means. However, it considered that the municipality had the right to benefit its citizens of the discovery of a new method. It then took cognisance that the municipality negotiated with the claimant but regarded that these negotiations could not replace the right of preference recognised to the claimant. Consequently, the Council of State decided that the municipality "will present the option to the gas company to declare before the expiry of the following month whether it intends to take charge of the lighting service by means of electricity under the conditions of the treaty with Mr. X…".[317]

The decision allowed Deville-lès-Rouen to impose alterations (lighting via electricity) and terms (those agreed with the electric company) on the gas company. This unilateral modification was allowed absent a clause allowing it, when it could have been included since other municipalities were using electric lighting by the time of the second agreement. The power was recognised in case law rather than in an act or any other form of "written law".

Moreover, it is interesting to note that this case presents issues that are still relevant. The case analyses a common situation where developing technologies render obsolete the one agreed in the contract. Therefore, authorities face the need to modify the contract or terminate it to re-procure. In this case, the Council of State conciliated the differing interests by allowing the authority to modify the contract, meeting the need with the newest technology. And it allows the contractor to keep its contractual position, arguably under commercial terms, since these were accepted by a third party.

The solution offered by the Council of State makes sense in the framework of the legal regime of Administrative Contracts in France, which is special with regard to private law precisely for the need to satisfy the changing public interest and deliver public services. Therefore, it seems consequential to allow public authorities to unilaterally impose modifications to satisfy those needs and deliver those services.

However, such a solution seems more complicated when there are other interests at stake, namely those of competitors and objectives like opening public procurement markets. It is hard to conceive that the same result could have been achieved in France under the current restrictions of EU law. It is likely that such a change would have been considered a substantial

[317] Compagnie nouvelle du gaz (n. 315)

modification. In that case, the authority would possibly have to terminate the contract and re-procure. In the decision under analysis, commercial terms seem to have been achieved in an uncommon fashion: a contract concluded with a third party. It is important to consider that the terms imposed to the contractor were acceptable, commercially speaking, since they were accepted by the other contractor. Nonetheless, this does not necessarily entail that the terms were commercially beneficial for the authority.

The second authority that is generally regarded as having clarified the existence of unilateral powers in administrative contracts[318] is the decision "Compagnie Générale française des tramways".[319]

In this case, the authority in deciding the timetable of the tramway imposed an increase in the number of trams in service to satisfy the increased needs. Legally, it was for the Préfet to determine the timetables of the service since that power was granted in a reglement. This, the Ministry of works claimed, allowed it to determine not only the times of the trams but also their number.

On the contrary, the company considered that there was a clause within the *cahier des charges* indicating the number of trams due. Therefore, the State had passed the determination of the number of trams to the contractual realm. Consequently, the authority could not modify that number other than by an amendment concluded by both parties.

In 1903, the Council of State decided a similar case in which it considered that the power given by the Règlement must be harmonised with *the cahier des charges,* and the legal minimum agreed by the parties was a "contractual minimum that could not be modified for any mean other than the common intention of the parties".[320]

The Company brought proceedings against the authority and obtained a favourable award in the first instance. Nonetheless, the Commissary of Government Leon Blum proposed the Council of State to overrule that judgement. The conclusions of the Commissary read, "The State will intervene where it is necessary to impose, if that is the case, to the concessionaire, a

[318] M Long, P Weil, G Braibant, P Delvolvé and B Genevois, 'Mutabilité- Équation Financiére' In Marceau Long et al, *Les Grands arrêts de la jurisprudence administrative* (21 ed, Dalloz, 2017) 115; Conseil d'etat (n. 316)
[319] Compagnie génerale française (n. 315)
[320] Conseil d'Etat, Compagnie des Chemins de fer économique du Nord (23 January 1903)

superior performance that that strictly foreseen (…) using not the powers conferred in the contract, but the powers which belongs to it as a public power (puissance publique)".

Analysing the regulations of the public administration that grant the power to the state of determining the timetable, the Council of State concluded that they:

> "imply not only **the right** to approve the timetables of the trams from the point of view of safety and convenience of the traffic, but also **to prescribe the modifications and additions** necessary to ensure, in the public interest, the normal operation of the service".

The Council of State said that "it would only be up to the Company, if it considers it grounded, to submit a claim for damages compensating the harm that it would have been caused (…)".[321] There are two different rules that need to be analysed: first, the existence of a power to unilaterally modify the contract, and second, the consequences of its use.

Relating to the first rule, the Council is clear in admitting that there is a right for authorities to prescribe modifications and additions to contracts. In this case, such power seems to have been extracted from a legal text (that granted the ability to determine timetables). Thus presented, this argument has served scholars that deny the existence of powers without express legal basis in written law. Nonetheless, the legal text grants a faculty not tied to the contract and only regarding timetables. Consequently, it is hard to accept that the power streams from a norm that does not mention a power to unilaterally modify contracts, nor even grants the power to determine the number of trams.

The second rule that deserves attention that always accompanies unilateral modifications is the right of the contractor to be compensated. It is clearly stated that the contractor can claim compensation for the harm suffered and caused by the "aggravation" in the exploitation of the service.[322]

[321] Compagnie génerale française (n. 315)
[322] Jean-Louis Mestre found antecedents to this rule in the Middle Ages. Jean-Louis Mestre, *Introduction historique au droit administratif français*, (Press Universitaires de France, 1985) 266

The Commissary explained: "If the economy of the contract is destroyed. If, by the use of the powers of the contracting authority, something is distorted in this balance of advantages and charges (…) the contractor can demonstrate that the intervention, although legal in itself, although obligatory for him, it has caused him a prejudice that must be compensated".[323]

It is from this position of the commissary that the concepts of "honest equivalence between obligations", "economic equilibrium", and "economic balance" of the contract emerged in French law as a necessary consequence of the use of the unilateral power to modify the contract.[324] From this case onwards, it is recognised that there is a power to modify administrative contracts even in the absence of a clause in that sense. Such a power necessarily implies fully compensating contractors.

Both rules were originally recognised as part of concession contracts, and the existence of the right to unilaterally modify the contract in all administrative contracts has not gone unchallenged.[325] When administrative law was a nascent discipline, these features that differed from private law were regarded as core of the administrative law.[326] Thus, the importance of unilateral powers was such that it was considered one of the fundamental elements of administrative contracts.[327]

Moreover, if the authority had these powers in a contract, it would be classified as an administrative contract, as opposed to private law contracts. In other words, the existence of "exorbitant powers" was one of the criteria to differentiate administrative from private law contracts. In the same line of thought, it has been even ascertained that "the exorbitance is thus, at least in appearance, consubstantial to the notion of administrative contract".[328]

Despite differences on the matter, case-law and authoritative scholars clarified the existence of this power for administrative contracts in general. Thus, De Laubadère sustained that there was

[323] Long (n. 318) 117
[324] De Laubadère (n 32), 33, 340, tome 3, 35
[325] M. L'Huillier, 'les contrats administratifs tiennet-ils lieu de loi á l'administration?' Dal. [1953] 87; F-P Bénoit, 'De l'inexistence d'un pouvoir de modification unilatérale dans les contrats administratifs' [1963] JCP I-1775, 25; F. Llorens, 'Reflexions sur le pouvoir de modification unilatérale du maître de l'ouvrage dans les machés de travaux public et privés' [1981] Droit et Ville 50, no. 11
[326] Llorens (n. 325) 53
[327] Gaston Jèze (n. 313) 298
[328] Marion Ubaud-Bergeron, 'Exorbitance et droit des contrats : quelques interrogations à propos de la modification non conventionnelle du contrat administrative', in Xavier Bioy, *L'identité de droit publique* (Presses de la Université Tolouse Capitole 2011)

enough ground based on case-law to consider that a general power to unilaterally modify existed.[329]

Moreover, currently, it is generally accepted that this unilateral power does exist as part of all Administrative Contracts.[330] The controversy ended with a decision of the Council of State regarding the legality of a Decree that allowed unilateral modifications within a certain type of administrative contracts. In deciding on this point, the CE ruled:

> "Considering, finally, that in Article 14-1, the authority may, during the life of the contract, **unilaterally make modifications** to the consistency of services and the way of exploitation, that the use of this prerogative may entail a revision of the financial clauses of the contract, and that the modifications thus made must not be incompatible with the chosen method of operation. The authors of the challenged Decree merely applied **the general rules applicable to administrative contracts**".[331]

Thus, the controversy has been settled, and the discussion over the existence of this power in all administrative contracts has become anecdotical.

8.1.2. The rationale and characteristics of this power

A feature that deserves attention and derives from the public law nature of the power to unilaterally modify the contract is its non-renounceable character. The Council of State affirmed a ruling that declared null and void a contractual clause in an administrative contract where the authority renounced its power to terminate the contract.[332] This was decided since "these clauses were incompatible with the principles of public domain and those of the needs of the operation of a public service, must be regarded as null".[333] This has been understood to apply to unilateral modifications.[334]

[329] De Laubadère (n. 32) 333 and ss
[330] Hélène Hoepffner, (n. 9) 40; Hélène Hoepffner, *Droit des contrats administratifs*, (Dalloz 2016) 387
[331] Conseil d'Etat, *Union des transports publics*, req. N° 34027 [1984]
[332] Conseil D'etat, *Association Eurolat et Crédit Foncier de France*, req. N° 41589 41699 [1985]
[333] Ibid
[334] Claude Blumann, *La renonciation en droit administratif français,* (LGDJ 1974) 211; Marion Ubaud-Bergeron (n. 328) 33

The reasoning seems coherent with the existence and justification of these powers. Indeed, if these rules exist in the absence of contractual clauses, it seems hard to justify that an authority can renounce them since that would entail, from that point of view, not having the powers that facilitate the correct delivery of public services and adequately meeting public needs. Similarly, it seems hard to justify accepting that they can renounce via contract to a public power granted "outside of the contract".[335] Thus, if a power has the legal hierarchy of a public power, which implies a public law nature, it seems difficult to articulate that it might be renounced via a convention.

The ability to unilaterally modify the contract is generally included within model contracts and contracts, at least from the 1950s.[336] Similarly, the consequences of its use were developed by case law, but model contracts generally govern the matter. This has been labelled as "contractualisation" of these powers.[337]

The fact that it exists in the absence of agreement[338] is one of the sharp differences between administrative contracts and current private law contracts in France. Today unilateral powers may exist in private law only if contemplated within the contract (as opposed to the past, where it was understood that this power could not exist).[339] Nonetheless, given the extended use of bilateral modifications in practice, and the standard use of clauses foreseeing the power to terminate unilaterally, the difference generally remains theoretical.[340]

In sum, the possibility of the authority was regarded as an "exorbitant power" since it did not exist in private law. Nonetheless, the contractor, placed in a position of inequality, had special rules protecting him from public law powers' use and potential abuses. The main rule protecting him was the right to a financial equilibrium of the contract.

[335] Claude Blumann (n. 334) 460
[336] De Laubadère et al (n. 32) 319
[337] Hoepffner (n. 9) 41
[338] Thus, the Council of State clearly stated relating to the power to unilaterally terminate the contract that the contracting authority "may use this faculty even though no legislative or regulatory provision, nor any contractual stipulation, has organized its exercise". Conseil d'Etat, Societé français 5, 22 April 1988, req. 86241, 86242, 88553
[339] Marc Cassiède, *Les pouvoirs contractuels: étude de droit privé* (Diss. Bordeaux 2018)
[340] F Llorens (n. 325) 58; Hoepffner (n. 9) 41

8.1.3. Limits to the unilateral power to modify the contract

The first rule protecting the contractor from the "exorbitant" power to modify the contract unilaterally is its main consequence: fully compensating the contractor, including direct losses and loss of profits.

Nonetheless, this protection is not the only barrier containing the powers of contracting authorities. Indeed, case law developed some limits to this power that were systematised early by scholars.[341] The general principle is the prohibition to substitute the object of the contract for a new one. "This principle appeared in the last years of the XIX century, in the judgements recognising the Administration a power of unilateral modification, aiming to protect the contractor of the public administration from eventual abuses of this right".[342]

The rules that have emerged have been systematised by separately analysing the quantitative and qualitative limits.[343] These rules, however, are to be applied concurrently and act in conjunction to prevent abuses. They are tied rather than independent rules arising out of the same principle. Consequently, it is not strange for the Court to scrutinise modifications from both quantitative and qualitative perspectives.[344]

The first type of limitation, qualitative, is based on the idea expressed by Pequignot in the following manner: "It is conceived, in fact, that when the contractor has consented to cooperate with the administration, this is for a certain object. It is for the administration to increase or modify this object more or less, but it cannot completely change it".[345] Consequently, "the administration cannot pretend to impose a modification that would result in denaturing (dénaturer) the contract".[346]

The authority has the power to unilaterally modify the contract, but not the power to transform it to create a new contract. It can modify but not novate the contract.[347] When the authority novates the contract, the contractor has the right to rescind it.

[341] Georges Pequignot, *Contribution à la théorie générale du contrat administratif* (Diss. Imprimerie du Midi 1945) 415; De Laubadère et al (n. 32) 338; Llorens (n. 325) 82
[342] Hoepffner (n. 9) 166
[343] Llorens (n. 325) 82; Hoepffner (n. 9) 9
[344] Conseil d'Etat, Societé "Etablissements Marius Series (25 June 1971), req. 70874 70875 70942
[345] Pequignot (n. 341) 415
[346] De Laubadère et al (n. 32), 339
[347] Hoepffner (n. 9) 9 and ss

One of the first references to this rule dates to 1889, when the Commissary Valabrègue concluded for the decision of 8 February 1889 of the Council of State:

> "A public contract can be terminated by the contractor (résilié) if the contracting authority (maître d'ouvrage), through changes, carried out a complete transformation of the project; if one of the main **essential conditions** for which he became involved had been modified".[348]

Several points deserve attention. First, the commissary clearly states that the contractor has a right to terminate the contract if the authority has carried out a complete transformation of the project, which is precisely an early manner of articulating the limit not to transform the contract into a new one.

Second, contractors could also terminate the contract if one of the essential conditions for which he became involved (intervenu) had been modified. It is submitted that these are the conditions that determined the participation of the contractor in the contract or the award procedure. Although this rule is clearly tied to the change of the object of the contract is slightly different since it does not only take the object of the contract "objectively" considered but allows to factor in other circumstances that might have been key for the contractor to conclude the contract. Regardless of whether this is a different rule from the first one or a sub-rule, it is relevant to note that the "essential conditions test" is used as a limit for contracting authorities to modify the contract unilaterally. Similar wording was adopted a century later by the CJEU.[349] This is remarkable since the purpose of the CJEU is very different from protecting the contractor, despite which it has used similar language.

The Council of State has repeatedly used the qualitative limit. For instance, in Societé Etablissements Marius Series, a contractor was ordered by the contracting authority to rebuild some works after they were devastated by fire. The contractor did not follow the orders issued by the authority, and the authority consequently terminated the contract based on a breach by the contractor. In deciding the claim presented by the contractor, the Council of State ruled:

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[348] Cited in De Laubadère (n. 32) 389: "*un marché de travaux publics pourrait être résilié si le maître d'ouvrage avait, par des changements, operé une transformation complète du projet, si l'unde des conditions essentielles principales en vue duquel il etait intervenu avait été modifié".* See also Hoepffner (n. 9) 165

[349] See Sections 2.2.1., 2.2.2., and 2.2.4

"the fire of the works does not constitute in itself, as a consequence of the non-unforeseeable character of such a risk, an event that would **completely modify the legal situation** created by the contract as to discharge the undertakings from their obligations".[350]

The Court clarified that the contractor "could not claim that such prescribed modifications in the present case have been such as to be **considered a new work**, alien to the object of the initial contract".[351]

Similarly, in Societé Compagnie Francaise D'entreprises, a contracting authority ordered certain technical modifications to the original work. The contractor refused to adopt the orders, which included providing "contra-sheaths intended for the evacuation of gases of the main sheath located in the new regional hospital". Because of the contractor's refusal, the authority put a third party in charge of this work and discounted the value of the payments due to the contractor. The Contractor brought proceedings asking for annulment of the decision to discount the payment.

The Council of State considered that although the original agreement did not provide this, the contractor had to build a conduct to ensure the evacuation of polluted air and gas. It also considered that some adjustments were agreed upon between the parties, but at the end, the authority ordered a different solution. On this basis, it concluded that "the construction of counter-sheathings would not involve any essential modification to the conditions of the contract".[352]

Finally, in Societé CITREM, an authority informed the contractor that the works agreed in the contract relating to the "sports zones" would not be executed. The contractor requested the authority to purchase in commercial terms the goods bought for the performance of the cancelled works and to recognise the loss of profit. The authority accepted the first request but refused the second. The authority put forward that the cahier general allowed it to reduce the value of the contract up to 20% without recognising the loss of profit. The Council of State considered that clause of the cahier general and decided: "the provision invoked by the administration if it allowed to modify the consistency of the works and to change their

[350] Conseil d'Etat, Societé (n. 344)
[351] Ibíd
[352] Conseil d'Etat, Compagnie Francaise D'entreprises (17 February 1978), N° 99193 99436

provisions, it is not applicable in case of a profound change of the object of the contract (…)".[353]

The Council of State imposed a limit to the power to unilaterally modify the contract. This limit, as it can be observed in all the cases referenced above, is extracted from the very object of the original agreement, and it intends to forbid novation of contracts imposed via unilateral modifications. The way this limit is presented slightly varies in terms of wording. Nonetheless, the general idea is the same: the object of the original agreement cannot be fundamentally altered. This aims to protect the common intention of the parties. The contract cannot be novated by the unilateral powers granted to one party since that would disregard the obligatory character of the contract and disrespect *pacta sunt servanda*.

Two general characteristics might be identified in those cases: first, all claims were submitted by disgruntled contractors that did not wish to perform the contract as modified.

Second, if alterations affect the object of the contract as to be considered a new contract, the contractor could terminate the contract. Nonetheless, terminating the contract is a right of the contractor; it is not its obligation or a right of a third party to challenge the modification. Consequently, if a contractor decides to perform unilateral modifications that alter the contract's object or its essential conditions, it could do so, at least before EU rules.

These two common characteristics allow us to conclude that the limit not to change the object of the contract is aimed at protecting the contractor that is at the receiving end of unilateral powers. Thus, it is a classical public law safeguard protecting the citizen-contractor from the powers of the state-contracting authority. A logic that perfectly fits within the administrative law edifice.

The second type of limitation is based on the idea that contractors conclude a contract "taking into consideration certain conditions, in particular, its technical and financial possibilities". Therefore "the administration cannot pretend to impose modifications which would result, by their significance, in disrupting the contract and its general economy".[354]

[353] Conseil d'Etat, Compagnie Industrielle De Travaux Electriques Et Mecaniques C.I.T.R.E.M, (14 March 1980)
[354] De Laubadère (n. 32) 339

The concept of disruption of the economy of the contract was first used by case-law in the context of imprévision theory,[355] that will be analysed below.[356] Nonetheless, the same concept was promptly transposed to the field of unilateral modifications as a limit.[357]

Thus, in Compagnie Française d'Entreprises, already referenced regarding the qualitative limits, the Council of State concluded that the "order (…) did not involve works which, by its nature, were alien to the contract and which, moreover, did not have the effect of disrupting the economy of the contract".[358]

In the same line in Syndicat Intercommunal Des Transports Publics De Cannes, Le Cannet Mandelieu, La Napoule, a contracting authority entrusted a contractor with the exploitation of a school bus service. The authority imposed some unilateral modifications regarding the organisation of the service that the contractor did not perform. The decision of the Council of State reads:

> "Whereas (…) under the general rules applicable to administrative contracts, the public person may unilaterally make changes to its contracts in the general interest; (…)".
> "Whereas (…) the company did not demonstrate that the modification thus decided by the STIP [authority] would have led to disrupting the economy of the contract".

It is worth noting at this point that this balance is different from the economic balance test recognised in EU law. The French standard is concerned with not placing burdens on the contractor to protect contractors. The EU law requirement is that the adjusted terms are not *more favourable* to the contractor as to impact competition. This difference in scope shows how a concept might be transposed from one legal order to another and how it is shaped and transformed by the latter legal system to adapt it to its objectives and principles.

It might be concluded that both qualitative and quantitative limits are based on the same idea of respect to the original agreement: the parties' common intention. And on the idea of creating

[355] Conseil d'etat, Compagnie générale d'éclairage de Bordeaux, 30 March 1916, N° 59928
[356] See section 8.5
[357] De Laubadère (n. 32) 388; Conseil d'Etat, Daux, 5 June 1918, rec. 516; Conseil d'Etat, Briançon, 23 June 1920, rec. 697; Conseil d'Etat, Societé entreprises cooperative française, 14 February 1934, rec. 222
[358] Conseil d'Etat (n. 352)

a public law safe-guard to protect the contractor-citizen from the state-authority that has special powers.

It is worth mentioning that the substitution of the object and the disruption of the economy of the contract are legal standards created by case law. As such, these legal standards *in abstracto* are analysed in each case *in concreto* in terms of the purpose and the extent of the modification and in relation to the original decisions of the parties.[359]

It is true that several cases have been decided in the matter, but the laconic argumentation of the French judge, the lack of uniformity, and the lack of sub-rules impede to anticipate outcomes with certainty.

Similarly, it creates legal uncertainty for contractors to be subject to unilateral powers that can modify its obligations if they do not reach those, arguably, high (and inconstant) standards.

In this sense, the economic balance gives additional protection to the original conditions. When the authority does modify the contract within limits, it must compensate the contractor: By restoring the conditions surrounding the original agreement.

Furthermore, limits found in case law are supplemented by limits and rules that can be found in the contracts, more specifically in the Cahiers des clauses Generales. Thus, De Laubadère mentions, by the 1950s, some quantitative limits specified in the Cahiers for increases or reductions in the mass of works for public works contracts.[360]

For instance, the Cahier des clauses Generales for roads and bridges granted a right to the contractor to terminate the contract if the increase or reduction is more than a sixth of the original value of the contract. Other CCG "contain provisions like the one just analysed, but the proportion of the limits are very frequently different than those for bridges and roads. Thus, war and marine a fourth for maintenance contracts, and a sixth for the others; P.T.T: a half for the increases and a fourth for the reductions; SNCF a fourth; Paris, technical services a sixth; architecture: a third, reconstruction: a fourth for increases and a fifth for reductions".[361]

[359] Hoepffner (n. 9) 166
[360] De Laubadère (n. 32) 388
[361] De Laubadère (n. 32) 394

In that way, parties simplify the task to determine where the limit to unilaterally modify the contract lies. Nonetheless, some uncertainty did remain since, although within those limits (quantitative), a modification might be regarded as altering the initial object in an unacceptable manner (qualitative). That was precisely the case in Societé CITREM referenced above.

Against the background, limits to modifications of administrative contracts initially developed from disputes between contracting parties and to contain the power to unilaterally modify the contract given to contracting authorities.

8.2. Bilateral modifications

At this point, two clarifications are needed. First, this subsection concentrates on bilateral modifications for which it is meant: all adjustments (as defined in the introduction) mutually agreed by the parties, as opposed to unilateral modifications.

Second, the word used to describe this phenomenon in French law is avenant; it is submitted that the best translation of this term is mutually agreed amendment. This is so since an avenant is defined as an "agreement modifying a convention (contract) by adapting or completing it through new clauses"; "more precisely, additional written act containing the modification".[362] This resembles the meaning of mutually agreed amendment which justifies the translation in English as simply amendment.

Bilateral modifications have always existed in French administrative law; in fact, they are the normal process of modification in practice.[363] Despite their practical importance, only until recently academia has started devoting some attention to them.[364]

This can be justified "by the fact that, for a long time, the law of amendments was limited to two principles which do not call for particular comments:

[362] Gérard Cornu, *Vocabulaire Juridique* (12 edition, Association Henri Capitant 2018)
[363] Etienne Fatôme, 'Les avenants' [1998] AJDA, 760; Hoepffner (n. 9) 27
[364] Fatôme, (n. 362); Hoepffnner (n. 330) 387

> "a principle of freedom: freedom for the parties to a contract to modify the clauses and, whereof, to conclude bilateral amendments. Principle of freedom which is itself only a consequence of another more general principle: the principle of freedom of contract".
>
> "a principle of *renvoi* to the rules governing the conclusion and the content of the contract modified by the bilateral amendment (…) the bilateral amendment must be subject to the same rules as the contract (…)".[365]

The first of these principles was clearly delineated by the Council of State in the following manner:

> "There is no provision in the law or regulations to prevent the clauses of a public contract, even if awarded by tender, from being amended by mutual agreement during the period of execution, subject, if necessary, to the approval of the competent authority".[366]

This lack of rules and the unbounded freedom of the parties to modify the contract does not particularly deserve further comments as opposed, perhaps, to the richer area of unilateral modification where rules, justifications, and limits were always developing in case law.

Moreover, it is also relevant to mention that scholars of administrative contracts tend to focus on what differed from private law; perhaps because the law of mutually agreed amendments resembled private law rules it did not attract attention. Nonetheless, the unbounded power of the parties to conclude amendments found its constraint in concepts already delineated by case law to limit unilateral modifications. Nonetheless, these limits apply equally to both types of modifications and are a matter for the following section.

[365] Fatôme, (n. 363) 760
[366] Conseil d'Etat, Sieur Coste, 22 November 1907, rec. 849

8.3. Limits to unilateral and bilateral modifications arising out of competition and similar concerns

Hoepffnner explained that "the reasoning of the administrative judge for the power of unilateral modification was naturally transposed to the power of bilateral modification by the parties".[367]

She explained that this is due to the fact that: "[T]he logic of competition has progressively extended from the award stage to the execution stage in order to ensure a certain continuity in the processes leading from the award of the contract to its execution".[368]

In this sense, in the late 80s, Rennes Administrative Tribunal censured an amendment "denaturing the initial contract" due to the significant increase in the volume of the agreed works and its financial consequences.[369] In a similar case, the Tribunal of Cergy-Pontoise deemed severable the work of renovation of part of a sewerage network not falling within the territorial limits agreed in the initial contract.[370]

These rulings were rapidly adopted by the Government, and a reform to the Code of Public Procurement was introduced in 1992 by Decree 92-1310. Articles 45 bis, applying to central public procurement, and 255 bis, for local governments, of the Code des Marchés publics read:

> "Except for the case of unforeseen technical circumstances not arising out from a fact of the parties, bilateral amendments and unilateral modifications cannot disrupt the economy of the contract nor change its object".

It must be mentioned that the limit to alter public contracts found in this provision does not cover all alterations. Thus, it is clear from the text that alterations could disrupt the economy of the contract or change its object if they are a consequence of an unforeseen technical circumstance not arising out from a fact of the parties. Those would be alterations arising out of risks.[371] Thus, if an unforeseen circumstance obliges the parties to renegotiate or to recognise compensation to the contractor due to the concretion of a risk, the alteration would still be valid

[367] Hoepffner (n. 9), 167
[368] Hoepffner (n. 9) 45
[369] Tribunal Administratif Rennes, Corep d'Ille-et-Vilaine, 8 October 1987, MP, no. 236, August, September. 1988, p., 15, obs. M. François.
[370] Tribunal Administratif Cergy-Pontoise, 7 Juin 1989, req. 8804263
[371] Fatôme (n. 363) 762

under this provision. Notwithstanding, it is important to highlight that regulations extended to bilateral amendments the same standards developed by case law to limit unilateral powers. However, the reason for the transposition is no longer the protection of the contractor, who has agreed to the amendment, but the protection of third parties and the award procedure. In 1998 Fatôme explained:

> "The principle of such a limitation is easily understood. The existence of an obligation on the administration to conclude certain contracts only after competitive bidding implies that once these contracts are concluded, the parties cannot modify them under conditions such that the competition is distorted. This would be the case if, after the conclusion of these contracts, the parties were entitled to modify them in such a way that the contract actually performed is no longer much like the contract concluded at the end of the competitive bidding procedure".[372]

Considering the above, it might be said that French law anticipated EU law, both in terms of rules and the reasoning behind them in limiting alterations of public contracts. In 1992 when the regulation above was adopted there were no rules in this sense in EU law.[373] Moreover, the French argument that a contract affecting the original agreement can be deemed a new contract that requires a new award procedure is also used in EU law.

However, the fundamental principles from which the French judge and scholars derived their conclusions are a conceivable consequence of the EU legal framework. Thus, French law followed first a pathway opened by the very principles of EU law. In that manner, it can be argued that the EU legal framework influenced French law, which in turn opened a path that was later followed by the former.

In case law, the Council of State applied the two standards, quantitative and qualitative, to determine the legality of bilateral amendments. Thus, in Puy-de-Dome, the Council ruled:

> "Whereas, on the one hand, that the bilateral amendments in dispute were intended to allow the performance of services identical to those provided for by the initial contract, whereas the amount of the services performed had reached the ceiling set by this

[372] Fatôme (n. 363) 761
[373] Cfr. Auricchio (n. 5) and Arrowsmith (n. 42)

> contract; that these amendments, of a very limited amount, which had the same object as that of the initial markets did not disrupt the economy of the contract and did not constitute, in the circumstances of the case, new contracts whose awarding should have been be made after prior call for competition under the conditions provided for by the Public Procurement Code (…).[374]

The Court maintains the "cumulative" use of quantitative and qualitative limits to unilateral powers identified in the 40s-50s by scholars and developed even earlier in case-law. Thus, not only the concepts were transposed, but also the way in which they are applied; a reasonable consequence since the underlying logic is similar: forbidding the emergence of new contracts.[375]

The regulations cited above only covered *marché publics*. Nonetheless, the application of the underlying principles has been extended to other types of Administrative Contracts, among other PPP[376] and delegations of public services.[377] This was done based on the same idea: to protect the award procedure and competition.

In this line, Article 8, Act 95-127 du 8 février 1995, applying to delegation of public services, reads:

> "All project of bilateral amendment to a works, goods, or services contract, or to a convention of delegation of public services that results in an increase of the total value of the contract higher than 5% must be submitted for opinion to the tender commission, or to the commission referred to in Article 43".

This article provides a procedural rather than substantial rule for modifications of public contracts. The rule is limited to a procedure that includes the opinion of a commission. As with the OECD rules, there are no clear substantial rules for when commissions must accept the

[374] Conseil d'Etat, Préfet de Puy-de-Dome, 22 June 1998, n° 173025.
[375] Fatôme, (n. 363) rejects that amendments modifying the object or disrupting the economy will always create a new contract. He bases his position on the fact that adjustments arising out of unforeseen circumstances not attributable to the parties can be validly done, from which he concludes that at least these valid agreements that not create a new contract exist.
[376] Article 16, Décret n°2004-18 du 6 janvier 2004 pris pour l'application de l'article L. 34-3-1 du code du domaine de l'Etat
[377] Fatôme, (n. 363); Hélène Hoepffner, 'L'encadrement de la modification d'une concession par les principes généraux de la commande publique' [2014] AJDA, 1104

proposed amendments. Nonetheless, it is submitted, the commissions do find guidance in the substantive rules already referred to above, unlike OECD rules that provide less guidance. This rule in French law finds its origin in the principle of "parallelism of the forms". Thus, if the original contract was awarded after examination of the specialised commission, the bilateral amendment to that contract must also be subjected to that procedure.[378] In that manner, transparency and integrity safeguards granted originally by these commissions in the award procedure are given *de novo* during the execution stage.

Moreover, there is, implicitly, a *de minimis* rule since it excludes from the procedure any bilateral amendment modifying the contract in less than 5% of the original value.

Another interesting point that arose from interpreting the rule above is the apparent limitation offered by the procurement thresholds. Thus, the Central Commission of Public Procurement interpreted Article 49-1 as forbidding bilateral alterations that meant that the modified value of the contract exceeded the thresholds, when the original contract was concluded without subjection to the procurement procedures because they did not reach the threshold. This must be so, the commission considered unless the judge deems that the cause of the bilateral agreement was unforeseeable at the moment of the award.

Thus, it might be argued that another rule of EU law, namely the *de minimis* rule, resembles this instruction alongside the rule that gave rise to it. Although the way percentages and thresholds are used in both cases differ, it is at least anecdotally interesting to note the use of similar criteria in both instances.

Another interesting wording was the concept of essential terms of the contract. Although, as mentioned, this term was first used in 1889, in 2005 was adopted by the Council of State, which clearly stated:

> "a bilateral amendment cannot substantially modify one of the essential terms of the delegation such as the duration or the volume of investments in charge of the delegated (contractor)".[379]

[378] Fatôme (n. 363) 765
[379] Conseil d'Etat, Avis, 19 avril 2005, Marchés et contrats administratifs, avis numéro 371.234

This term of, although referring back to the 2000 opinion on change of contractor, might have been influenced by EU case-law, who had already adopted similar wordings.[380] For this reason, it is submitted, it might be erroneous to simply affirm that the concept was "reprise" by EU law without giving an explanation different than the coincidence in terms.[381] Nonetheless, it is submitted, an explanation can be offered for this "reprise".

First, it must be said that there are antecedents, even in wording, of the CJEU decisions that considered the change of an essential condition a limit to modification of public contracts. Thus, it can hardly be argued against the coincidence in terms between French law, including the 1889 document, and the CJEU wording. For instance, in Rennes, the Court clarified that "it must be considered whether the negotiations were substantially different in character (…) such as to demonstrate intention of the parties to renegotiate the essential terms". [382]

The use of "essential terms" of the contract in Rennes might be explained by considering that the CJEU was deciding on an argument presented by the French Government in the following sense: because the modification did not alter the substantive terms of the contract, the contract was the same one.[383] The government based its arguments on a theory of its internal law: the modification/novation difference based on the alteration or not of essential terms, and the Court, in deciding on and accepting this argument, ended up adopting the national doctrine that was submitted as a defence argument.

Thus, it might be hypothesised that a national legal concept made its way into EU law via the submission of a defendant in a legal proceeding before the CJEU. Moreover, the way the CJEU used its own case law explains the subsequent reprisal of the terms in further case law and they way in which the legislator codifies case law in EU law explains its adoption in the Directives. Nonetheless, as mentioned regarding the economic balance standard, these concepts vary to present more utility to the objectives and principles of the receiving legal system.

[380] See section 2.2.1
[381] Hoepffner (n. 9) 172
[382] Rennes (n. 43) 44
[383] See section 2.2.1

8.4. Sujetions imprevues- Technical risks

In the Traité Des Contrats Administratifs it was said that "during the execution of administrative contracts, particularly of work contracts, material difficulties of an absolutely abnormal character, that could not be reasonably foreseen by the parties at the moment of concluding the contract, and that renders the performance more expensive might occur. These exceptional circumstances grant to the contractor a right to be fully compensated under the form of an increase in the price of the contract".[384]

Several elements come together in this definition, and they need to be separately analysed. First, there is an element relating to the field of application: works contracts. In this aspect, it needs to be highlighted: historical reasons led to this limited field of application, and it also needs to be mentioned that the theory has been mainly applied to ground conditions. Therefore, some necessary background will be provided. This will also be done to continue with the methodology adopted in this thesis of presenting legal developments in their historical context. (8.4.1.)

Second, there is a component of the circumstances that justify the application of the theory. Thus, the definition includes a requirement for "material difficulties" "absolutely abnormal". These difficulties could not have reasonably been foreseen at the moment of concluding the contract, and they need to render performance more expensive. (8.4.2.)

Third, once the field of application and the conditions for applying the theory are clear, the consequence of the theory comes into play: fully compensating the contractor in the form of a price increase. (8.4.3.)

8.4.1. Historical background and the field of application of the sujetions imprevues (unforeseen ground conditions)

The theory of sujetions has not been uniformly applied through the whole domain of administrative contracts; its application has been restricted to works contracts,[385] which is a sub-category of administrative contracts.

[384] Laubadère et al (N. 32) 9
[385] Hoepffner (n. 330) 415; De Laubadère et al (N. 32) 9

The explanation for such a restrictive approach can be found in the context and origin of the doctrine. This theory was created to modulate the harsh effects of model contracts and contract law on the contractor when facing unexpected ground conditions in the context of fixed-price works contracts.

The theory lies on a 'simple' issue: "a price has been agreed for the foundation works, earthworks, or excavation works provided for in the specifications based on a clause, normally a fixed price clause, considering the surrounding circumstances in a higher or lower degree. The contractor, facing difficulties, estimates that they are not within the price agreed in the contract. The administration, on the contrary, argues the fixed-price character of the contract to refuse any compensation to the contractor".[386]

An impasse arises due to conflicting positions. Moreover, in fixed-price works contracts and its General Cahiers, clauses limiting authorities' liability were normally included. For instance, clauses stating that the contract has a fixed-price "regardless of the difficulties that might be found", or more precisely as to the soil, the price will be applied "to every type of soil".[387] Similarly, the Cahiers included articles in the following terms: the contractor "cannot, under any circumstance, disregard the price of the contract agreed by him".[388]

The rationale for these clauses is linked to the type of contract. Indeed, the whole idea of fixed-price contracts is to allocate all risks to contractors. Therefore, clauses ensuring that this allocation of risks is properly and unconditionally done for all risks are mere manifestations of the type of contract. It is worth mentioning that the strict application of the terms, it has been argued, might lead to inequitable solutions, particularly for the contractor, who must pay high cost-overruns due to unforeseen geological circumstances.[389] On the other hand, recognising any compensation will be against the strict letter of the contract. More attention will be devoted to this tension below.

From the above, two points need accentuation. First, this theory finds its field of application limited to fixed-price contracts. This is so in practice, even if not as a matter of principle. In

[386] Vidal (n. 34) 452
[387] De Laubadère (N. 32), Tome III, Livre VII, 12
[388] Vidal (n. 34) 448
[389] J. Catz, 'Le maître d'œuvre et le risque du sol', [1981] Cahiers juridiques de l'électricité et du gaz, 59

contracts with a different type of risk allocation, the geological risk might have been allocated to the authority or shared by the parties.

Second, sujetions generally relate to conditions of the ground or the underground. Indeed, Vidal said that "I am aware that the field of application of the theory of sujetions is wider than what the jurisprudence commonly calls jurisprudence of "déblais". Although our analysis is not limited to this field, it has to be objectively agreed that the fundamentals of the theory of sujetions have been forged on claims grounded effectively on difficulties found in the execution of foundation works described in the specifications".[390]

Having done this groundwork, the analysis can proceed to the following step. This is how the judge has interpreted clauses limiting liability for ground conditions in the context of fixed-price contracts.

Laurent Vidal has a remarkably clear explanation of the origin of this theory. In his analysis, it was proven that during the 19th century, the Council of State respected the fixed-price nature of contracts and applied clauses exonerating authorities from liability for unforeseen ground conditions. For instance, in a judgement of 6 July 1894, the Council of State ruled:

> *"Whereas the price annex contains an average price applicable to rock cutting of all kinds; that if the contractor found in a trench rock harder than they could expect to find, according to the results of neighbouring surveys, this circumstance cannot authorise to ask revision of the fixed-price of the contract since it was demonstrated that the route of the line was not changed after the award".*[391]

It can be observed that the unexpected ground conditions were irrelevant for the Council of State to apply the terms of the contract strictly. Notwithstanding, the Council of State progressively reviewed its understanding. Indeed, Vidal pointed out that in the first decades of the 20th century, the "harbingers" can be observed. He mentions: "It is gradually, indeed, that the lack of prior knowledge of the soil, the difference between the nature of the soil and the

[390] Vidal (n. 34) 452
[391] Conseil d'Etat, 6 July 1984, Magniet, Leb., P. 47. Cited by Laurent Vidal (n. 34) 456. See also: Conseil d'Etat, 24 July 1896, Pradines, Leb P. 597. Consei d'Etat 9 August 1983, Goeytes, Leb. P. 686

results of studies, or even the insufficiency of those analyses will play in favour of the contractor. This will be so despite clauses drafted in the strictest terms".[392]

After analysing clauses with different content that precluded contractors from claiming compensation for unexpected ground conditions, Vidal explains that until the 1930s, it was rare for the Council of State to grant compensation against the letter of the contract. In the 1930s the criterion of "substantial modification or disruption of the economy of the contract" (…) "as a condition of admissions for compensation in the case of fixed-price contracts made its appearance".[393]

For instance, in the decision of 4 February 1931, it was ruled: "These difficulties (…) nonetheless, by their un-foreseeability and their amplitude, they modified the economy of the contract to an extent important enough to open up [to the claimants] (…) right to be compensated for unforeseen circumstances".[394]

It is clear from the text above that the Council of State modulated the strictness of clauses limiting liability for ground conditions. The rationale seems to be that it became standard practice to include clauses that globally and limitlessly transferred geological risk to the contractor. Moreover, these clauses acted as exculpatory clauses and presumed perfect knowledge of the site conditions from the mere fact, and moment, of submitting an offer.[395]

Such clauses have been described as "abusive clauses imposed by authorities to their contractors, who accept them because of their state of economic inferiority. In addition, they are truly unrealistic".[396]

To modulate the severity of these "abusive" clauses and soften their harsh consequences, the Council of State looked for ways to bring fairness into the contract. The way was by granting compensations, which is practically equivalent to a price increase, i.e., an alteration.

[392] Vidal (n. 34) 459
[393] Vidal (n. 34) 481
[394] Conseil d'Etat, 4 February 1931, Albouy et Dequecker, Leb., 132. Referenced by Vidal (n. 34) 485
[395] Vidal (n. 34) 481
[396] Catz (n. 389) 489

Considering the above, it can be concluded that the theory of sujetions imprevues was originally designed to remedy harsh consequences on contractors arising out of clauses limiting authorities from liability in the case of unforeseen ground conditions, and it is in this field that the sujetions continue to apply.

It can be hypothesised that the limited field of application has a multifactorial cause. First, the strict clauses limiting liability were mainly designed for ground conditions in works contracts. Therefore, the need for a "remedy" against harsh results was limited to this field.

Second, the limited applicability seems to be rooted in the idea that works contracts were generally more complex than services or supply contracts. It was traditionally considered that unforeseen technical circumstances disrupting the economy of the contract were more likely to arise in works contracts and for ground conditions, at least when compared to supply or services contracts at the beginning of the 20th century.[397] A similar idea explains the existence of the clause for differing site conditions in USA law only in construction contracts.[398]

Third, other theories dealt with other types of risks. Thus, a risk that could arise in a supply contract was an increase in the price of the raw materials. This risk was considered an economic risk and will fall within the realm of imprevision. Notwithstanding, it must be reminded that sujetions imprevues are generally applied as a factual circumstance rather than as a matter of principle of law. This means that had contractors been able to demonstrate and fulfil the requirements for application of the theory in supplies or services contracts, it could have been applied. The fact that this did not happen seems to reinforce the idea that technical and material issues were more common in the field of works contracts, and particularly for differing site conditions.

[397] It must be said that there is no evidence to ascertain as a fact that more unforeseeable circumstances disrupting the economy of the contract arise in work as opposed to supplying contracts. Nonetheless, the different treatment in procurement law, and the fact that sujetions imprevues are mainly claimed in the field of works, backs this idea of generally more complexity in works than supply or services contracts, at least in the past. Today this might be different due to the complexity of certain service contracts.
[398] See section 9.5

8.4.2 Grounds to invoke the theory of sujetions imprevues

The Council of State has defined it as a theory that aims to face "material difficulties found during the execution of a contract, that have an exceptional character, unforeseeable at the time of the conclusion of the contract, and which cause is external to the parties".[399]

It has been interpreted that four conditions need to be met for this theory to apply. First, the factual cause must be a material risk with exceptional character. Second, the difficulties shall be external to the parties; they can arise out of third persons' or natural facts. Third, they must be unforeseeable at the time of concluding the contract. Fourth, they must lead to an important cost overrun in the sense of a "disruption of the economy of the contract".[400]

On the first condition, it has already been said that the sujetions must be technical or material, and it generally relates to "natural phenomena".[401] It has already been explained that the most common technical or material risk refers to ground conditions. Nonetheless, severe weather conditions have been accepted as a material risk. That was the case in Societé Citra-France, where the Council of State ruled that "it is not contested that the rains fell on the Parisian region during the months of September and October 1974 have been of exceptional and unforeseeable character due to their great importance".[402]

Furthermore, also facts from third parties have been accepted as "sujetions". This was the case in Ville de Carcasson,[403] in this case, a pipeline that was not included in the original design was regarded as a sujetion imprevue. Similarly, in Ancona[404] the Council of State considered a material difficulty in some repair works undertaken in a way used by the contractor.

The second condition refers to the externality of the circumstances. This means that no compensation will be due "if a fact of the contractor is in part cause of the circumstance, or if it has contributed to further aggravation of the circumstance, or if it the contractor had the

[399] Conseil d'Etat, Commune de Lens, 30 July 2003, N° 223445
[400] Hoepffner (n. 9) 415-416. André de Laubadere et al (n. 32), Tome III, Livre VII, 17
[401] Laubadère et al, (n. 32) Tome III, Livre VIII, 15
[402] Conseil d'Etat, Societé Cintra-France, 13 May 1987, N° 35374 50006 50065
[403] Conseil d'Etat, 21 July 1937, Ville de Carcassone, 754. Referenced by De Laubadère (n. 32) Tome III, Livre VII, 16
[404] Conseil d'Etat, 5 February 1931, Ancona, 137. Referenced by De Laubadère (n. 32) Tome III, Livre VII, 16

means to prevent it from realising, or if it has not complied with the provision of the contract or the authority's orders".[405]

This seems a liability issue; if the contractor has done something that might allow to re-qualify a sujetion from being "external" to make it casually linked with his behaviour, then it is not external and will not grant the right to compensation.

In this sense, in Societé Campenon-Bernard Cetra, the Council of State decided that "the exceptional difficulties encountered in the construction of the foundations and the superstructure of the 'Pont de Brontone', on the one hand, find their cause in the technological choices proposed by the contractor and accepted by the authority and are not therefore external to the will of the parties (…) it might be consequently concluded that the exceptional circumstances described above do not give right to compensation under the theory of sujetions imprevues"[406]

On the other hand, if the circumstance is causally linked to the behaviour of the other contractual party, i.e., the authority, the circumstance cannot be qualified as a sujetion imprevu. Unlike when the circumstance is causally linked to the behaviour of the contractor, in this case, compensation might arise for the contractor but for a different reason: act of the sovereign (fait du prince),[407] or breach of contract.

The third requirement concerns the unforeseeable character of the circumstance. This unforeseeability must be analysed "at the moment of concluding the contract". For the task of analysing foreseeability, the judge normally undertakes a full evaluation *in concreto* of the behaviour of the contractor, the behaviour of the authority, and the information originally provided by the latter.[408]

Moreover, the judge also considers the criterion of "disruption of the economy of the contract" to analyse the unforeseeable character of a circumstance, thus creating a melange between the third and the fourth requirements.

[405] Laubadére (n. 32) Tome III, Livre VII, 16
[406] Conseil d'Etat, in Societe Campenon-Bernard Cetra, 31 January 1997, N° 119430
[407] Laubadère (n. 32) Tome III, Livre VII, 16.
[408] Laubadère (n. 32), Tome III, Livre VII, 17; Vidal (n. 34) 459-460

Indeed, Vidal has argued that "[t]hus, the un-foreseeability of the event it is all the most certain that it results translated into the disruption of the economy of the contract".[409] He argues that the "concept of disruption of the economy of the contract has since its origin, and by definition, a vocation not only to achieve autonomy but also to take precedence over the criterion of un-foreseeability".[410]

Although it seems accurate that the criterion of disruption of the economy plays some role in determining whether a circumstance was unforeseeable, jurisprudence and doctrine generally consider foreseeability to be an independent requirement that also regards other elements like the behaviour of the parties.[411]

The fourth requirement is that the sujetion must disrupt the economy of the contract. Some context has already been given as to the scope of this notion when dealing with the same concept as a limit to unilateral modifications. The transposition of the concept to the field of sujetions imprevues seems to have similar purposes but somehow an inverse logic. Indeed, the contract has been signed and the risks allocated. Therefore, the judge cannot modify the risk allocation and the terms of the contract unless it can understand that facing "abnormal and un-foreseeable sujetions, it is stated that the parties could not have been able to include such matters into the stipulated price and that they must be remunerated properly, outside the contract price".[412] The logic seems to be that the contract as altered by the unforeseen circumstance is a different contract than that originally expected by the parties. Therefore, further alterations need to be done to restore the original intention. This is equivalent to saying that had they known about the circumstances, they would not have agreed to that price[413].

Considering the above, it can be introduced that generally, the justification for the theory of sujetions imprevues is the "common intention of the parties".[414] Indeed, it has been argued that the reason to compensate is that the sujetions "do not enter within the common intention of the parties".[415]

[409] Vidal (n. 34) 485
[410] Vidal (n. 34) 485
[411] Hoepffner (n. 330) 415-416; De Laubère et al (n. 32), Tome III, Livre VII, 16-18
[412] De Laubère et al (n. 32) Tome III, Livre VII, 12
[413] Ibíd; Conseil D'etat, Yaher, 5 July 1929, 676: "The price within the common intention of the parties will be applied only to the soil natures in which basis the price has been agreed"
[414] Laubère et al (n. 32) Tome III, Livre VII, 12
[415] Conseil d'Etat, Societé Enterprise coopérative Française, 10 December 1938,

Nonetheless, Vidal has explained that "the common intention of the parties, as the foundation for sujetions imprevues, has long inspired the jurisprudence of the Council of State as well as the doctrine. It has, however, progressively, and quite logically, give way to equity as a foundation of the theory".[416] More generally, several explanations to justify the principle of financial equilibrium have been attempted, from implicit clauses to property rights, also including equity, continuity in the delivery of public services and/or satisfaction of the general interest and contract consideration.[417]

At this point, another interesting discussion about the legal background and justification of a theory in domestic law needs to be overlooked to focus on the rules and their relationship with procurement objectives.

8.4.3. Compensation and analysis of sujetions imprevues theory

The economic consequences of alterations are not generally part of this thesis. However, some relevant points of this theory and its consequences will be assessed.

The first consequence, tacit perhaps, of the sujetions imprevues is that when they arise, they are not an excuse for non-performance, nor they discharge from contractual obligations. Thus, the contractor remains contractually obliged to fulfil its duties in a timely manner. Nonetheless, as mentioned, if the requirements for application of the sujetions imprevues are met, the judge will proceed to grant full compensation to the contractor.

The compensation, the authors of the Traité Des Contrats Administratifs explained, takes the form of a price increase. This increase must fully cover all the expenses paid by the contractor to perform its obligations facing the sujetions imprevues. The full compensation includes, at least, direct loss.

Although, understandably, the judge wants to curtail the harsh effects of contractual clauses transferring unlimited risks to contractors, and this is especially so in light of fairness and equity, it has to be said that some criticism might arise, especially in light of trade objectives

[416] Vidal (n. 32) 506
[417] Nicolas Gabayet, 'L'aléa dans les contrats publics en droit anglais et français' (LGDJ 2015) 4

and with the lens of protecting the result of the procurement procedure as will be explained further below.

By granting compensation, the judge created four alterations. First, it introduced judicially and ex post facto an adjustment to the price agreed by the parties.

Second, the judge altered the risk allocation agreed by the parties. Indeed, even if harsh, the allocation of risks, including the geological one, to the contractor was agreed upon by both parties. Therefore, by granting compensation for geological conditions, the judge is re-allocating the risk to the administration.

Third, the whole point of the fixed-price contract is to allocate all the risks to the contractor. Therefore, by compensating, the judge is also creating a mechanism to change from a fixed-price contract to a cost-plus contract. Therefore, courts are not only adjusting the price of the contract or distorting risk allocation but changing the very type of contract.

It must be stated that although there is a change in the type of contract, or nature of the contract from fixed-price to cost-plus, such an alteration would not classify as an alteration of the overall nature of the contract as provided for in Article 72-1-C-ii. This, as explained in the respective section,[418] responds to the object to be procured or the type of procurement rather than the type of contract.

Fourth, the judge overlooked the disclaimer/exculpatory clause that expressly allocated all ground related risk to the contractor. Although not necessarily desirable within a traditional French law perspective, these alterations can be reconciled with the public service approach, national objectives in procurement, and the contractor as a collaborator of the administration.

Indeed, by granting compensation, the judge ensures that contractors will deliver even when facing increases in costs by unforeseen circumstances. This is a desirable outcome from an efficiency, public interest, and public service delivery perspective. Continuity in the delivery of public service and general interest satisfaction is one of the explanations offered to justify the protection of the financial equilibrium of the contract.[419]

[418] See chapter 2
[419] Gabayet (n. 417) 167-171

Second, contractors will not have to bear all the losses that might later impact the prices of future contracts awarded to the same contractor. Third, authorities are not "in the business of putting contractor into bankruptcy",[420] which might justify the compensation if the circumstance is truly exceptional and the economy of the contract is categorically disrupted.

However, such an approach seems hard to reconcile with EU and trade objectives. It is very likely that the price of the contract, the risk allocation, the type of contract (fixed-price or cost-plus), and the exculpatory clauses are taken into consideration by suppliers to participate in an award procedure or not, and they certainly determine the characteristics of their offer.

There might be little doubt that these alterations have an impact on the award procedure. Arguably, had the contract been advertised as a cost-plus contract where no risk for ground conditions must be bear by the contractor, suppliers could have submitted a different offer. In addition, other suppliers might have been interested in the contract as adjusted.

First, some competitors might have avoided participating in the award procedure due to a risk allocation in a fixed-price contract with exculpatory clauses that expose them to unlimited liability.

Second, competitors might have offered a bidding price higher than the awardee precisely because they were charging a contingency or price premium as a buffer in case ground conditions were dramatically different than expected. A higher price might also have been charged for insurances covering ground conditions risks. In this case, the alterations under this theory will undermine the whole award procedure, especially if the award criterion was the lowest price.

In fact, by taking the original price agreed by the parties to observe if the risk disrupts the economy of the contract, the judge disregards that other competitors might have had a better judgement in assessing the risks and, for that reason, offered a higher price and were therefore not awarded the contract.

[420] Turpin (n. 214) 177

Moreover, if foreseeability is analysed considering the "disruption of the economy", as Vidal demonstrates, the original price offered by the contractor is the comparator to analyse if a circumstance is unforeseeable or not. Thus, only the lowest price offered during an award procedure informs the decision of the judge to determine both foreseeability and the disruption of the economy.

It is submitted that the judge could analyse other offers presented during the award procedure to have a complete view of whether the circumstance was foreseeable and disrupted the economy. If the judge finds that even having the higher offer as a comparator, the circumstance does disrupt the economy, and was likely to have been unforeseeable, then it will have a final decision that at least considers the procurement procedure.

At this point, it might be argued generally for EU law that the foreseeability of the circumstance, if it includes price as a criterion, must consider the price of other offers different to the awardee's.

Furthermore, it is submitted that due to its impact on the award procedure explained in the four alterations above; this theory could only be applied under the current EU rules if it meets the requirements set out in Article 72-1-C for unforeseen circumstances. An argument to support this view can be found in the broad scope adopted of modifications in EU law that includes almost any alterations even if with the occasion of settlement agreements, [421] and arguably also because of judges' decisions on unforeseen circumstances altering the contract.

Moreover, unlike Article 45 of the former Code des Marchés Publics that allowed modifications disrupting the economy of the contract or changing the object of the contract under cases of unforeseen technical circumstances not arising out from a fact of the parties, the 2016 and 2018 Code did not include such a possibility. The 2018 Code literally transposed EU law. From this fact, it is submitted, it can be interpreted that the French regulator closed the door for any type of alterations disrupting the economy or changing the object of the contract, even if these adjustments arise out of sujetions imprevues.[422] This interpretation of the French Code also aligns with the EU approach, which should be precisely its purpose.

[421] See section 2.2.6
[422] Laurent Richer, *Droit des contrats administratifs* (12th ed, LGDJ 2021) 277

Consequently, it can be concluded that Article 72 of the Directive applies to all alterations and therefore excludes, or at least limits, the application of sujetions imprevues. Moreover, the views of Hoepffner and Richer seem to accept that these theories, not only sujetions imprevues, are most likely not applicable under the current EU rules on modification.[423]

The next question that arises in this context is not a management stage question but one that is strictly linked with it. The question is whether fixed-price contracts, with full risk allocation on the contractor, are ideal for dealing with works contracts where ground conditions might create unforeseeable expenses that are disruptive to the economy of the contract. Or, on the other hand, should authorities consider a different type of contract and/or a different type of risk allocation to avoid situations that might give rise to the application of the sujetions imprevues.

The treatment under this theory might also create legal uncertainty because it is unclear when certain unforeseen circumstances will meet the threshold to be considered "sujetions imprevues". It is submitted that a different approach to risk allocation might help avoid the impact on the competition procedure and the legal uncertainty. This is via risk allocation that is done duly and carefully but also in a commercially viable manner during the planning stage. This might include alterations for clearly stipulated ground conditions that are thus advertised. In other words, by dealing with it via risk allocation plus review clauses of Article 72-1-A.

It might be counter-argued that the uncertainty is moved from meeting the criteria for sujetions imprevues to meeting the criteria set out in a review clause. Although this might be a valid criticism, an argument might be made that more information can be provided in a review clause and a risk allocation annex as to the type of expectable ground conditions, and thus understood to be included in, or excluded from, the original price.

Under those circumstances, courts must simply enforce the risk allocation without "correcting" the harsh effects of contractual clauses on contractors, even if they must bear some losses. That would be so since any decision in the opposite sense will be a direct affront to risk allocation, the award procedure, and the contractual terms. Moreover, it will create incentives for contractors to lowball in the procurement procedure expecting compensations during the

[423] Hoepffner (n. 330) 411; Richer (n. 422) 277

management stage. The lowballing in this case will be not to charge a premium price or insurance under the expectation that no unforeseen circumstance will arise, and if it arises, claiming compensation under this theory.

8.5. L'imprévision

A traditional definition of l'imprevision has been given in the Traité Des Contrats Administratifs. This authority reads, "When circumstances beyond the control of the parties and unforeseeable at the time of concluding the administrative contract disrupt the economy of the contract, without making it impossible to perform it, and they create a deficit for the contractor, it remains strictly obliged to perform its obligations, but it is entitled to be helped by the contracting authority to overcome the difficulty that has arisen. Thus, the authority takes over part of the deficit caused by those circumstances".[424] As to its purposes, it has been said that "The theory of l''imprevision plays a role in safeguarding contract consideration over time".[425]

To maintain a logical structure in this section, the structure of this sub-section will echo that of the sujetions imprevues. Consequently, first, some historical background to the theory will be given (8.5.1.). Second, the grounds for invoking the theory will be presented. (8.5.2). Third, the type of economic help will be described, and the theory critically analysed (8.5.3).

8.5.1. Historical background of l'imprevision

In the early 19th century, it was common to introduce clauses granting compensation for price increases due to certain circumstances in supply and works contracts. "Thus, the increase in price equal to the rise of costs which, following maritime warfare, overstretched the price of a contract of maritime transportation".[426] Such clauses became so common that the Government decided to introduce them in the Cahiers de clauses et conditions generals.[427]

[424] De Laubadere et al (n. 32), Tome III, Livre VII, 72
[425] Vidal (n. 34) 165, 325
[426] Conseil d'Etat, Maugin, 20 June 1837, Leb. 257. Cited by Vidal (n. 34), 106
[427] Vidal (n. 34) 106

Nonetheless, most legal scholars identify 30 March 1916 as the inaugural date of l'imprevision.[428] This same date enlightens the type of events covered by the theory. Indeed, the first arret of the Council of State was issued during the First World War.

The decision "*Compagnie générale d'éclairage de Bordeaux*" concerns a concession contract for the public service of lighting in the city of Bordeaux. The unforeseen circumstance envisaged by the contractor was a fivefold increase in coal prices from the moment of concluding the contract until 1916. This increase had its origin in the German occupation of the coal-producing regions, and complications in transportation by sea from alternative sources due to the war.[429] The prices considered at the moment of conclusion of the contract were 23-28f, and the real increase was from 23 to 116F.[430]

In French law, a fundamental characteristic of the concession contract was the full allocation of risks to the concessionaire, something that was considered by the Council of State in this decision in the following terms:

> "Considering that, in principle, the concession contract definitively settles, until its expiry, the respective obligations of the concessionaire and the authority; that the concessionaire is obliged to perform the service provided for under the conditions specified in the agreement and is paid by the charges to the users stipulated therein; that the variation in the price of raw materials due to economic circumstances constitutes a market hazard which may, depending on the case, be favourable or unfavourable to the concessionaire and remain at his own risk, each party being deemed to have taken into account this hazard in the calculations and forecasts she made before committing herself.[431]

The Council of State disregards the strict letter of the contract since its application would render inequitable results. On this basis, it concluded:

[428] Hoepffner (n. 330) 412; Richer (n. 422) 278; De Laubadere (n. 32) Tome III, Livre VII, 74; Vidal (n. 34), 122 and ss
[429] Conseil d'etat (n. 355)
[430] Long et al (n. 318) 185
[431] Ibid

> "Whereas it follows from the foregoing that (…) it would be quite excessive to admit that the cahiers must be applied pure and simply as if we were in the presence of an ordinary risk. On the contrary, it is important to seek, in order to put an end to the temporary difficulties, a solution which takes into account at the same time the general interest, which requires the continuation of delivery of the public service by the concessionaire using all its mean of production, and the special conditions that do not allow the contract to be normally applied.
>
> Whereas that for this purpose, it should be decided, on the one hand, that the company is obliged to provide the conceded service and, on the other hand, that it must bear during this transitional period only the share of the consequences arising out of the force majeure that a reasonable interpretation of the contract allows to be left to its charge".[432]

It can be observed that the Judge overlooked a fundamental feature of concession contracts and the risk allocation agreed upon in the contract to avoid the unfair outcome that, under the circumstances of this case, they would carry.

Moreover, a point that deserves attention is that the Council of State refers to the consequences "arising out of the force majeure". This reference in the first case on l'imprevision would be excluded from later cases. It must be highlighted that the event cannot make performance impossible. The event giving rise to l'imprevision shall make the performance more difficult without rendering it impossible.

Thus, it might be said that the theory of l'imprevision occupies a middle ground between the foreseen and undisturbed performance of the contract and a major event that would render the contract impossible to be performed.[433] The latter is a place occupied by the doctrine of force majeure, which under French law will discharge the contractor from its obligations. It could be argued that l'imprevision acts in French law as a hardship clause granting mechanisms for an obligation that has become burdensome to be performed. The latter seems to be reinforced by the usage of variation and revision clauses, "thus depriving partially the theory of l'imprevision of its own effects".[434]

[432] Ibid
[433] Vidal (n. 34) 118
[434] Long et al (n. 318) 190

Another interesting circumstance of the historical development relates to the field of application of this theory. It was first applied in the context of concession contracts involving the delivery of public services by a private concessionaire. This is a circumstance shared with the unilateral power to modify the contract.[435] Similarly to that power, the theory of l'imprevision progressively expanded its scope of application and is now generally applied to administrative contracts.

There have been voices that criticise the expansion and claim this was motivated by the eagerness of administrative law scholars and judges to create a distinctive theory of administrative law.[436]

Nonetheless, the most authoritative scholars and case law generally accept the field of application to be the whole ambit of administrative contracts, even if the main domain is concession contracts.[437] Thus, this theory has been applied to transport,[438] works,[439] and supply contracts.[440] This is one of the key differences with the sujetions imprevues generally restricted to works contracts. The rationale for the difference, as was suggested in the previous section, might be related to the likelihood of an economic risk to arise in non-works contracts as opposed to the technical/material risk.

To understand the scope, it is necessary again to place it in the historical context. The justification for the theory is the abnormal increase in prices following the warfare. In this context, it seems hard to limit l'imprevision based on the type of contract since this can hardly be linked to the justification, i.e., price increases during the war, that affected all of them in a similar manner. Nonetheless, it must be said that the application of this theory was not as extended as it might appear.

For instance, some contracts were not impacted in a similar manner by the war due to their short-term duration, which means that they were concluded and performed in a window of time that did not allow the price increases to considerably impact the contract as agreed.[441] This is

[435] See section 8.1
[436] Gabayat (N. 417) 29
[437] De Laubadere (n. 32), Tome III, Livre VII, 72; Long et al (n. 318) 186
[438] Conseil d'Etat, 21 July 1917, Compagnie Générale des automobiles postales, rec. 586
[439] Conseil d'Etat, 30 October 1925, Mas-Gayet, rec. 836
[440] Conseil d'Etat, 8 February 1918, Gaz de Poissy, rec. 122
[441] Vidal (n. 34) 170

linked with the type of contract and the fact that risks are more likely to arise in long-term contracts.[442] In addition, the justification of l'imprevision was the continuity of the public service, something not necessarily at stake in short-term contracts. However, the Council of State has accepted the application of this theory in these contracts provided the grounds are met,[443] which demonstrates a shift in the justification from public service continuity to the notion of economic balance.[444] Despite this, single delivery contracts are generally regarded as being outside the scope of l'imprevision[445] since there is no time, regularly, for the appearance of risks justifying the adaption of contractual obligations to new circumstances.

Another example in which resorting to the theory of l'imprevision was unnecessary concerns contracts with price-revision clauses in case of war.[446] Contractors were protected from the impact of the unforeseen circumstances via contractual mechanisms, which allowed them to avoid the judicial protection granted under the theory. This confirms the idea that l'imprevision plays a similar role to hardship clauses.

8.5.2. Grounds to invoke the theory of l'imprevision

The grounds that justify the application of the theory of l'imprevision closely resemble those presented under the section of sujetions imprevues.[447] This similitude discharge from the duty to explain all grounds again. Consequently, when appropriate, reference is made to that section.

The requirements for applying l'imprevision are four. The first requirement concerns the type of risk. L'imprevision is aimed at alleviating the consequences of economic risk. The second requirement is for the difficulty to be external to the parties. The third requirement relates to the unforeseeable character of the events at the moment of concluding the contract. The fourth condition relates to the consequences of the event, particularly the disruption of the economy of the contract.

[442] Chamie (n. 79) 7
[443] Conseil d'Etat, 24 January, 1923, Compagnies de Charbons et Briquettes de Blanzy et de l'Ouest, eb, 55.
[444] Vidal (n. 34) 176
[445] Conseil d'Etat, 3 December 1920, Fromassol, rec. 1036. Long et al (n. 318) 186
[446] Vidal, (n. 34) 170
[447] See section 8.4

Relating to the first requirement, it has already been explained that the classification of theories dealing with risks takes into consideration the type of risk envisaged by each theory. Thus, the economic events (economic risks) "give rise to the theory of l'imprevision".[448]

This exposition eases the understanding of the theory. Nevertheless, the authors of the Traité Des Contrats Administratifs have pointed out that in practice, the causes are more complicated since an economic risk might arise from natural facts, traditionally within the realm of material risk, or from the intervention of the administration that should be comprised by the act of the sovereign. In this sense, they explain that the cause of an economic event, like a price increase can be originated from a natural disaster, or devaluation can be triggered by governmental decisions. In those cases, the clear division becomes burry.[449] Such is the case of salary increases decreed by the government or taxes; in those cases of general legislative measures, it would be the theory of imprevision and not the act of the sovereign that would apply. Albeit more could be said, and examples could be given to elaborate these complex phenomena further, it is submitted that the differences are comprehensible as they stand for the purposes of this thesis.

Furthermore, it is also relevant to present some examples where this theory has been applied. The example par excellence remains the original events in which the theory was shaped: an increase in prices due to war. A fact that might contribute to the understanding of this theory relates to its "cyclic" application. Clouzot has demonstrated that there have been three periods in which this theory has been applied: "during and in the aftermath of the First War World, with occasion of the 1974 oil shock, and at the begging of the 2000s with the steel price increase".[450]

Although other events have triggered the application of l'imprevision in French law, it is submitted that the enunciation of these examples suffices to give an insight as to what an "economic risk" means in French law. Not only worldwide events would meet the requirement to be considered an economic risk. Another point that needs stressing is that all events are temporal, affecting performance in a temporal rather than permanent manner.

[448] De Laubadere (n. 32) Tome III, Livre VII, 91
[449] De Laubadere (n. 32) 94
[450] Ludivine Clouzot, 'La théorie de l'imprévision en droit des contrats administratifs: une improbable désuétude' [2010] Revue française de droit administratif 5, 937

The second condition is that the event must be external to the parties. As explained with sujetions imprevues, the externality of the event in relation to the parties requires that it cannot be causally linked to them. Subsequently, if the contractor has done something that allows requalifying the event from being external to "causally linked" to it, it would have no right to economic help.

In this sense, the Council of State has denied the application of l'imprevision in cases where there is wrongdoing (breach) by the contractor;[451] it has neglected using technical means that would have allow him to avoid the deficit;[452] it has deprived itself of using alternative means by not applying the user charges it could have perceived, or by accepting reductions in user charges that are below what an adequate management would have justified;[453] it should have completed performance by the moment in which the circumstance arose;[454] the situation has been aggravated by the contractor's conduct.[455]

On the other hand, as explained for the sujetions, if the event can be causally linked to the authority it would be a different theory that would generally apply: act of the sovereign. This is generally accurate, and contractors would generally invoke the fait du prince because it offers more favourable effects. Nonetheless, the authors of the Traité Des Contrats Administratifs have demonstrated that it would apply if the fact were outside the intention of the authority but arising out from her.[456] In such a case, it might be argued that the application of l'imprevision depends on the unintentional character of the event.

The third requirement is the un-foreseeability of the event at the moment of conclusion of the contract. As the name of the theory indicates, the event should have been unforeseeable at the moment of concluding the contract.

[451] Conseil d'Etat, 8 May 1955, Compagnies réunies du gas; Conseil d'etat, 20 janvier 1928, Commune de Montagnac; Conseil d'Etat, 27 July 1935, Societé la Fusion du gas
[452] Conseil d'Etat, 18 February, 1921, Compagnie générale d'éclairage de Castelnaudary; Conseil d'Etat, Ville de Mont-fort-L'Amaury, 27 March 1926, 375
[453] Conseil d'Etat, 8 May 1955, Compagnies réunies du gas; Conseil d'Etat, 25 October 1935, Societé Électrique de Vinay
[454] Conseil d'Etat, 30 October 1925, Masgauet; Conseil d'Etat, 29 April 1949, Debosque
[455] Conseil d'Etat, 23 January 1952, Compagno
[456] De Laubadere (n. 32) Tome III, Livre VII, 104

This requirement was articulated in the decision of Gaz de Bordeaux in the following fashion:

> "But considering that, as a result of the occupation by the enemy of most of the coal-producing regions in continental Europe, the difficulty of sea transport has become more and more difficult because of the requisition of ships and the character and duration of the maritime war, the rise during the present war in the price of coal, which is a raw material for manufacturing gas, has reached such a proportion that it not only has an exceptional character in the sense usually given to this term, but it entails in the cost of the manufacturers of gas an increase which, to an extent escapes all the calculations, certainly exceed the extreme limits of the increases which could have been envisaged by the parties during the signing of the concession contract; that, as a result of the above circumstances, the economy of the contract is absolutely upset".[457]

The war, the complications to transport by sea, and the five-fold price increase were considered by the Council of State not only as exceptional circumstances, "in the sense usually given to this term", but "to the extent that escapes (déjouant) all the calculations" and certainly exceeds the extreme limits that the parties could have foresaw at the moment of concluding the contract.

The analysis of the unforeseeable character is analysed case-by-case, or in concreto, and considering the circumstances of the contract and the event. Consequently, an event is not absolutely and objectively unforeseeable. It is unforeseeable if it cannot have been foreseen in the circumstances of a given contract.[458] Thus, it is possible, at least theoretically, that the same factual circumstance can be regarded as unforeseeable in the context of a contract and not classified as such for a different one.

The fourth condition of application of l'imprevision concerns the effects of the economic risk. The imprevision theory will only apply to risk that disrupt the economy of the contract. This notion has already been shortly analysed in the sujetions imprevues and modifications sections. Notwithstanding, some attention will be devoted to this concept here since it was precisely in the context of l'imprevision that it first arose.

[457] Conseil d'Etat (n. 458)
[458] De Laubadère (n. 32) Tome III, Livre VII, 98

The economy of a contract will not be disrupted simply because the contract ceases to be profitable or there is a decrease in the expected profit.[459] For the economy of a contract to be disrupted, there needs to be a deficit for the contractor in performing its obligations.

Moreover, the price should exceed the "limit price". For the French case law and doctrine, the "limit price" means the maximum price that parties could have envisaged at the time of concluding the contract.[460]

The 'limit price' is analysed on a case-by-case basis. This analysis, moreover, is a technical analysis, and as such, the judge entrusts experts to retrospectively determine what the parties could, at the moment of the contract, foresee as possible in the future.[461]

The existence of a deficit and exceeding the 'limit price' is necessary but do not suffice since these are 'indicative' conditions, or steps, towards reaching the higher threshold of "disruption of the economy of the contract".

Again, there is no general definition of disruption of the economy of a contract, nor there is a percental or monetary threshold. The disruption of the economy is a legal standard that needs to be applied by the judges in each case ,taking into account its particular circumstances.[462] A circumstance that has been criticised since "case law of the Council of State does not comprehend in fact no requirement and does not provide precision on the extent that this deficit should have".[463] Vidal offers further insights into the type of disruption necessary and how this is read by the Council of State jointly with the determination of foreseeability. This interesting insight will be overlooked since it does not affect the analysis of the rules under the lens of the procurement objectives.

A few examples might illustrate the point. As a start, the facts of *Compagnie générale d'eclairage de Bordeaux* might be recalled. In that instance, the price increase was five-fold (from 23 to 116). Notwithstanding, it cannot be held as a rule that a five-fold price increase

[459] Conseil d'Etat, 25 November 1932, Compagnie pour l'éclairge des villes; Conseil d'Etat, 15 June 1928, Commune de la Courtinem
[460] De Laubadère (n. 32) Tome III, Livre VII, 107; Conseil d'Etat, 8 August 1924, Gaz de Bivre, 818; Conseil d'Etat, 3 Janvier 1936, Commune de Tursac, 6; Conseil d'Etat, 21 November 1947, Petot
[461] De Laubadère (n. 32) 107-108
[462] De Laubadère (n. 32) 108
[463] Vidal (n. 34) 191

will always be considered as disrupting the economy of a contract. For example, in a scenario where that increase has been allocated to one of the parties as a risk, and that party is insured against it. First, the un-foreseeability of the event would not be met since it is an allocated risk. Second, the economy would not be disrupted because a third party (the insurer) would cover the increase that caused the deficit and overtook the limit price.

On the other hand, a price increase closer to the original price of the contract (100% increase) was considered as not disrupting its economy. It must be said that this increase was a disruption of the economy in the context of sujetions imprevues; nonetheless, it does illustrate the magnitude of the impact required for a contract (or its economy)[464] to be disrupted.[465]

Under normal circumstances, the party bearing a risk must deal with its consequences when it realises. L'imprevision is not an exception to that rule. It is generally argued that one of the consequences of l'imprevision is that foreseeable risks are governed by the contractual provisions.[466] On the contrary, unforeseeable risks (or unforeseeable consequences) because they escape what the parties could have foreseen and the economy of the contract, they also scape the contract and its provision.

In other words, the parties could not have regulated in the contract circumstances that they could not have foreseen when concluding it. Therefore, the contract does not apply to those circumstances. Under this understanding, it is a prevailing idea that l'imprevision has an extra-contractual nature;[467] due to this extra-contractual character, those circumstances are governed by extra-contractual rules that differ from the provisions in the contract.[468]

The interest of the judge, rather than restoring the contract, was that the contractor continued performing its obligations. For this reason, judges and scholars initially justified l'imprevision on the principle of "continuity" in the delivery of public services. In some cases, contracting authorities, and the Council of State, cannot allow contractors to stop performance. In the case of electric energy or water, a local authority simply cannot allow the contractor to stop delivering.

[464] The Council of State uses interchangeably disruption of the economy of the contract or disruption of the contract in the context of l'imprevision.
[465] Conseil d'Etat, 19 February 1936, Societé T.II.E.G.
[466] Vidal (n. 43) 180
[467] De Laubadere et al (n. 32), 72; Laurent Vidal (n. 34) 181
[468] Vidal (n. 34) 181

It might be argued that the circumstances referenced above will generally fall within the realm of force majeure (or frustration) in other legal contexts. This means that a war followed by a five-fold price increase in private sector contracts or a different domestic legal system might have been regarded as force majeure authorising non-performance or excluding liability for breach of contract. Notwithstanding, this legal result was at odds with the ends of contracting authorities and national procurement objectives. Consequently, a legal mechanism was required to ensure continued performance.

The device was creating a middle ground between performance facing 'normal risks' and non-performance justified in force majeure. Arguably, the new mechanism squeezed the field of force majeure to avoid justified non-performance. Moreover, this new legal device grants contractors certain economic help to overcome the "exceptional risks" envisaged. As mentioned, this middle ground can be occupied in other contexts by hardship, price revision, and other contractual, rather than 'extra-contractual', mechanisms.

A similar understanding can be found in French legal scholars, who consider that an 'insufficient contractual practice favoured the 'appearance' of l'imprevision', and its 'usefulness' has been 'annihilated' by contractual mechanisms that play similar roles to the theory.[469]

Furthermore, this theory was shaped to avoid defaults when contractors provided public services. A clear example of this is concessions in the utilities sector. Nonetheless, the theory progressively expanded to other contracts, including short-term and supply contracts, where it is harder to appreciate the idea of continuity in public service delivery. This circumstance has allowed authors like Laurent Vidal to sustain that the justification has shifted from the continuity of delivery to a mechanism of economic balance. [470]

8.5.3 Economic help and analysis of l'imprevision

One of the main consequences of this theory concerns the obligation for the contractor to continue performing his obligations even if it faces circumstances meeting the requirement to

[469] Clouzot (n. 450); Long et al (n. 318) 190
[470] Vidal (n. 34) 176

invoke this theory.[471] L'imprevision unlike sujetions imprevues and act of the sovereign does not give right to full compensation. The economic consequence is described as an "economic help".[472]

The method of valuation of this economic help is, in short, based on the idea of ensuring that contractors bear the economic consequences of the risk up to what constitutes a normal risk. Thus, the authority will bear costs relating to the extraordinary risk alone. However, the authority does not assume fully the cost of the extraordinary risk since the parties share "the extra-contractual costs".[473]

The principle can be explained as a three-step process: identifying the moment the "extra-contractual" situation arose, determining the costs caused by the extra-contractual situation, and distributing these costs between contractor and authority.[474]

In the partition of costs caused by this type of risk Richer has explained, in principle, that the administration takes 90% of the deficit to its charge.[475] In addition, the Judge can consider the circumstances of the contract to determine the final ruling on the matter. Thus, the Council of State has considered the economic benefits of the contractor prior to the risk, and its prospective benefits to estimate the economic help.[476] Moreover, it must be reminded that, obviously, the economic contribution only addresses direct losses and not loss of profit.[477]

As mentioned, the analysis of economic consequences of alterations does not belong to this thesis, and no further analysis will be displayed. However, it is possible to make some general comments about this theory. The first point that needs accentuation concerns the contractualisation of the theory. Progressively this theory has been replaced in practice by hardship or price-revision clauses. The issue has been addressed from within and not without the contract. This might be a desirable practice since it grants legal certainty for parties and third parties from the moment of the award procedure if they respect Article 72-1-a on review clauses.

[471] De Laubadere (n. 32) 115
[472] De Laubadere (n. 32), 119; Hoepffner (n. 330) 414
[473] Vidal (n. 34), 296
[474] De Laubadére (n. 43) 127
[475] Richer (n. 422) 281; Conseil d'Etat, 8 November 1935, Ville de Lagny
[476] De Laubadere (n. 32) 128-129; Conseil d'Etat, 21 April 1944, Compagnie Française des cables télégraphiques, Lebon 119
[477] Vidal (n. 34) 285

Moreover, it is understandable that the judge wants to curtail the harsh effects of contractual clauses that transfer limitless risks to contractors, but criticism might arise from the perspective of trade and procurement objectives.

It must be said that there is no express reference to this theory in the new 2018 Code. Consequently, it might be argued that, if applicable, [478] it will only apply when meeting the requirements set out in Article 72-1-C and will be limited by those rules.

Moreover, Richer has pointed out,[479] that this theory will be constrained by Article 72 of the Public Contracts Directive. In that sense, it seems likely that l'imprevision will only apply if the adjustments do not imply an overall price increase of 50%. However, Richer also explains that this might be rare in practice since it must be considered that the contractor must bear part of the deficit. Moreover, it is submitted, it must be taken into consideration that the events giving rise to l'imprevision are temporary and not permanent events, which makes it difficult in practice for a plus-50% economic help to be required.

Chapter 9: American law on alterations to public contracts

The American system is the third case study, and it has various similarities and differences compared to the other systems. The American procurement system has evolved towards the creation of a special body of law for alterations to public contracts. However, it has some special features that deserve close attention.

For instance, contracting officers are authorised to unilaterally impose a determined course of action. This 'power' as opposed to the French system finds its source in the contract. In this sense, it seems that the American and British systems are similar. Nonetheless, the similarity shall not be overstated since the American system, unlike the British, does have a comprehensive body of regulations and case law as to the limits and consequences of alterations.

[478] Hoepffner (n. 330) 411; Richer (n. 422) 277
[479] Richer (n. 422) 281

Additionally, similarly to EU procurement law, the American system has considered it necessary to impose limits on alterations to protect competition and the award procedure. Notwithstanding, unlike the EU legislator, in the US, the law has used general standards that are less detailed.

The US system shares ideas, objectives and values with other procurement regimes. Nonetheless, American law has dealt with the issues using different tools and providing peculiar legal responses. This is one of the reasons for including the US system as a case study. The backbone of the American Procurement system is the Federal Acquisition Regulation (FAR).

Thus, the different legal phenomena that fall within the definition of alterations for this thesis' purposes are regulated in independent sections in the FAR. Moreover, each section is further elaborated in the standard clauses, also part of the FAR.

For instance, Part 43 of the FAR regulates contract modifications and section 52.243 sets forth a contract clause prescribed by Section 43.205. Through this clause the provisions and policies of Part 43 make their way into the contract.

The analysis can be presented by differentiating between modifications arising out from the parties (regardless of their unilateral or bilateral character) and other alterations (risks) also regulated by the standard clauses. Moreover, US law acknowledges the difference between unilateral and bilateral modifications. Indeed, FAR 43.103 reads:

Contract modifications are of the following types:

1. (a) *Bilateral.* A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the contracting officer. Bilateral modifications are used to-
    a. (1) Make negotiated equitable adjustments resulting from the issuance of a change order;
    b. (2) Definitize letter contracts; and
    c. (3) Reflect other agreements of the parties modifying the terms of contracts.
2. (b) *Unilateral.* A unilateral modification is a contract modification that is signed only by the contracting officer. Unilateral modifications are used, for example, to-

a. (1) Make administrative changes;
b. (2) Issue change orders;
c. (3) Make changes authorized by clauses other than a changes clause (*e.g.*,Property clause, Options clause, or Suspension of Work clause); and
d. (4) Issue termination notices.

Against the background, it is possible to replicate, to an extent, the structure used for other jurisdictions. In this sense, the first two parts of this chapter will focus on unilateral and bilateral modifications, respectively, whereas the remaining sections will focus on other phenomena relating to risks, such as delays and differing site conditions.

9.1. Unilateral Modifications

As with other chapters, the USA section on unilateral modifications will analyse in detail different aspects of the right of contracting authorities to unilaterally modify the contract. Thus, the existence and source, the rationale, and the scope of the right will be analysed.

9.1.1. Existence of a right to unilaterally modify the contract

The history of unilateral modifications in France was presented in secondary sources as the history of case law relating to the recognition of a unilateral power to modify the contract and of its economic consequences.[480] On the contrary, the history of unilateral modifications to public contracts in the USA is presented in literature as the history of contract clauses granting a right to modify the contract and dealing with its consequences.[481] This 'slight' difference permits to appreciate the relative importance of legal sources in procurement, and more specifically in the law of alterations to public contracts, in each legal system.

Moreover, this difference makes it difficult to use the same methodological approach used for other systems. It is hard to provide the context of the case and the rationales of the decision-maker to adopt a final decision when the object of analysis is a contract clause and not case law. However, some context and rationales of the contract clauses will be given to maintain a

[480] See section 8.1.
[481] Ralph Cibinic, John Nash and Steven W. Feldman, *Government Contract Changes* (Thomson Reuters 2007)

coherent and, to the extent practicable, similar methodological approach, as was done with the UK.

9.1.1.1. History of clauses allowing unilateral modifications

The first traces of a clause allowing the government to unilaterally modify the Contract has been traced back to 1818 in a U.S. Army contract for muskets.[482] This clause reads:

> "It is further agreed, that if the Ordnance Department should so far change the model of the muskets manufactured at the national armories, as to direct the barrels and bayonets to be finished of a brown color, after the manner commonly used, and direct the locks to be finished without polishing, the said Asa Waters will conform to the directions which may be issued from the Ordnance Department to that effect, without claiming any extra compensation therefor; it being fully understood that the muskets contracted for by the said Asa Waters shall be, in all respects, of a uniform pattern with those which may be made at the United States' armory. Should any alterations or pattern other than above mentioned, be decreed by the Ordnance Department, the said Asa Waters will be entitled to compensation for any extra expenses occasioned by such alterations."

Interestingly, the original clause gives the contractor the right to a price adjustment in the event of an alteration but does not explicitly give the Government the right to order changes. Instead, it seems to assume the Government has the inherent right to "decree" an alteration of the works. This language is in accord with the concept of power of the sovereign at the time and undoubtedly bound the contractor within normal limits.[483]

A different wording was adopted during the Civil War for the construction of the Etlah, a warship. This clause reads:

> "It is further agreed, that the parties of the second part shall have the privilege of making alterations and additions to the plans and specifications at any time during the progress of the work, as they may deem necessary and proper, and if said alterations and

[482] Nash and Feldman (n. 481) 11
[483] Nash and Feldman (n. 481) 11, S. 2.2

> additions shall cause extra expense to the parties of the first part, they will pay for the same at fair and reasonable rates; and should said changes cause less work and expense to the parties of the first part, a corresponding reduction to be made from the contract price; and in each case the cost of the alterations to be determined when the changes are directed to be made".[484]

This clause contains both the right of the Government to order changes and the right of the contractor to a price adjustment. In addition, it includes the possibility for the government to make 'downward' adjustments in price in the event of a change that decreases the work and expense.

About the resemblance of this clause with the current clause has been said, "Thus, some of the themes from current Changes clause language were well developed approximately 140 years ago".[485]

The inclusion of that clause in that moment of history has been subjected to an interesting analysis. It has been explained that such inclusion was needed due to the "impact of science on the construction of an iron warship". Particularly, an "ironclad steam-battery was then a novelty in naval construction (…) a revolution in naval warfare as was made by the introduction of gunpowder; and this revolution required changes in almost every particular of the multifarious combination without parallel, which now makes a ship of war (…)". This led to ascertain that "in naval procurement at least, the changes clause was generated under forced draught to try to keep up with a sudden acceleration in the strides of science".[486] This is similar to the purposes that led the Council of State in France to recognise the existence of the same right.

After the First War, the Government developed standard clauses for contracts. Standard Form 23 for construction contracts and Standard Form 32 for supply contracts included Changes clauses. Although they have some differences, the Standard form for construction will be analysed since it approaches more closely the current Changes clauses. It adopted the principle of granting the Government a unilateral right to modify the contract. It introduced the concept

[484] Ibid, S. 2.3
[485] Ibid, S 2.2
[486] Trowbridge F vom Baur 'The Origin of the Changes Clause in Naval Procurement' [1976] *Pub. Cont. LJ*, vol. 8, 175, 178

of equitable adjustment as the standard of compensation. Moreover, it required a timely notice of any claim for adjustment. In addition, it shall be highlighted, this clause contained a limitation to the right of the government; the Contracting Officer can only order changes "within the general scope". All these elements are included in the current versions of the Changes clauses.

9.1.1.2. Current clauses on unilateral Modifications

Standard Form 23 and 32 were reviewed in 1967 and 1957, respectively, and their content was the basis for the FAR when it was adopted in 1984. The FAR Changes clauses have not been modified since their adoption. Part 43 of the FAR is dedicated to dealing with the "policies and procedures for preparing and processing contract modifications for all types (…)".[487]

As explained, each part of the FAR makes its way into the contract through contract clauses whose inclusion is ordered by the very FAR. These clauses are provided for by part 52 FAR. Thus, FAR 43.205 orders the inclusion of Changes clauses found in FAR 52. For instance, for fixed-price contracts, FAR 43-205(a)(1) reads:

> "The contracting officer shall insert the clause at 52.243-1, Changes-Fixed-Price, in solicitations and contracts when a fixed-price contract for supplies is contemplated".

In turn, FAR 52.243 provides different Changes clauses for different type of contracts, amongst other, fixed-price, construction, supply, and Cost-reimbursement.

All these clauses, with minor variations, start in the following manner:

> (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following (…):

[487] FAR 43.000

The main element in this subsection is that the Changes clauses authorise the contracting officer to make changes. It is clear in giving authority to contracting officers to order changes, even against the will of contractors.

Other relevant elements will be analysed further below, amongst them the discretion given to the Officer to order changes,[488] as well as the limits[489] and scope of the clause.[490]

In the USA, the existence of a unilateral right to modify the contract did not give rise, as in France, to major theoretical discussions as to whether such a right was at odds with the pacta sunt servanda principle. Notwithstanding, it is worth pointing out that after the 1967 revision of the 23 Standard form, some scholars did comment on the Changes clauses in the following terms:

> "When Uncle Sam is one of the contracting parties a basic change in the concept of mutuality of obligation takes place".[491]

> "The Changes clause is perhaps the most significant feature of the Government contract that distinguishes it from the conventional contract. By virtue of this clause, the Government is entitled unilaterally to change the contract and hold the contractor to performance under the unilaterally changed contract. It is this significant departure from the traditional concept of mutuality, with its pointed implications on the non-governmental party, that sets the Government contract apart from the conventional commercial contract".[492]

These references become more remarkable considering that modern literature does not generally refer to them. Moreover, no reference to the change in the 'concept of mutuality' operated by the Changes clause or the Changes clause as a "distinguishing feature" from "the

[488] See section 9.1.2
[489] See section 9.1.3
[490] See section 9.1.3
[491] Dennis Polen, 'Changes Clause and the Concept of Constructive Changes: Novel Aspects of Contracts with Uncle Sam' [1974] U. San Fernando Valley L. Rev., vol. 3, 79
[492] Eldon H. Crowell and W. Stanfield Jhonson, 'A Primer on the Standard Form Changes Clause' [1966] Wm. & Mary L. Rev., vol. 8, 550

conventional commercial contract" that "sets the government contract apart" can be found in more recent secondary sources.[493]

There are, however, references to the treatment of government contracts as "exceptional" or congruent with traditional contract law. Nonetheless, this refers to sovereign immunity and other liability issues related to regulatory powers and does not relate to the changes clauses or the unilateral modifications allowed under the contract.[494] Moreover, the theorisation by Schwarz differentiating between exceptionality and congruence is not widespread in the Government Contracting parlance, including jurisprudence and scholars, as opposed to the common tongue of "exceptionality" used in France.

In other words, Government Contracts are a specific field of study but within general contract law. It is a special contract with some peculiarities, but so are banking, finance, insurance, and other types of contracts. Therefore, it is valid to study its peculiarities but always as a discipline belonging, and not wholly, distinct from general contract law.[495]

Regarding the insertion of the clause, it has been said that "Most government contracts include a Changes clause, which gives the government unliteral right to order changes in contract work during performance".[496]

This short sentence offers some elements that deserve closer analysis. First, the inclusion of a Changes clause in most government contracts in practice means that most contracting authorities will have a unilaterally right to modify the contract.

Second, the starting point is the existence of the "Changes Clause". Thus, as said above, unilateral modifications are allowed in the US because of contractual terms, not extra-contractual powers. Therefore, the possibility for the government to demand a performance that differs from the originally agreed is a right and not a power.

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[493] Cibinic et al (n. 31); Nash ad Feldman (n. 481); Steven W Feldman. *Government Contract Guidebook*. (Thomson/West, 2007)
[494] Joshua Schwartz, 'Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law' [1995] *Geo. Wash. L. Rev.* 64, 633
[495] Joshua Schwartz, 'Assembling Winstar: Triumph of the Ideal of Congruence in Government Contracts Law´[1996] *Pub. Cont. LJ* 26, 481
[496] Cibinic, et al (n. 31) 345

The first element is similar to other systems since the faculty to unilaterally modify the contract exists in most contracts. Moreover, it is legally accurate to ascertain that a unilateral right to modify the contract only exists because of a Changes clause in the US. Nonetheless, it cannot be overlooked that if the authority fails to include such a clause in writing, it will be considered incorporated,[497] in most cases,[498] into the contract under the Christian doctrine.[499] On this issue, it has been held that:

> "The Corps' **failure to include the appropriate alternative language for the Changes clause** as prescribed by FAR 43.205(a), for fixed price, architect-engineer or other professional services **is corrected as a matter of law** according to the "Christian Doctrine." The language of **the appropriate Changes clause will be read into the contract** and used as the basis for interpreting the Appellant's rights".[500]

The legal justification is that the Changes clause is "a mandatory contract clause(s) which express a significant or deeply-ingrained strand of public procurement policy".[501] This is precisely the result achieved in France by considering the Unilateral Modification a public law power; it would exist even in the absence of a contract clause.

9.1.2. The rationale and characteristics of this right

The features and scope of the right depend on the content of the clause.[502] The first element that needs consideration is the discretion granted to the Contracting officer. The Changes Clauses read: "The Contracting Officer may (…) make changes".

There is no qualification as to the reasons that authorise the contracting Officer to make changes. Therefore, as long as it is not arbitrary, any reason might be valid to order changes.

[497] GAI Consultants, INC. ENGBCA No. 6030, 95-2 CA 27620. James R. Schmidtlein Company, GSBCA 5311, 79-2 BCA 14157-
[498] Aero Corp., ASBCA 8178, 1963 BCA ¶3665
[499] G. L. Christian and Associates v. the United States, 312 F.2d 418 (Ct. Cl. 1963). KUNZI, Stanton G. Losing Sight of Christian Values: The Evolution and (Disturbing) Implications of the Christian Doctrine. Army Law., 1992, p. 11.
[500] GAI Consultants, INC. ENGBCA No. 6030, 95-2 CA 27620
[501] General Engineering & Machine Works, Appellant, v. Sean C. O'keefe, Acting Secretary of the Navy, Appellee, 991 F.2d 775 (Fed. Cir. 1993)
[502] See 9.1.3.

It must be said that the discretion granted by the Changes Clause broadens the functions that the Changes clause might serve. In different terms, because contracting officers are not bound to certain reasons to modify the contract, they can exercise the right to unilaterally modify the contract aiming at achieving different objectives, as explained below.

The first rationale and function of the clause is to introduce flexibility into government contracts. On this note, it has been said that:

> "The primary—and original—purpose of the Changes clause is undoubtedly to (1) ensure that the Government has a wide degree of flexibility during the performance and administration of a Government contract and (2) guarantee that the contractor is adequately compensated when the Government exercises this flexibility".[503]

In this sense, the clause provides "operating flexibility" "to order changes in the work to accommodate advances in technology and changes in the government's needs and requirements".[504]

This, as mentioned, resembles in part the rationale for the unilateral power in the French System. Moreover, it is interesting to observe that a 140-year-old clause anticipated issues still of relevance.

In the quote, the authors mention that guaranteeing the right to adequate compensation (equitable adjustment) is one of the main functions of the Changes clause. This must be understood through contract law lens. In this manner, the Government achieved legal certainty since it introduced the standard of compensation within the contract. i.e., equitable adjustment, and did not let it in the hands of the judge to determine it. Further, it provides consideration for those changes.

Another important function served by the clause is that it ensures efficiency in the performance of public contracts. Most Changes clauses include the following statement: "nothing in this clause shall excuse the Contractor from proceeding with the contract as changed".

[503] Nash and Feldman (n. 482) section 3.3
[504] Cibinic et al (n. 31) 346

Such a statement excludes the possibility for the contractor to stop performance if it is not satisfied with the order or with the equitable adjustment determined by the Contracting Officer. This clear doubts regarding the effects on performance of disputes, under the Disputes clause, on this topic.

The second major purpose of the clause, linked to the former, "is to furnish procurement authority to the Contracting Officer to order additional work within the general scope of the contract without using the procedures required for 'new procurement' or utilizing new funds".[505] Thus, the Changes clauses has the explicit purpose of avoiding additional termination and transaction cost associated with launching a new procurement for the work as changed.

The third and very peculiar feature of this clause is that it serves as a legal means to process contractor's claims against the government.[506] The Changes clause has been used to remedy situations in which the authority changes the work without following the procedures set out in the clause. In these cases, the contractor can use the contract Changes clause to pursue compensation for the costs under the constructive change doctrine.

Another function generally attributed to the Changes clause is that it provides means and incentives for proposing changes to the work, "thereby, facilitating more efficient performance and improving the quality of contract end products".[507]

The contractor is incentivised to propose changes benefiting the authority since once the change is agreed upon or ordered, the contractor is entitled to receive an equitable adjustment. This includes extra profit if the change involves additional costs. Moreover, for the cases in which the proposed change implies savings for the authority, the FAR includes a different clause to create the incentive for change propositions favouring the authority, i.e., the Value Engineering Clause. However, they are not part of this thesis.

[505] Cibinic et al (n. 31) 346; Nash and Feldman (n. 482), S 3.3
[506] Cibinic et al (n. 31) 347
[507] Cibinic et al (n. 31) 346

9.1.3. Scope and limits to the right to unilaterally modify the contract

One of the consequences of the contractual nature of the right to unilaterally modify the contract is that its scope and limits are also provided for within the clause. Therefore, this subsection is devoted to analysing both the types of changes (9.1.3.2) that can be ordered and their limit, i.e., within the scope of the contract (9.1.3.1).

It must be stated that for a change to be allowed needs to 'meet both tests'; it requires to be both within the general scope of the contract and be one of the types of changes provided for the clauses.[508]

However, sometimes both requirements mingle and might play together in a single case. For example, in E.L. Hamm & Associates, INC.[509] the parties discussed whether a change from lease to ownership of the building was allowed. The Contractor asserted that the change was not 'within the general scope of the contract', and "even if the modification was within the general scope of the contract, it is impermissible because it does not fall within one of the three narrow areas in which changes are allowed". Although the Board decided that the case was not within the scope, it is important to observe the interplay between limits and types of changes.

9.1.3.1. Changes within the general scope of the contract and cardinal changes

The Changes clauses allows Contracting officers to "make changes within the general scope of this contract". It is necessary to mention that Courts and Boards have generally labelled 'cardinal changes' those modifications that are not within the scope of the contract.

First, the policies and rationales of the limit will be shortly presented. Second, decisions dealing with the concepts of within the scope and cardinal change will be put forward.

[508] Cibinic et al (n. 31) Chapter 4, B; Nash and Feldman (n. 482) S. 4.1
[509] ASBCA No. 43972, 94-2 BCA, 26,724, WL 17091194

(i) Functions and rationales for limiting the right

No evidence could be found as to the reasons that led the Government to include limits to the right of Contracting Officers to unilaterally modify the contract. However, in practice, this limit has performed different functions that allow hypothesising that they might have also been its rationales.

First, the limit has served as a means of protection to contractors against 'cardinal changes' that might affect their previsions when concluding the contract. In this sense, it has been held that the cardinal change doctrine "purpose is to provide a breach remedy for contractors who are directed by the Government to perform work which is not within the general scope of the contract".[510]

Second, the limit has also served as a limit to the authority of contracting officers. In this manner, the Government ensures that Contracting Officers do not circumvent rules on authorisations, procurement procedures, budgetary limits, etc., via changes.

A third function, closely tied with the former, is that it served to protect competition held during the award procedure. Nonetheless, this function will be analysed further below.

Although not presented in this manner, these three functions have been summarised in the following fashion: "From a legal viewpoint, a change outside the scope of the contract is a new procurement that the Government is not authorized to order and the contractor is not obligated to perform".[511]

It is important to stress that a cardinal change is regarded as a breach of contract. This is one of the few situations where contractors are authorised to stop performance and bring proceedings, unlike others where it might complain but without the right to stop performance.

[510] Edward R. Marden Corp. v. United States, 442 F.2d 364, 369 (Ct. Cl. 1971)
[511] Nash and Feldman (n. 482) S 4.2

(ii) Standards to determine if a cardinal change has occurred

It is necessary to determine what is a change outside the general scope of the Contract, i.e., a cardinal change. From a legal standpoint, the 'general scope of the contract' is a very broad (and vague) legal standard that might mean different things in different contexts. For this reason, it is critical to observe decisions dealing with the matter to inform the interpretation and concretion of this standard.

It is necessary to reiterate that these decisions only deal with the application of this standard in unilateral changes and with the function of protecting the contractor. The cases of bilateral changes outside the general scope of the contract and displaying the third function (protecting the award procedure and competitors) will be analysed further below.

Scholars devoting attention to this topic have considered that, to some extent, it is possible to differentiate between two tests: tests focusing on the nature of the work and tests dealing with the amount of effort. It is interesting that each test seems to focus on the qualitative or quantitative impact of the change, which approaches the systematisation of French law by scholars.

A. Nature of the Work-qualitative limit

Some important elements need to be stressed in relation to this test. First, boards and courts have worded in different manners the standard to consider that a cardinal change has occurred. Although these differences could be interpreted as evidence for arguing the existence of different standards, it is submitted, and generally accepted by the doctrine, that the terminology attempts to clarify what can be considered a cardinal change rather than intentional nuances of the same standard or evidence of different standards.

A second element that is shared by the second test, since it is general to the concept of cardinal changes, relates to the factual nature of the question. This is, boards and courts cannot determine *in abstracto* whether a cardinal change has occurred or not, they must rely on the factual circumstances and evidence, of the changes and contract *sub iudice*. This is a sensible clarification since the changes are limited to be within the scope of the contract. Accordingly,

the contract and its scope are critical and the main parameter to determine the 'cardinality' of a given change.

In accordance with the above, some factual circumstances need to be given to properly comprehend the cases presented in this part, as well as the practical application of the standard.

A very early case is Freund v. United States. The Post Office in a mail delivery contract ordered a change of routes at the same rate per mile as originally agreed. The disgruntled contractor brought proceedings. In interpreting clauses allowing changes within the four corners of the Contract, the Supreme Court ruled that:

> "this court [is] properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application **to what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into**".

Thus, the Court explicitly said that it would interpret the limits to the Changes clauses based on what was within the contemplation of the parties when concluding the contract. This extract expressly recognises that the scope of the Changes clause must be interpreted as from the moment of conclusion.

This temporal standpoint visibly pursues to protect legal certainty by restraining authorities from making changes that could not have fairly and reasonably been foreseen at the moment of concluding the contract. This argument is reinforced by the policies underlying this principle.

The policy for this decision was to avoid "official favoritism as between contractors, and results in enlarged expenditures, because it increases the prices which contractors, in view of the added risk, incorporate in their bids for government contracts".[512]

Thus, the standard, in this case, was aimed at protecting the contractor by taking it into consideration. Nonetheless, the policy goes beyond the contractor's protection, namely

[512] Freund v. United States, 260 U.S. 60 (1922)

avoiding favouritism (by awarding contracts via modifications) and price increases (since contractors would charge primes or insurances to pay for eventual cardinal changes imposed by the authority).

This second policy explains the reason of the Court to establish the conclusion of the contract as the temporal comparator. If the Changes clause is construed only as allowing changes that could have been fairly and reasonably contemplated by the parties when concluding the contract, the Contractor does not need to charge a premium for potential cardinal changes', that could not have been foreseen. Moreover, the Contractor does not need either to charge a premium for changes that are not cardinal since he will be duly compensated via the equitable adjustment.

Another relevant case is Air-A-Plane Corp. v. United States, where the Court of Claims decided over a case to make smoke generators, in which more than 1.000 changes were made to the work. These changes included, on occasions, several modifications to the same element.[513]

In this decision, the Court ruled that the Changes clauses "does not authorize a 'cardinal' change—a drastic modification beyond the scope of the contract". The standard to determine if that has occurred was "whether the modified job 'was essentially the same work as the parties bargained for when the contract was awarded" (…) Conversely, there is a cardinal change if the ordered deviations 'altered the nature of the thing to be constructed'.

Moreover, as warned above, it is also significant to point out that the Supreme Court adopted a case-by-case approach. In this sense, the Court said, "There is no exact formula .... Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole".

Similar applications to the standard have been displayed. For instance, in *Stewart and Stevenson Services*[514], it was required from the Appellant to demonstrate: "that the nature and amount of the additional work was so **drastic and profound** so as to be tantamount to work

[513] United States Courts of Claim, 408 F.2d 1030 (Ct. Cl. 1969), 11 GC ¶ 95
[514] Inc., ASBCA 43631, 97-2 BCA ¶ 29252

materially different from that bargained for under the Changes clause". This case deal with changes to the specifications of generators due to original failures in the designs.

The comparison is to be made between the original agreement and the contract as modified. Moreover, it is made through the lens of the standard; in this case, for the change to be cardinal, it must be "drastic and profound" and "materially different" from that bargained for under the Changes clause.

Some scholars have put forth an argument in the sense that the determining factor for a change to be cardinal relates to the "function or nature" of the work.[515] In this line of thought, "If the changed item performs essentially the same function, it is likely that the change will be found to be within the general scope of the contract".[516]

To support this position, Nash et al., have relied on cases like Aragona, where multiple changes to a hospital construction contract "that altered many of the materials used in its construction were within the scope of the contract because the hospital was not different in its size or performance after the changes were effected".[517] Other cases invoked to support this position also include Keco Industries inc. v US where the change to furnish gasoline-driven refrigeration units instead of electricity-driven units was considered to be within the scope since "the two types of refrigerators were essentially the same except for the power units".

To reach this conclusion, the Court also considered that the initial contract included both types of refrigerators and regarded the marginal difference in contract and price production between the two types of units.[518] Similar approaches and conclusions have been reached in other cases.[519]

[515] Cibinic et al (n. 31) S 4.3
[516] Nash and Feldman (n. 482) S 4.3
[517] Aragona Constr. Co. v. United States, 165 Ct. Cl. 382 (1964)
[518] Keco Industries, Inc. v. United States, 364 F.2d 838 (Ct. Cl. 1966)
[519] Wunderlich Contracting Co. v. United States, 351 F.2d 956 (Ct. Cl. 1965); Contact Int'l, Inc. v. Widnall, 106 F.3d 426 (Fed. Cir. 1997); PCL Constr. Servs., Inc. v. United States, 47 Fed. Cl. 745 (2000), aff'd, 96 Fed. Appx. 672 (Fed. Cir. 2004); Contel Advanced Sys., Inc., ASBCA 49072, 02-1 BCA ¶31,808

B. Cost and Disruption-quantitative limit

The second test that has been applied by Boards and Courts in the USA to determine whether a change is within the scope of the contract relates to the "degree of work disruption and cost increases experienced by the contractor".[520]

This test is a question of facts and must be determined considering the circumstances. Accordingly, a certain amount or percentage might be regarded as being a cardinal change. In contrast, that same amount might be considered within the scope in a different contract given the circumstances, as will be elaborated further below regarding the General Dynamics case.

To begin with, it is relevant to mention that "contractors have rarely been successful on these grounds. However, there are a few cases holding that the work was so much greater that it amounted to a cardinal change".[521]

Amongst these cases, In *Peter Kiewit Sons' Co v. Summit Constr. Co*.,[522] a change that added over 200% to the cost of the work was considered cardinal. In Atlantic Dry Corp. v. US,[523] the Court upheld a decision in which a cost increase of 4.6 million in a 5.8 million contract was considered cardinal. In this decision, nonetheless, the Court clarified that "determining the merits of a cardinal change claim requires an examination of the totality of the circumstances surrounding the project and the many modifications". It also acknowledged that "two of the relevant circumstances are the increase in the cost of completing the project and the number of changes made".

The decision expressly stresses that though relevant, increases in costs and the number of changes are only two of the many relevant circumstances for a final decision. This articulation, it is submitted, questions the very existence of a "cost and disruption" test deployed by courts and available to invocation by claimants.

[520] Cibinic et al (n. 31) 349
[521] Cibinic et al (n. 31) 349
[522] Peter Kiewit Sons' Co. v. Summit Const. Co., 422 F.2d 242 (8th Cir. 1969)
[523] Atl. Dry Dock Corp. v. United States, 773 F. Supp. 335, 339–40 (M.D. Fla. 1991)

In some other instances, significative quantitative changes have been held to be within the scope of the Contract. For instance, in General Dynamics Corp. v. US, the Court[524] the original contract for the construction of nuclear submarines had been for roughly 60 million, and the ordered changes amounted to approximately 100 million over the original price. The changes were regarded as within the scope of the contract. They were a consequence of a major redesign of the submarines because of the loss of a nuclear submarine of the same design.

The reasoning of the Court was that the submarines "carried the technology of their time to its outer limits" (…) that "The very survival of the nation might have been thought to be involved in the prompt correction of known design defects" (…). Finally, the Court also considered that "those who contract to build submarines must take into account what is likely to occur in submarine development".

It is important to bear in mind that the Court considered what might have been expected by contractors that build nuclear submarines. Although not explicitly, the linkage was made to the moment of contract conclusion. Moreover, the Court referred to what was foreseeable to be within the Changes clauses depending on the nature of the contract at hand. The Court implied that changes of more than 100% of the original contract value were foreseeable due to the special nature of the nuclear submarine development industry.

A similar result was reached in another case where a 170% price increase was considered to be within the scope of the contract. In *Axel Electronics*,[525] the Board said "Certainly we have not understood the test to be an automatic mathematical comparison of the original contract price and the amount claimed as an equitable adjustment. Actually, examination of the character of the change alleged is far more significant in determining whether that change is properly within the scope of the contract's Changes clause".

The Board gives preponderance to the qualitative impact of the change rather than its quantitative consequences, which reinforces the idea that though relevant circumstances, it is hard to argue that a proper and independent test exists for costs and disruptions generated by the changes.

[524] Gen. Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978)
[525] Appeal of Axel Elecs., Inc., ASBCA No. 18990, 74-1 B.C.A. (CCH) ¶ 10471 (Feb. 7, 1974)

A board seems to have gone further in privileging the qualitative over the quantitative analysis in *Ackon Inc*. The Board held that:

> "Work was performed out of sequence, changes were directed and extra work was required to overcome the differing site conditions, methods and manner of performance were altered, and time for performance was compressed. However, the work was not wholly different from that which was awarded".

From this apart, it has been interpreted that the changes "would not be outside the scope unless they made the work 'wholly different' from the originally contracted one".[526] However, Cibinic et al. did not stress enough, it is submitted, that that the Board also considered that "The difficulties experienced and the resulting additional costs proved with reasonable certainty are cognizable under the relief granting language of the pertinent contract provisions".

From the language of the decision, it is possible to infer that had the additional costs proven not "cognisable under the relief granting language of the pertinent provision", the change would have been considered a cardinal change, even if the work was not 'wholly different'. On that basis, it would be possible to argue that the quantitative limit is not irrelevant, provided it was not reasonably foreseeable that the change was within the clause's scope at the moment of concluding the contract.

Furthermore, it is important to point out that the Court of Claims has said:

> "The number of changes is not, in and of itself, the test by which it should be determined whether or not alterations are outside of the scope of a contract. This court decided in Magoba Construction Co. v. United States, 1943, 99 Ct. Cl. 662, that the Government had not breached a construction contract in which it had made 62 separate changes. On the other hand, obviously, a single change which is beyond the scope of a contract may be serious enough to constitute an actionable breach of that contract".[527]

Thus, the number of changes is not a critical circumstance to determine if they are outside the scope. However, that does not mean that they are irrelevant either.

[526] Cibinic et al (n. 31) 349
[527] P. L. Saddler v. United States, 287 F.2d 411 (Ct. Cl. 1961)

(iii) Conclusion to the subsection

As a conclusion of this subsection, some general considerations will be presented regarding the Cardinal Changes doctrine. First, in both tests, the Cardinal Change doctrine is a matter of fact where the 'totality of the circumstances' needs to be taken into account. It is from this that several other consequences arise as per below.

Second, there is no set limit in terms of quantity or percentage to determine that a cardinal change has occurred. This grants extended flexibility to the authority whose discretion is only limited by the original agreement. This, nonetheless, might raise more issues in terms of competition, as explained further below.

Third, the preponderance is given to the qualitative rather than quantitative impact of the changes on the original contract. This might be explained by the general interpretation given to the concept of 'scope' in legal matters.

However, it is submitted, this preponderance is a policy-driven interpretation of courts and boards. The policy behind, it is submitted, is to grant as much flexibility as possible to Contracting Officers to achieve their ends. For this reason, the ultimate standard is if the work is essentially the same as originally agreed or if the function performed by the product as modified differs from the one agreed for in the original contract.

This is also linked with the termination and transaction costs that re-procurement involves. If the function has not changed, it is justifiable to avoid these costs. However, competition concerns remain. Nonetheless, if any contractor would have faced similar changes, a reasonable inference is that competition concerns diminish because the function has not changed.

Fourth, it must be considered that decisions generally take into consideration whether the change was foreseeable at the moment of concluding the contract. Thus, competitors might also have foreseen the existence of these changes and know they are permitted if they do not

change the function of the product; this is a further reduction in competition preoccupations raised by the wide flexibility.

In this framework, it is worth remarking that the type of contract is of utmost importance as a circumstance. Thus, the changes that might be undertaken, and expected, in a contract to produce nuclear submarines[528] are different from other types of contracts. Therefore, it seems reasonable to conclude that the scope of the Changes clause will be construed considering the complexity of the works.

9.1.3.2. The types of changes admitted by the Changes Clauses

For a unilateral modification to be valid, it must be within its scope. After giving a general and discretionary right to order modifications, the Changes clauses include certain permitted types of changes. They vary according to the type of contract.

The type of changes for supplies contracts read:

> (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
>
> a. (2) Method of shipment or packing.
> b. (3) Place of delivery.

For services contract:

> (1) Description of services to be performed.
> (2) Time of performance (*i.e.*,hours of the day, days of the week, etc.).
> (3) Place of performance of the services.

For construction contracts the clause slightly varies and reads:

[528] See section B above

> The Contracting Officer may (…) make changes in the work within the general scope of the contract, including changes
>
> (1) In the specifications (including drawings and designs);
> (2) In the method or manner of performance of the work;
> (3) In the Government-furnished property or services; or
> (4) Directing acceleration in the performance of the work.

A literal interpretation of this last clause will imply that the construction contract clause is *numerus apertus* since it states 'including changes', which would permit the government to order unlisted changes. On the contrary, the supplies and services clause would contain an exhaustive list since they use the wording 'in any one or more of the following'.

Nonetheless, it must be clarified that in practice and case law this, subtle but important, difference "has not come into play".[529] Having said that, it is possible to analyse some types of changes undertaken under the Changes clause.

(i) The contract works

The Changes clauses include different wording depending on the type of contract to allow changes in technical details of the works; this includes "the descriptive part of the contract that governs the configuration and performance of the end product or service to be delivered or completed under the contract".[530]

Consequently, it is necessary for the clause to guarantee this function. "Generally, this is accomplished by providing for changes to the drawings or specifications".[531] "The service contract clause achieves the same purpose by permitting changes in the "description of services".[532]

Thus, the clause for supplies allows changes in the "Drawings, designs, or specifications". This right, nonetheless, is only granted when the supplies are 'specially manufactured' for the

[529] Cibinic et al (n. 31) 355
[530] Nash and Feldman (n. 482) S 4.11
[531] Cibinic et al (n. 31) 355
[532] Nash and Feldman (n. 482) S 4.11

government. Although the reason to exclude supplies not specially manufactured for the Government could not be found in case law or literature,[533] it is submitted, that this considers the potential costs and consequences of such changes, i.e., imply changing the production lines. These changes might prove challenging and expensive when the contractor is the producer. However, it is not uncommon that the government's supplier is not the manufacturer. In the latter case, the changes turn from difficult and complex to almost impossible since the contractor does not have the power or right to order the producer to alter its production line to satisfy the government's changes.

On the other hand, when products are especially manufactured for the government, the production process is created or altered to meet the government's needs and a change in the drawings or specifications, and the consequent alteration of the production process seems less problematic.

Moreover, it is important to point out that Boards interpret changes to the work broadly. Thus, in *Basys Inc*., before the adoption of the FAR, the Government used the supply clause for a services contract. In that case, the Board construed the term "specifications" broadly as to encompass the amount of work. In that decision, the Broad said that 'specifications' could be interpreted to mean "the written description of the work to be done".[534]

(ii) Terms and Conditions

The Changes clause does not expressly provide the right to modify terms and conditions unliterally. The wide interpretation of the first type of changes is not generally as wide as to encompass these.

Although this is a fundamental difference in theory, "The distinction between drawings and specifications and terms and conditions, however, has been rarely discussed".[535] Nonetheless, decisions in which the difference has been discussed exist. For instance, in *BMY—A Division of Harsco Corp*, the Board spell out the object of the decision in these terms:

[533] Cibinic et al (n. 31) 355; Nash and Feldman (n. 482) S 4.11
[534] Basys, Inc. GSBCA TD-7, 73-1 BCA 9798; Cibinic et al (n. 31) 355; Nash and Feldman (n. 482) S 4.11
[535] Nash and Feldman (n. 482) S 4.11

> In deciding the issue submitted in this appeal, we basically have to decide whether the term "specifications," as used in the Changes clause, includes the warranty provisions of the contract. We conclude that it does not.[536]

The substance of the reasoning reads as follows:

> "Merely examining this portion of the Changes clause leads one to the conclusion that the warranty is not part of the specifications (…) It is clear that the supplies in this contract were not to be manufactured in accordance with the warranty provision".
> (…)

Thus, the warranty was considered outside the Changes clauses and particularly the specifications, which constitute the part of the contract that can be unilaterally modified.

Some other cases can be presented. The first example has already been referred to above, and it was the change from lease to ownership where the change was considered to be out of scope, and no analysis of the types of changes was displayed; *E.L. Hamm & Associates, INC*.[537]

Other changes to Terms and Conditions have been ruled out for:

- Altering payment terms of the contract. Since "The scope of the unilateral right to modify the Contract in the Changes clause does not include the right to modify general provisions of the contract."[538]
- Reducing funding on a terminated cost-reimbursement contract, due to the fact that "Basic contract hornbook law is that one party may unilaterally alter contract terms only to the extent, if any, authorized by any contract provision. The respondent has cited no clause, authorities, or precedents that would authorize such unilateral action.

[536] BMY—A Division of Harsco Corp., 91-1 BCA P 23565 (A.S.B.C.A.), ASBCA No. 36926, 1990 WL 257928
[537] ASBCA No. 43972, 94-2 BCA, 26,724, WL 17091194
[538] B.F. Carvin Construct. Co., VABCA 3224, 92-1 BCA 24,481, WL 11990865; In another case the Board said: "That clause clearly contemplates that a contracting officer may at any time, by written order, make changes within the general scope of the contract in the description of services to be performed. (…) The unilateral change taken by DOE impacted the contract's payment provisions, which are not part of the general scope of work under the contract. The unilateral change made by DOE is beyond the general scope and cannot be "regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." CH2M-WG Idaho, LLC, CBCA 3876, BCA 26,849, WL 4124349. *CBCA 3876*.

> We are aware of no clause in the contract which would permit the action here taken; it is not within the unilateral authority created by the Changes clause".[539]

On the other hand, in some cases, Boards have allowed changes to the Terms and Conditions under the Changes clauses. Thus, in *Space Age Engineering Inc*.,[540] the Board seems to consider a wage determination to be a Change to the contract, which brought it within the concept of specifications.[541]

This decision reads: "As it was wrongful for the Government to insist that because Space Age was a successor contractor it had to pay its employees the so-called 'conformed' wages, doing so constituted a change for which Space Age is entitled to be compensated. For this reason, the appeal is sustained to the extent that 'conformed' wages and fringe benefits paid by Space Age exceeded those of the Wage Determination which was part of the contract".

Similarly, in *Compudyne Corporation*,[542] the Court seems to consider the Technical Data Clause to be part of the specifications. This decision says: "More specifically, we find that an alleged change in the data licensing requirements that allegedly increased the cost of a contractor's performance is a dispute for which the Changes clause provides a remedy".

As can be observed, these two decisions can be understood as policy-driven. The board aimed at granting a remedy to the contractor through the Changes clauses for the extra expenses incurred in by the authority's orders. In Nash's words, they 'needed to find that a constructive change had occurred'.[543]

Moreover, it has been ascertained that the Changes clause is not "intended to give the Government the unilateral right to change standard clauses of the contract".[544] In addition, it has been argued that FAR 1.401(c) and 1.403 expressly forbid any unauthorised modification of a standard FAR clause. For this reason, these cases "should be seen primarily as jurisdictional rulings under prior law".[545]

[539] TEM Associates, INC. DOTCAB 2556, 93-2 BCA, 25,759, WL 13936641.
[540] ASBCA 16588, 72-2 BCA 9636, WL 1744
[541] Nash and Feldman (n. 482) S 4.11; Cibinic et al (n. 32) 356
[542] ABSCA 14556, 72-1 BCA, 9218 WL 1285.
[543] Nash and Feldman (n. 482) S 4.11
[544] Nash and Feldman (n. 482) S 4.11
[545] Nash and Feldman (n. 482) S 4.11

(iii) Changes in quantity

As mentioned, the Changes clauses have been interpreted in a broad manner. Thus, the right to change specifications and designs was construed broadly as to encompass changes to the amount of work in a services contract.[546] Notwithstanding, a different outcome can be observed regarding changes in substantial quantities of major items.

The fact that quantity changes in major items are not generally held to be within the scope of the contract is closely tied with the quantitative test and demonstrates the importance of quantity and costs in some cases and under certain circumstances. Therefore, no further development will be displayed.

(iv) Deductive changes v. termination for convenience

When facing the need to delete an item from a contract, the Contracting Officer faces two different options: using the Changes clause or a partial termination for convenience. The difference in terms of consequences is the compensation received by the contractor.

For the purposes of this section, nonetheless, the relevant issue is that there is a rule that forbids the deletion of major items from the contract under the Changes clause. This is an inverse rule, so to speak, compared to the one analysed in the preceding section. This is so because the Changes clause finds limits for major increases in quantity as explained above, and it also finds limits for major deletions of items. However, in the latter case, the course of action could be undertaken under a different clause: termination for convenience. Therefore, authorities' flexibility will not be hindered; it would simply be granted under a different contract clause.

The general rule is that whereas the Changes clause can be used for minor deletion, the Termination for convenience clause is the adequate legal means for major deletions or generally for other than minor deletions.[547]

This was the approach in JW Bateson Co, where the Court held: "The long and short of it is that the proper yardstick in judging between a change and a termination in projects of this

[546] Basys, Inc. GSBCA TD-7, 73-1 BCA 9798
[547] Cibinic et al (n. 31) 356; Nash and Feldman (n. 482) S 415

magnitude would best be found by thinking in terms of major and minor variations in the plans".'[548]

Finally, it is important to stress that no mathematical rule exists, and deductions as low as 5%[549] of the total contract value have been regarded as not allowed under the Changes clause. In contrast, deductions as high as 12%[550] have been held to be permitted.[551] This suggests that there is a significant variation in the application of the rules by review bodies and courts.

(v) Accelerations and deaccelerations

The starting point is that, at least for services and construction contracts, there is an express mention of this type of change, in one case to accelerate (construction) or to impose time performance alterations more generally (services).

Nash and Feldman and Cibinic et al. describe that this type of change made its way into the Changes clauses via the Constructive Changes doctrine. Traditionally time changes were held to be outside the scope of the clause. Later, some cases were decided considering constructive accelerations some orders issued by Contracting Officers. The corollary of such decisions is that if the change can be regarded as such for Constructive Changes purposes, it should also be regarded as a change for Changes Clauses' purposes.

That explains the current wording allowing accelerations for Construction Contracts. It is important to point out that where similar language is "omitted from the listed changes that the Government could order unilaterally" (…) "revisions to scheduled delivery dates (…) required the consent of the contractor; in effect such revisions had to be bilateral, rather than unilateral."[552]

However, this conclusion was reached factoring in that "this omission was not an oversight" since the government reserved the right to order changes to the delivery date in a limited manner (within 48 hours for a tanker order and agreed by the contractor for a barge order).

[548] J. W. Bateson Co. v. United States, 308 F.2d 510, 513 (5th Cir. 1962)
[549] Kakos Nursery, Inc., ASBCA 10989, 66-2 BCA ¶ 5733, 9 GC ¶ 350
[550] American Constr. & Energy, Inc., ASBCA 34934, 88-1 BCA ¶ 20361
[551] Nash and Feldman (n. 482) S 4.15
[552] Coastal States Petroleum Co., ASBCA No. 31059, 88-1 B.C.A. (CCH) ¶ 20468 (Jan. 25, 1988)

Therefore, the Board could not recognise an unbounded right to alter this aspect when the contract contained express limitations to it. Moreover, the limited inclusion, it might be inferred, estopped from applying the Christian Doctrine to read in the standard clause's wording which arguably would have granted a wider faculty.

Moreover, in supply contracts, "an acceleration could be ordered under the Changes clause even in the absence of an express provision of acceleration in the clause".[553] However, Nash and Feldman consider that "the better view is that such accelerations may not be ordered using the Changes clause because the clause contains no explicit statement granting the Government this right".[554]

On the other hand, deaccelerations of the schedule or delays have generally been regarded as outside of the Changes clause for construction contracts.[555] However, as with the partial termination/deductive changes, this responds to the fact that there is a specific contract clause for these alterations, i.e., the suspension of work clause.[556] Therefore, the flexibility for the authority is granted under a different clause.

Despite this general rule, some decisions have regarded deaccelerations as within the Changes clause's scope.[557] The general rule, nonetheless, remains that accelerations are within the Changes clause scope, whereas deaccelerations must be relegated to the Suspension of Works clause. This "is best explained by history rather than logic".[558]

(vi) Method or manner of performance

The specific way this type of change is permitted under the Changes Clauses, obviously, depends on the type of contract. Thus, some clauses allow modifying the method of shipment

[553] Int'l Signal & Control Corp., ASBCA No. 26908, 85-3 B.C.A. (CCH) ¶ 18355 (Aug. 20, 1985); In Fermont Div., Dynamics Corp. of Am., ASBCA No. 15806, 75-1 B.C.A. (CCH) ¶ 11139 (Feb. 20, 1975) when the Court said: "This has been held for constructive changes where there is "a cause of action for an equitable adjustment in the contract price under the Changes clause, even absent express provision for acceleration in that clause"
[554] Nash and Feldman (n. 482) S 4.8
[555] Simmel-Industrie Meccaniche Societa per Azioni, ASBCA 6141, 61-1 BCA ¶2917; Broome Constr., Inc., AGBCA 232, 71-2 BCA ¶9100, aff'd, 203 Ct. Cl. 521, 492 F.2d 829 (1974); Cosmos Eng'rs, Inc., IBCA 979-12-72, 73-1 BCA ¶9972
[556] Nash and Feldman (n. 482) S 4.8
[557] Commercial Contractors, Inc., ASBCA 30675, 88-3 BCA ¶20,877; Pan Arctic Corp., ASBCA 20133, 77-1 BCA ¶12,514; Fred A. Arnold, Inc., ASBCA 18915, 75-2 BCA ¶11,496
[558] Nash and Feldman (n. 482) S 4.8

and packing of supplies, whereas the construction clause will enable changes in the method or manner of performance of the works.

The rationale for including this relates to some changes not related directly to the specification, drawings or features of the product but rather on aspects that are not necessarily reflected in the final work. For instance, this clause has been used to order changes in the storage location,[559] the refusal from the government to accept a method not prohibited by the specifications,[560] a direction to work in one building at a time,[561] amongst other.[562]

Thus, types of changes are expressly broadened to include things that do not necessarily affect the final product or its quality. As in other cases, this can be seen as a purposely expansion of the flexibility granted to Contracting Officers.

9.2. Bilateral Modifications

As mentioned above, bilateral modifications are simply defined in the FAR as the "contract modification that is signed by the contractor and the contracting officer". The Changes clauses do not generally cover bilateral modifications. The only exception to this rule is the Changes clause for commercial items. FAR 52.212-4 reads: "Changes in the terms and conditions of this contract may be made only by written agreement of the parties".

Nonetheless, it is important to consider that "Although the major Changes clauses only discuss the possibility of unilateral orders from the contracting officer changing the work, most agencies favor the ordering of changes in the form of a bilateral modification to the contract. Thus, the general government policy is not covered in the language of the Changes clauses".[563]

An important consideration relating to bilateral modifications in this system is that freedom to bilaterally modify contracts is implied. This means that, unlike unilateral modifications, no contractual clause is needed to understand that parties have the right to modify the contract.

[559] McShain, Inc., GSBCA 3541, 73-1 BCA ¶ 9981
[560] Thomas Electric, Inc., ASBCA 30832, 89-1 BCA ¶ 21516
[561] Commercial Contractors, Inc., ASBCA 30675, 88-3 BCA ¶ 20877
[562] Eagle Contracting, Inc., AGBCA 88-225-1, 92-3 BCA ¶ 25018; M&H Constr. Co., ASBCA 21578, 79-1 BCA ¶ 13688
[563] Cibinic et al (n. 31) 364

This directly derives from the freedom of contract that encompasses such possibility. However, parties to a government contract in the American system do not have an unbounded right to modify the original agreement. This limitation, as in the EU and France, was found by controllers of the system when considering the competition held to award the contract.

9.3. Limits to unilateral and bilateral modifications arising out of competition concerns and respect for the procurement procedure

Challenges may, in theory, be addressed against unilateral and bilateral modifications. However, in practice, most challenges are submitted by competitors and addressed against modifications agreed to by the parties.

In *American Air Filter Company, inc.*,[564] the Comptroller General said:

> "We have consistently held that contract modifications, whether they be unilaterally ordered by the government or agreed upon by the contracting parties and incorporated into a supplemental agreement, are primarily the responsibility of the contracting agency. however, we have also held that if the contract as changed is materially different from the contract for which competition was held, the contract should be terminated and the new requirement competed, unless a noncompetitive procurement is justifiable."

There are several interesting elements in this apart. First, there is a clear recognition of the freedom to modify the contract. Second, the Comptroller General acknowledged that such freedom is limited, and the contract cannot be materially different from the contract for which the competition was held. A precision must be made in this point since the standard in the American case considers the contract opportunity for which competition was held, which, as will be elaborated further below, is not the same as the original contract; this is the contract as concluded between the parties.

[564] In the Am. Air Filter Co., Inc., 57 Comp. Gen. 285 (Feb. 16, 1978)

Third, the consequence of a material alteration of the contract must be termination and a subsequent new competitive process. This is the same legal requirement set out by other procurement systems where competition is a legal obligation, e.g. the EU.

There is a fourth interesting point if a noncompetitive procurement is justifiable, then the alteration might validly render the contract as changed materially different from the one competed for. Indeed, there is no legal justification for imposing termination and re-procurement due to competition concerns to award a new contract without competition. This point was already made for the EU, which has no explicit rule authorising substantial modifications when the circumstance falls within the grounds for using competitive negotiation without notice.[565]

The second point highlighted was that the standard to analyse a change for competition purposes is not the same as the standard to analyse a cardinal change when acting as a protection for the contractor. In *Reconsideration of American Air filter*, the Comptroller said:

> "The impact of any modification is in our view to be determined by examining whether the alteration is within the scope of the competition which was initially conducted. ordinarily, a modification falls within the scope of the procurement provided that it is of a nature which potential offerors would have reasonably anticipated under the Changes clause.
>
> To determine what potential offerors would have reasonably expected, consideration should be given, in our view, to the procurement format used, the history of the present and related past procurements, and the nature of the supplies or services sought a variety of factors may be pertinent, including: whether the requirement was appropriate initially for an advertised or negotiated procurement; whether a standard off-the-shelf or similar item is sought; or to whether, e.g., the contract is one for research and development, suggesting that broad changes might be expected because the government's requirements are at best only indefinite".[566]

[565] See section 2.3.3
[566] Am. Air Filter (n. 564)

The test for competition purposes varies from the test for breach purposes (unilateral). First, the alteration is not analysed to be within the scope of the contract but within the scope of the competition. Therefore, the change must be assessed against what a potential offeror would have reasonably anticipated. Moreover, to determine this several factors would be taken into consideration; in this case, the Comptroller mentions, amongst others, the procurement format, the history of present and related past procurement, and the nature of the supplies or services sought.

The enumeration of several factors emphasises that as its "sister test" for breach, the 'within the competition scope' test is a matter of fact that needs to be assessed against the 'totality of the circumstances'. Therefore, the same percentages, values, and Changes clauses do not guarantee that the same outcome will be reached. Thus, to stick to an 'easy example', a different result might be obtained in the supply and construction of nuclear submarines when compared to changes in other supply or services contracts, even if all other factors remain equal.

Another relevant decision, this time from the Court of Appeals has explained the difference and overlapping, between these tests in the following terms:

> "This case does not ask whether Government modifications breached a contract but asks instead whether Government modifications changed the contract enough to circumvent the statutory requirement of competition. The cardinal change doctrine asks whether a modification exceeds the scope of the contract's changes clause; this case asks whether the modification is within the scope of the competition conducted to achieve the original contract. In application, these questions overlap. (…) A modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract's changes clause. Id. at 573.4"[567]

The limit is set by the scope of the contract, as stated by the Changes clause. When analysing changes for competition purposes, the standard takes into consideration not the scope of the original contract, but the scope of the competition held to award it.

[567] AT&T Commc'ns, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993)

Although the difference might appear minor, it is not. For instance, there are several changes that can be agreed upon by the Government and the awardee after competition but before conclusion. By modifying the scope of the standard from the scope of the contract to the scope of the competition, American Courts considered all potential changes to protect competitors appropriately. It is important to anticipate that the scope of competition is determined by the solicitation, which might differ considerably from the contract.

Moreover, there is a relevant point that has also been highlighted in literature, in protest litigation by ***competitors,*** the focus is on what the competitors should have anticipated to be within the scope of the competition.[568] This differs from litigation for breach, where the focus is on whether the ***contractor*** should have anticipated the change to be within the scope of the contract.

It is remarkable to appreciate how the American courts and boards adapted the standard to grant meaningful protection. By placing itself in the position of competitors and asking if the change could have been anticipated, courts reject *in abstracto* analysis on whether a change is permissible. It also discards theoretical analysis on what can be regarded to be within the scope of competition. A different standard to protect competition, it is submitted, would be artificial.

However, the *in concreto* analysis is not a subjective analysis of the competitors' expectations. In other words, the standard must be objective;[569] what should/could have been anticipated by competitors, and not subjective; what was *actually* anticipated by one particular competitor or a specific group of them.

An objective standard offers benefits in terms of legal certainty. The outcome of the legality of a change cannot be determined by the *actual* expectations of competitors but based on what could have objectively been anticipated to be within the scope.

Against the background, it can be concluded that both legal certainty for contract changes (via an objective and not subjective standard) and the expectations of the market and the competition requirements (by considering objective expectations) are protected by the standard set up by Courts and Boards.

[568] Cibinic et al (n. 31)
[569] Nash and Feldman (n. 482) S 3.10

A clear presentation of policies and standards concerned to the limits imposed by competition to modifications can be found in one GAO decision that reads:

> "As a general rule, our Office will not consider protests against contract modifications, as they involve matters of contract administration that are the responsibility of the contracting agency. (...) We will, however, consider a protest that a modification is beyond the scope of the original contract, and that the subject of the modification thus should be competitively procured absent a valid sole-source justification. (…)
>
> In weighing the propriety of a modification, we look to whether there is a material difference between the modified contract and the prime contract that was originally competed. (…) In determining the materiality of a modification, we consider factors such as the extent of any changes in the type of work, performance period and costs between the contract as awarded and as modified. (…) We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes during the course of the contract that in fact occurred, (…), or whether the modification is of a nature which potential offerors would reasonably have anticipated under the changes clause (…)".[570]

All elements described above are brought together in this extract: the general freedom to change because "it is responsibility of the contracting agency"; the limit to conclude modifications beyond the scope of the competition due to competition constraints; the need for termination and re-procurement if the change is beyond the scope; the material difference between the contract competed for and the contract as modified as an initial comparator; and the main test: whether potential offerors could have reasonably anticipated the modification to be within competition.

This decision mentions that there is more than one factor in weighing "the propriety of a modification". Amongst the signalled factors are the extent of the changes in the type of work, performance period and costs.

[570] Neil R. Gross & Co., Inc., 69 Comp. Gen. 247, 294 (Feb. 23, 1990)

In commenting on this decision, it has been pointed out that "The primary focus appears to be on whether the change could have been anticipated by the offerors".[571] It is submitted that these other factors help determining if the change meets the "primary standard/test".

Moreover, it might be worthy of attention that the GAO established two additional factors. First, it would consider "whether the solicitation for the original contract advised offerors of the potential for the type of changes" adopted. Thus, the solicitation is one of the main factors to consider. This is a reasonable corollary of the protected interest: competition.

The second factor focuses on whether "modification is of a nature which potential offerors would reasonably have anticipated under the changes clause". This second factor seems to encompass the test analysed in the previous section but from the perspective of potential offerors. In other words, if a change can be regarded to be within the Changes clauses (this being within the scope of the contract and one of the permitted types by the clause) from the perspective of a potential competitor, it would be valid; otherwise, termination and re-procurement are needed.

As with the preceding sections, it is considered that the way the test works in practice offers further clarity to the theoretical presentation of the standard. Therefore, some cases will be analysed.

For instance, in *Avtron*, the contract concerned an aircraft generator test stand. In this case, the input and output power requirements were modified; the output power was modified from 160 to 100 horsepower. Later, further modifications were undertaken. For instance, a limitation on the input power was specified. The modification would allow for two output shafts rather than one. The contractor assessed the cost impact and determined it was 10.5% of the original cost and the time impact of 180 days.

The Navy submitted its arguments relying on the fact that the requirements and proposed modifications were not substantial, did not change the nature neither the purpose or method of operation of the test stand.

[571] Cibinic et al (n. 31)

The Comptroller General concluded that the "proposed modifications to the performance specifications in the purchase description for aircraft generator test stands will materially alter the terms of the original contract and change the field of competition".[572]

The Comptroller General took into consideration that the two drive shafts was a conventional method of operation, and it was expressly disallowed during competition. As a result of this, the Comptroller held:

> "firms like *Avtron* were compelled to offer high-priced units that could span the entire speed range, and Defense Technology won the competition in large part because its approach to meeting the Navy's needs—the hydroviscous drive—could be offered at a lower price. That somewhat unique approach, however, ultimately was found unworkable, and the currently proposed modification would specify the offeror-desired approach that expressly had been disallowed at the outset of the procurement. We think it entirely unfair to firms that lose a contract competition because an agency proscribes a conventional, suggested performance approach for the agency to decide, after award, that the same approach is precisely the one needed and then modify the contract accordingly".[573]

In the competition, the "conventional method" was excluded. Therefore, some offerors proposed high price-units to meet the agency's specifications. Moreover, although this was not expressly addressed, potential offerors might have been restrained from tendering due to the "one shaft" unconventional method. Consequently, the authority restricted competition on the one hand (for potential offerors) and distorted competition on the other (for actual offerors) since during the award stage demanded an unconventional method and turned back to the conventional method during the management stage. This demonstrates an impact on competition that must be rejected.

It might be hypothesised that the opposite result would have been reached if the "sister test" for breach from a claim by the contractor would have been applied. In fact, there is no change in the function of the product, and arguably the disruption is not major as to disproportionately affect the contractor in a quantitative manner. Moreover, the changes are clearly within the

[572] Avtron Mfg., Inc., 67 Comp. Gen. 404, 405 (May 16, 1988)
[573] Ibid

scope of the permitted ones by the Changes clauses since they are alterations to the specifications. An argument could also be made in the opposite sense, that the fact that the method was disallowed during the procurement would have permitted the contractor to claim that such change was not cognisable and outside of the scope. However, it is submitted, more weight should be given to the right of the authority to alter specifications and the fact that the new specifications are the standard market practice.

Nonetheless, precisely because the scope is not the contract as agreed but the competition, the specifications are not analysed only against the contract, but they encompass the impact they might have on competition. Hence, although not expressly, the standard seems to be very similar to the EU substantial modifications test that considers if a different tender could have been accepted or other offerors might have been interested or admitted to tendering for the contract.

In this case the unconventional specifications might have acted as a deterrent to tender, a reason for high price offers, or as a barrier to entry, a reason that suffices to forbid changes that would render the performance to what was "conventional" within that given market.

In *Neil R. Gross*,[574] the agency was having issues defining its requirements when the hearing reporting services contract expired at the end of the fiscal year. The Department of Labour decided to extend the current contract on an interim basis until a contract could be awarded competitively.

The Comptroller General concluded that "In light of the significant difference in the character of the services, the prior procurement of the services under separate contracts, and the apparent substantial increase in costs under the Heritage [the current contractor] contract, we find that the modification of the heritage contract is beyond the scope of the firm's existing contract." Several factors were considered, amongst others, that the changes included a series of alterations that overall rendered the performance of the contract significative more difficult and costly. For these reasons, the changes were beyond the competition and unacceptable. Other relevant factors relevant to this test are: if the bidders had been warned that such a change might occur the change might be within the scope of competition.[575]

[574] 69 Comp. Gen. 247, 292 (Feb. 23, 1990)
[575] Paragon Sys., Inc., Comp. Gen. Dec. B-284694.2, 2000 CPD ¶114.

Similarly, the amplitude of the definition of the work in the description is a relevant factor. In *Aircraft Charter*[576] the Court accepted the argument of the Government and considered that the "terms of the Solicitation [that] are expansive and broad, rather than narrow and specific". On this basis, the Court concluded that expansion to a new country of aerial services in circumstances different than those originally agreed between the parties could be performed by the contractor within the scope of the competition.

It is important to highlight that the Court, in this case, paid special attention to the language of the solicitation and description "Because this protest focuses, in large part, on the expectations of bidders responding to the Solicitation".[577] Henceforth, the hypothesis mentioned above that adjudicators might focus on the solicitation for actual bidders might find further support in this case.

Another factor that has been considered is the explicit exclusion of services. In Sprint Communications, a change was outside the scope of competition because the services included via modification were explicitly excluded from the competition, which also included a provision stating that those services "will be provided by the Government under separate contract".[578] Therefore, it was concluded that "The modification represents a material departure from the contract as competed and awarded".[579]

More generally, changes altering the type of work called for by the contract are likely to be considered outside of the scope of competition.[580] Changes reducing the quality or difficulty of the works are likely to be considered to be outside the scope of competition when changes are seen as potentially enlarging the field of competition.[581] Major additions to the quantity are permitted, however, this is conditional on the solicitation containing language permitting such

[576] Aircraft Charter Sols., Inc. v. United States, 109 Fed. Cl. 398, 415 (2013)
[577] Ibid
[578] Sprint Commc'ns Co., B-278407 (Feb. 13, 1998)
[579] Ibid
[580] Global Computer Enters, Inc. v. United States, 88 Fed. Cl. 350 (2009), modified on recons., 88 Fed. Cl. 466 (2009); Makro Janitorial Servs., Inc., Comp. Gen. Dec. B-282690, 99-2 CPD ¶39; Stoehner Sec. Servs., Inc., Comp. Gen. Dec. B-248077.3, 92-2 CPD ¶285
[581] Poly-Pac. Techs., Inc., Comp. Gen. Dec. B-296029, 2005 CPD ¶288; Marvin J. Perry & Assocs., Comp. Gen. Dec. B-277684, 97-2 CPD ¶128; Avtron Mfg., Inc., 67 Comp. Gen. 404 (B-229972), 88-1 CPD ¶458, recons. denied, 67 Comp. Gen. 614 (B-229972.2), 88-2 CPD ¶273

action.[582] Changes permitting additional time to perform are generally regarded as within the scope of the competition[583].[584]

Finally, it is important to remark that the competitive process can lead to a different result than would a focus on the work alone, as elaborated for Avtron. Similarly, in *WebCraft Packaging*, a change in some specifications of the paper was considered outside the scope of the competition. It was considered that the "minor change" was from a specialty item to a paper widely available in the market. Therefore, "the revision in the specifications changed the field of competition".[585]

9.4. Differing site conditions

In risk allocation matters, it can be said that American law is not fundamentally different to the UK approach. This means that parties continue to be bound by contract terms even facing unforeseen events, such as differing site conditions unless the doctrines of frustration or impracticability can be invoked. However, it is within the parties' power to agree to risk allocation mechanisms. The Differing site conditions clause is a risk allocation clause.

Due to its "risk allocation nature", it might be argued that changes operated because of the differing site condition clause is not a modification to a public contract. This is so since the basic principle of the clause is to allocate the risk for "normal and expected" conditions to the contractor and the risk of "differing site conditions" to the government. However, this clause does fall within the scope of this thesis because it is an alteration to the contract. This is so since there will be more work than planned and more payments than originally agreed, even if this operates via an *intra-contracto* alteration.

Furthermore, this clause deserves attention because of its similarities to the sujetions imprevues in France. However, it is worth warning that they are similar due to the circumstances that give rise to both, as well as the price increase. However, they are different from another perspective.

[582] American Apparel, Inc. v. United States, 108 Fed. Cl. 11 (2012); Ceradyne, Inc. v. United States, 103 Fed. Cl. 1 (2012); Overseas Lease Group, Inc., Comp. Gen. Dec. B-402111, 2010 CPD 34
[583] Saratoga Indus., Inc., Comp. Gen. Dec. B-247141, 92-1 CPD ¶397; Ion Track Instruments, Inc., Comp. Gen. Dec. B-238893, 90-2 CPD ¶31
[584] Cibinic et al (n. 31) 352 and ss
[585] Webcraft Packaging, Div. of Beatrice Foods Co, B-194087 (Aug. 14, 1979)

This is, the sujetions imprevues is an *extra contracto* alteration, whereas the differing site conditions clause because it is a clause, is an *intra contracto* alteration.

It can be said that the site conditions clause was mainly designed to be used in construction contracts and for pre-existing site conditions. Thus, FAR 36.502 foresees that the Differing site condition clause shall be inserted "when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal (…) is contemplated".

Moreover, the clause provides for two circumstances that are regarded as differing site conditions:

> "(1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract; or
> (2) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract".

These categories have common requirements and type-specific requirements that will be analysed below. As can be observed from its content, it is aimed at facing site conditions in construction contracts. Its content might be explained by the idea, perhaps historically accurate, that site conditions in construction contracts were the most common and important risk in government contracting.

Furthermore, it has been pointed out that the rationale of the clause is to allocate differing site conditions to the government.[586] The full allocation of this risk on the contractor might lead to two possible outcomes: first, each bidder would be forced to undertake extensive and expensive examinations of the contract site and these costs will be charged by the successful bidder to the authority or the costs might deter bidders from participating in the procurement process altogether. The second possible outcome is that lacking the will, time or resources for a full evaluation of the site conditions; bidders might decide to charge a contingency or premium price on the contract to face potential realisations of site-related risks. Any other scenario in the midst of these two extremes may, and possibly will, occur.

[586] Cibinic et al (n. 31) 435

Moreover, in any of those two situations, the risk realisation might bring the contract under the doctrine of impracticability. Arguably this is also an undesired outcome in terms of timely delivery and transaction costs for authorities that have already undertaken a procurement procedure.

On the other hand, the government has generally gathered information on the worksite during the planning stage. Thus, it seems sensible generally to rely on its own pre-existing information rather than allow each bidder to undertake *de novo* investigations or pay contingency primes for all contracts even though the government is in possession of information indicating the type of site conditions to be encountered.

Furthermore, in this clause, there seems to be a general policy possibly based on a cost-benefit analysis in the sense that it is more beneficial to pay site-risks associated costs in contracts where risk occurs rather than paying primes or investigation costs all government construction contracts.

The issue with this clause is that it leaves some space for low-balling. However, such space seems to be narrower in the American system for several circumstances: first, authorities undertake investigations of the site conditions prior to launching the project. Second, this data can be examined by bidders prior to submitting their bids. Third, boards and courts in the United States are generally reluctant to grant recovery by contractors absent express language allocating risks to the government.[587] This, in practice, has also meant that the interpretation of risks allocated to the government, at least in fixed-price contracts, is narrowly construed. In the case under analysis, all requirements set forth in the Differing site conditions clause must be met as it is explained below.

Thus, it might be said that although the clause allocates the risk to the government, it does so in a limited manner and under clear and, arguably, stringent circumstances. These circumstances can be classified into general conditions, for both types of conditions and specific circumstances for each type of category.

[587] Cibinic et al (n. 31) 227

9.4.1. General Conditions for both types of categories

For a circumstance to be comprised within the clause, the condition must pre-date the contract. There is no express provision in the clause indicating that it must predate it, but such a requirement has been clearly articulated by case law.[588]

The clause only covers physical conditions; nonetheless, those conditions might be created by acts of god or man-made. In Cibinic et al. words "[i]t is the time when the condition is created, not the force that creates the condition, that determines whether it will be covered by the clause".[589]

Thus, although the site condition might generally refer to the site conditions 'by nature', they might encompass man-made facts. In this sense, in Cosmo Const. Co v US, underground debris was considered a differing site condition for the purposes of this clause.[590] Similarly, in Community Power[591] unexpected cans, ammunition and underwear in cleaning a duct system in a military barracks were held a differing site condition for the contractor.

Another clarification point is that the site conditions clause does not cover only soil or ground conditions. For instance, in Edgar M. Williams,[592] the presence of double roofs was declared to be a differing site condition. Thus, the site conditions of the construction contract are understood in a wide rather than a restricted ground-only manner.

It might be argued that this understanding of the site conditions allows extending the advantages and objectives of the clause beyond the field of soil/underground risks for construction contracts. It might also be argued that it is limited in the sense that its inclusion is mandatory only for construction and only for site conditions. However, it is hard to criticise a policy and the cost-benefit analysis behind the risk allocation of a given country without empirical evidence for it.

[588] In Olympus Corp. v. United States, 98 F.3d 1314 (Fed. Cir. 1996) the "Circuit Judge, held that differing site conditions clause applied only to conditions existing at time of contracting, and thus did not have any application to soil contamination and labor problems which developed only after contract was signed"
[589] Cibinic et al, (n. 31) 437
[590] Cosmo Const. Co. v. United States, 451 F.2d 602 (Ct. Cl. 1971)
[591] Community Power Suction Furnace Cleaning Co. ABSCA 13803, 69-2 BCA 7963
[592] Edgar M. Williams, ABSCA 16508, 72-2 BCA 9734.

The wide interpretation of the physical condition is not so wide as to encompass other phenomena like the Tet offensive during the Vietnam war or the breakdown in law enforcement that permitted striking workers to attack the contractor's workforce.[593]

It is hard to determine the exact reason for this interpretation since, arguably, at least war and strikes could have been considered physical conditions at the site. However the, in this sense, restrictive, interpretation seems to respond to the historical rationales of the clause. It seems reasonable that courts and boards construed the clause restricted to ground conditions following such rationales even if not clearly indicated in the provision.

Another element that comes into the interpretation of this clause is the definition of "at the site". There is case law clarifying some 'grey' cases. For instance, there are cases that have considered quarries and pits to be at the site or at least compensable for contract purposes.[594] Nonetheless, this seems to be a matter of fact to be decided on a case-by-case basis since when the quarrel is not mentioned in the contract, the varying conditions have not been considered to be at the site.[595]

Finally, both types require conditions "differing materially" from what is expected or indicated in the contract. Based on case law, it is not easy to determine what is required for the conditions to differ materially. It seems that this is a standard which full-fledged extension can only be appreciated in cases and mostly on a case-by-case basis.

Cibinic et al., nonetheless, have found that the evidence of this 'standard' can be presented in the manner of additional works or the need to use a different method than originally contemplated.[596]

However, it seems that the question of changing conditions is different from its consequences. In other words, differing conditions might cause larger amounts of works or require a different performance method, but evidence needs to demonstrate 'directly' that there is indeed a differing physical condition. For example, the presence of high-water levels and dewatering

[593] Cibnic et al (n. 31) 441
[594] In this sense see: Kaiser Indus. Corp. v. United States, 340 F.2d 322 (Ct. Cl. 1965); Morrison-Knudsen Co. v. United States, 397 F.2d 826 (Ct. Cl. 1968)
[595] L.G. Everist, Inc. v. United States, 231 Ct. Cl. 1013, 1013 (1982)
[596] Cibinic et al (n. 31) 442

problems beyond what was expected from reliance on "the subsurface indications provided by the boring logs" is an example of a differing site condition.[597] These varying conditions relied on by the contractor created the need for additional work efforts, which implied cost increases.

Thus, it might be said that this is a three-tier standard: conditions, works/method, and costs. However, in practice, this theoretical difference is not always easy to appreciate. For instance, it might be argued that the "materiality" of a difference can only be truly appreciated by observing the cost impact on the contract. Notwithstanding, Courts have held that changed conditions are conceptually different from the additional expenses caused by a differing site condition. For instance, in Roscoe-Ajax Const. Co. v. US,[598] the Court clearly stated that the board erred by assuming that changed conditions did not occur unless additional expense was proved.

In that case, the Court applied *mutatis mutandi* a Suspension for Work precedent case[599] and repeated that the board "fail[ed] to disentangle the question of the existence of a suspension from the independent issue of what damage the suspension caused or could have caused," and that the board had erroneously "rolled all these questions into one".[600]

It is interesting to point out that this USA issue of differentiating between material differences in site condition and its consequences resembles the French discussions on the requirements for unforeseen circumstances and their effects on the contract relating to l'imprevision. In France, it has been said, that the effects act as a prism to appreciate the foreseeability of a given circumstance, in the US for this area, they are at least theoretically different. However, the fact that, as Cibinic et al. point out, evidence of material differences may "take the form of proof of larger amount of work than originally contemplated or of the need to use a different method to accomplish the work" bring the cause and the consequences closer together at least from a procedural-evidence perspective. This, it is submitted, responds to the complexity of these circumstances and its demonstration rather than an intellectual choice to accept material differences to be proven via more work or a different performance method.

[597] N. Slope Tech. Ltd., Inc. v. United States, 14 Cl. Ct. 242, 255 (1988)
[598] Roscoe-Ajax Const. Co. v. United States, 458 F.2d 55, 61 (Ct. Cl. 1972)
[599] Merritt-Chapman & Scott Corp. v. United States, 439 F.2d 185 (Ct. Cl. 1971)
[600] Roscoe-Ajax (n. 598)

Furthermore, evidence for additional work or a different method does not suffice to meet the standard. In Yukon Constr. Corp. FAACAP 66-4, 65-2 BCA 5005, the board concluded that a 16% overrun for excavation did not suffice as evidence for a differing site condition, but a 25% would have met the standard. This is not a percentual indication of general applicability, the very board warned, however, it does reveal that any increased effort does not suffice for a differing condition to be considered "materially different".

The application of this standard in practice demonstrates varying results. This can be explained based on the circumstances of each contract, as well as the varying effects of the "changed conditions" on the contract costs.

9.4.2. Specific Conditions of each type of category

There are two types of ground conditions categories, and their specific requirements will be analysed separately.

9.4.2.1. Type I category

The first category of ground conditions relates to "Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract".

Perhaps this category's most important type-specific requirement is that the condition must be "indicated in this contract". Other requisites arise in practice from this seemingly simple requirement.

There is case law indicating what exactly "contract documents" means. Cibinic et al. have pointed out that this term "has been given an expansive interpretation to include not only the solicitation documents (…) but also documents and materials referred to in the solicitation documents".[601] Thus, it has been decided that:

> "The term "contract documents" is to be interpreted with considerable breadth to include not only the bidding documents (Invitation for Bids, drawings, specifications

[601] Cibinic et al (n. 32) 447

and other documents physically furnished to bidders) but also documents and materials mentioned in the bidding documents as well".[602]

Moreover, there is also considerable case law interpreting the term "indications". Cases can be found construing this term as including both express and implied indications. In Fost Const. C.A. & Williams Bros. Co. v. US, it was held that:

> "For this part of the Changed Conditions Clause to apply, it is not necessary that the 'indications' in the contract be explicit or specific; all that is required is that there be enough of an indication on the face of the contract documents for a bidder reasonably not to expect 'subsurface or latent physical conditions at the site differing materially from those indicated in this contract".[603]

It is impossible not to highlight the similitude between this expansive interpretation and the fairly inclusive list of NEC4, used by the UK government, on the same matter. However, recent cases[604] seem to have changed this interpretation and to have a higher standard as to require misrepresentation from the contract documents. In this sense, it has been said that:

> "In order to succeed on a Type I differing site condition claim, United must first show that "a reasonable contractor reading the contract documents as a whole would interpret them as making a representation as to the site conditions".[605]

It is not completely clear that this is a new and higher standard than "indication". Moreover, other "indications" will likely have at least persuasive force in determining the existence of indications in future cases.

This apart also includes other requirements of type I conditions: that there is a reasonable interpretation of the indications and a reasonable reliance. A contractor cannot be successful in a type I claim if it misconstrued or misinterpreted the contract data. Thus, in John Massman, it was said that:

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[602] Dawco Const., Inc. v. United States, 18 Cl. Ct. 682, 687–88 (1989), aff'd in part, rev'd in part, 930 F.2d 872 (Fed. Cir. 1991)
[603] Foster Const. C. A. & Williams Bros. Co. v. United States, 435 F.2d 873, 875 (Ct. Cl. 1970)
[604] E.g. Int'l Tech. Corp. v. Winter, 523 F.3d 1341, 1348 (Fed. Cir. 2008)
[605] United Constructors, LLC v. United States, 95 Fed. (Cl. 26, 36 2010)

> "The vital information was the river flow for the period of contract performance. The fact that the river flows from 1978–1983 would have raised the averages listed in the table does not prove that the averages were wrong, only that whatever reliance plaintiff placed on them was unreasonable".[606]

Moreover, it seems obvious for the government to be liable to pay an equitable adjustment only when the conclusion reached by the contractor is based on a reasonable contract information interpretation and a reasonable reliance. Here, unlike the UK, the difference between data and interpretation has not arisen but reasonable may act for similar purposes, i.e., controlling undue interpretations of the contractor.

A contractor must also be able to establish that the condition was subsurface or latent. The condition does not need to be hidden to be sub-surface or latent; it suffices if it is reasonably unforeseen based on the investigation of the contract documents. Thus, in Dayton Const. Co., HUDBCA 82-746-C34, 83-2 BCA 16,809, "the contractor was permitted to recover the costs of removing a greater quantity of asphalt than the approximate amount specified in the contract".[607]

9.4.2.2. Type II category

The second category of ground conditions relates to "Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract". Relating to the specific requirements attached to this second type of event, the Claims Courts has pointed out that:

> "A Type II claim requires plaintiff to show three elements. First, plaintiff must show that it did not know about the physical condition. Second, plaintiff must show that it could not have anticipated the condition from inspection or general experience. Third,

[606] John Massman Contracting Co. v. United States, 23 (Cl. Ct. 24, 32 (1991)

[607] Cibinic et al (n. 31) 454

plaintiff must show that the condition varied from the norm in similar contracting work".[608]

These requirements must be demonstrated independently by the contractor/claimant.[609] The unknown requirement means that the condition "could not have been reasonably anticipated from the contractor's study of the contract documents, its inspection of the site, and its general experience".[610] Therefore, if the information was available in the documents, recovery for such costs is not possible.[611]

Moreover, the contractor's experience is also considered when assessing the unknown character of conditions.[612] It is interesting to note that in Wilson Construction Inc., AGBCA 89-178-1, 92-2, BCA 24,798, the Board deemed important the company's President's knowledge of the site.

The "unknown test" seems to systematise subjective and objective elements in the sense that it requires no previous knowledge, but in doing so, takes into consideration objectives elements: such as the information provided in the contract documents and the inspection carried out by the contractor, but also subjective elements such as the work-experience of the contractor or even its president.

The second requirement relates to foreseeability. This is a "classic" foreseeability requirement based on the information provided in the contract documents and the reasonable investigation of the site. This standard will preclude compensation when the contractor knew or should have known of the condition.[613] Consequently, conditions discoverable by site investigation, documentation, or reasonable inquiries will be ruled out as differing site conditions.[614] Thus, the test not only demands a passive but an active role from bidders since reliance on the

[608] Lathan Co. v. United States, 20 (Cl. Ct. 122 1990), No. 64-89 C, 20 (Cl. Ct. 122)
[609] Cibinic et al (n. 32), 461
[610] Cibinic et al (n. 32) 461
[611] In Youngdale & Sons Construction Co. v. United States, 27 Fed. (Cl. 516 1993) Jan. 15, 1993, the Court said: "Consequently, given the foregoing geological data contained in the three relevant boring logs and the corroborative testimony of plaintiffs own expert with respect to the information contained in those borings, it is clear to the court that the government has made a reasonably accurate positive representation as to the character and nature of the subsurface materials expected to be encountered and where they may be found, given the location of each of the borings"
[612] Cibinic et al (n. 31) 462
[613] Bettersroads Ashphat Corp., ABSBCA 32417, 88-1 BCA 20,366. Cibinic et al (n. 31) 462.464
[614] Cibinic et al (n. 31) 464

information provided is not enough and *reasonable inquiries* are expected to discover site conditions.[615]

Finally, the condition shall also be unusual. In Western Well Drilling Co. v. United States, 96 F. Supp. 377 (N.D. Cal. 1951), the Court explained that: "The term "unusual" does not refer to a condition which would be deemed a geological freak but rather a condition which would not be anticipated by the parties to the contract in entering into their initial agreement". Like others, this test depends on the specific conditions of the site since it seems patent, certain conditions may be unusual in each geographical area, whereas they may not be deemed to be so in a different one.

9.5. Unforeseen circumstances, risk allocation and excusable delays

As mentioned, US law does not fundamentally distance from common law in the sense that in the face of unforeseen circumstances, parties, in principle, continue to be bound by contract terms. In Cibinic et al words,"courts have been reluctant to grant recovery in such cases absent relatively express language in the contract allocating the risk to the government".[616] Nonetheless, under certain circumstances. parties might be relieved from performance provided that the circumstances fall within the scope of impracticability of performance[617]. Another potential exception to this rule can be found in contract clauses if the government agrees to bear the consequences of unforeseen economic circumstances.

Before embarking on the analysis of the risk allocation for unforeseen economic circumstances, it is important to mention that, although not part of this research since it provides relief from compliance and not an alteration to the terms, the doctrine of impracticability, in short, is a valid defence to a claim of breach. The steps to validly claim the doctrine have been explained by the Courts in the following terms:

> "When the issue is raised, the court is asked to construct a condition of performance based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency — something unexpected — must have occurred.

[615] Servidone Const. Corp. v. U.S., United States Court of Appeals, Federal Circuit, Apr 24, 1991 931 F.2d 860 (Fed. Cir. 1991)
[616] Cibinic et al (n. 31) 228
[617] Cibinic et al (n. 31) 289

> Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable. Unless the court finds these three requirements satisfied, the plea of impossibility must fail".[618]

The doctrine of impracticability is relevant since it does not only act as a threshold for valid non-performance, but also since it can act, in a manner, as a device for alterations. This is so since contractors, under certain circumstances, can recover costs incurred in attempting to perform an impracticable contract. Thus, an alteration to the contract price (recoverable costs) would be paid before discharge from the obligations is granted.[619] Although the analysis of the conditions under which those costs are recoverable is interesting from a comparative perspective; it does not fall within this thesis scope since it concerns the economic effects of discharges and alterations that were expressly excluded from this work.

As Cibinic et al. explain "[r]isks are broadly allocated by the selection of the pricing arrangement reflected in the contract type. Thus, under cost-reimbursement contracts the government accepts the risks of increased costs, delays, and non-performance, while under firm-fixed-price the contractor bears the majority of these risks".[620] Attention will focus on fixed-price contracts since this has been the scope in other jurisdictions.

Therefore, there must be express language, "express warranties", for the costs of an event outside of the parties' control to be recoverable by the contractor. In this context, it is important to point out that no FAR clause allocates risks for unforeseen economic circumstances to the government. Therefore, unless otherwise indicated in the contract, the contractor is bound to perform the contract as agreed, even in the event of supervening events that render the contract most expensive.

Moreover, it is also relevant to mention that even in those contracts that include clauses that differ from the FAR as to the allocation of economic risks, they do not generally refer to such

[618] Transatlantic Financing Corporation, Appellant, v. United States of America, Appellee, 363 F.2d 312 (D.C. Cir. 1966)
[619] Cibinic et al (n. 31) 289 and ss
[620] Cibinic et al (n. 31) 227

words as "express warranty", or "promise" or "guarantees", and, consequently, "the contractor generally has a difficult burden to show that such language amounts to a warranty".[621]

Against the background, the contractor will generally bear the costs of supervening events unless otherwise expressly indicated in the contract. However, the contractor may find some type of relief, not economic, via the excusable delay provisions.

Time performance is one of the core elements of any public contract. As mentioned,[622] a dramatic alteration of time performance is a cardinal change as relevant as changes to the quantity or type of work. This, amongst others, responds to the fact that the efforts to perform a given amount of work will vary depending on the time granted to perform it.

Cibinic et al. have explained that "[t]he contractor bears the risk of both time and cost for delays that it causes or that are within its control. Generally, a contractor is excused from performance because of delays caused by factors for which neither it nor the government is responsible; however, the contractor must bear the cost impact of such delays. The government is responsible for both time and cost effects of delays that it causes, that are under its control, or for which it has agreed to compensate the contractor".[623]

To face non-anticipated delays, the FAR contains several provisions granting *intra-contracto* flexibility for time-related alterations. The basic functioning of these clauses is to allocate time and cost effects within a risk allocation logic. Thus, contractors might be relieved from sanctions for delays or even be entitled to receive an equitable adjustment when facing certain events. The main clauses dealing with delays are the "Excusable Delays", "Suspension of Work", "Government Delay of Work", and Stop-Work Order clauses. Only the excusable delays clause falls within this section's scope due to its content and nature: it deals with unforeseen events.

Excusable delays clauses contain a "precise scheme of risk allocation for delays".[624] The function of these provisions is to protect contractors from sanction for late performance.

[621] Cibinic et al (n. 31) 228
[622] See section 9.1.3.1
[623] Cibinic et al (n. 31) 487
[624] Ibid

Further, the excusable delay provision may lead "to recovery of additional compensation if the government constructively accelerates performance".[625]

In fixed-price supply contracts, the provision is in the Default Clause and reads:

> " (c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor".[626]

The excusable delay provision for fixed-price construction contracts reads:

> "(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if-
> (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include"-.

After which the same 9 events of the supply contract are listed with the addition of the following two:

> (iii) Acts of another Contractor in the performance of a contract with the Government,
> (…)
> (xi) Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and(…)"[627]

[625] Cibinic et al (n. 31) 488
[626] FAR 52-249-8
[627] FAR 52-249-10.

For commercial contracts, FAR 52.212-4 has a similar listing with the addition of "delays of common carriers".[628]

For Construction Contracts, the FAR set forth three requirements for an event to fall within the Excusable Delays Clause's scope, the event shall be: (i) "beyond the control of the contractor", (ii) "without the contractor's fault or negligence" and, (iii) unforeseeable. The other two clauses do not demand for the event to be unforeseeable. However, this may be tacitly demanded, as explained below. Furthermore, the clause lists some events that are classified as causes of excusable delays.

The first requirement is for the event to be beyond the control of the contractor. Cibinic et al. explain that this requirement has been applied in three different ways.[629] The first sense has to do with the *foreseeability* of the event, the second with the possibility of *preventing* it, and the third relates to the ability to *overcome* its effects.

The event is considered not to be "beyond the contractor's control" when it is foreseeable. If the event is foreseeable, "the contractor may be held responsible for making alternative arrangements for performance or may be considered to have assumed the risk of the event".[630] What is foreseeable depends, of course, on the circumstances of the contract and the contract documents as explained in other parts of this thesis. However, it can be mentioned that claims have been rejected under the ground of foreseeability when military conflict has escalated, but was underway at the time of contracting,[631] when foreign customs and imports procedures have delayed compliance,[632] amongst other.[633]

This first way, arguably, mixes two different requirements: beyond the control of the parties and the foreseeability of the event. However, as explained for the risk in French law,[634] this is not a unique situation since the foreseeability of an event is difficult to appreciate *in abstracto,* it is closely linked with other legal institutions, and it, generally, has legal consequences.

[628] Cibinic et al (n. 31) 489
[629] Cibinic et al (n. 31) 489
[630] Cibinic et al (n. 31) 489
[631] Hitemp Wires Co., ASBSCA 11638, 67-1 BCA 6252
[632] E.L. David Const Co., ASBCA 29221, 90-3 BCA 23025
[633] Hillscrest Aircraft Co., v Department of Agricutilture, CBCA 2317, 12-1 BCA 34939
[634] See chapter 8

According to the second fashion of understanding the first requirement, the contractor must not be able to prevent the event from occurring. Once again, the ability to prevent an event shall be assessed on a case-by-case basis. Nonetheless, to illuminate the way it has been applied, it can be mentioned that in *Fox Construction Inc. V General Serv. Admim*,[635] the contractor was denied relief because the board found that the event could have been prevented if the contractor had performed pressure testing with a liquid other than water or with air. The board held this even though the freeze damage to the air conditioning units was caused by a breach of the implied warranty of the specifications and delays in approving the switch gears.

The third notion of "beyond control" demands that the contractor could not have overcome this delay. The contractor must not be able to *overcome* the effects of the event to comply on time with the contract. Overcoming the effects may be understood in a legal sense and arising from specific requirements, like in the case of the supply contract, which states that sub-contractors' delays are not excusable if the supplies or services were obtainable from other sources (FAR 52-249-8 (d)). However, in some cases where the facts are held to be within the doctrine of impracticability, the event has been held to be beyond the contractor's control.[636]

Arguably, the laws of different countries have developed the requirement for the event to be "beyond the control" of the contractor to avoid "self-infringed" imprevisions or excusable delays. Furthermore, it is submitted, an event may be within the contractor's control due to *causal* (physical) or *legal* reasons. To be best of the author's knowledge, this has not been systematised in this fashion in US law. However, arguably, an event may not be beyond control when the contractor *causally* produced the event or could have physically avoided it. Moreover, the event may not be *legally* beyond control when the contractor, even if *causally* or *physically* could not have prevented it, is in control of its consequences: this is precisely the case when the event is foreseeable, and the contractor assumed the risks. In such cases, the contractor could have foreseen manners to circumvent the consequences of the event or even if that is not the case. Lastly, the consequences are legally in its control, i.e., the consequences of the risk are for him to bear.

[635] GSBCA 11543, 93-3 BCA 26,193
[636] Jennie-O Foods, Inc. v. United States, 580 F.2d 400 (Ct. Cl. 1978)

Considering the above, the three manners in which "beyond the control" have been understood respond to the abovementioned concepts: *prevention* from occurring relates to *causal* or *physical* reasons for control. *Foreseeability* relates to *legal* reasons for controlling the event and *overcome* the effects to the bearing of realised risks.

The second requirement is that the event has occurred "without contractor's fault or negligence". This requirement is closely linked with the idea of avoiding self-infringed excusable delays. Once again, whether an event has occurred with or without contractors' negligence or fault depends on the particular facts of a given case. Nonetheless, to illustrate the comprehension of US law, some cases will be mentioned.

For instance, in *KARPAK Data & Design,*[637] the contractor claimed that the government-imposed excessive workload caused a delay. In that case, the Board held that "KARPAK has not proved that its default was without its fault or negligence. As established, KARPAK's work was replete with error and of poor quality". Moreover, it sustained, "KARPAS was responsible for obtaining and retaining sufficient personnel to perform the contract". And, finally, the Board said "[w]hen we examine KARPAK's failure to perform Call No. 1, we conclude that its repeated need to spend time correcting deficiencies, rather than an excessive workload, led to its default". In *California Dredging Co.*[638], the Board refused to grant relief since the sinking of a dredge was due to negligence of the Contractor "because it had failed to overcome the maritime presumption that the dredge was unseaworthy"[639].

For Construction Contracts the third requirement is the unforeseeable character of the event. "Foreseeability is generally equated with knowledge or the reason to know prior to bidding".[640] Foreseeability of an event is to be assessed factually and on the particular facts of each contract. Nonetheless, it can generally be asserted that contractors are expected to know or have reason to know of facts that are within the scope of their business operation, and that may affect the contract performance. In *Diversified Marine Tech, Inc.,* the Board denied relief because "Diversified is located in the Tampa area and thus must be presumed to be totally familiar with the weather patterns in that area (…) If Diversified had analyzed its ability to complete the job

[637] IBCA 2944, 93-1 BCA 25,630
[638] ENGBA 5532, 92-1 BCA 24475
[639] Cibinic et al (n. 32) 492
[640] Cibinic et al (n. 32) 492

in normal Tampa weather and decided it wished to go forward and bid, then it should have also planned for the use of some means of mitigating the effects of Tampa's normal weather".

Nonetheless, the mere possibility for an event to occur does not suffice for it to be classified as foreseeable in the terms of this clause. On this point, the Court of Claims expressly tackled this take in *J. D. Hedin Construction Company, Inc. v. the United States,*[641] by sustaining that the "the Board drastically downgraded the extent, unforeseeability, and gravity of the cement shortage in 1955". And, on that basis, reversing the decision because "it imposed too high standards on plaintiff, expecting the latter to have prophetic insight and to take extraordinary preventive action which it is simply not reasonable to ask of the normal contractor".

In other terms, arguably, the foreseeability standard expects contractors to take "ordinary preventive action", which is "reasonable to ask for a normal contractor". In this sense, foreseeability is not an *in abstracto* legal criterion without any economic basis, but, arguably, it has some commercial element. This argument may be made on the basis that what is reasonable to ask or ordinary preventive actions are precisely those that are "commercially" sensible. In this manner, it is submitted, the American concept of foreseeability, for excusable delays purposes at least, approaches the NEC 4 standard of the "reasonable to have allowed for" since it does not suffice to be prophetically or "merely" possible to be regarded as foreseeable for the purposes of the excusable delay clause.

An important consideration regarding the foreseeability of an event is that it is a requirement for Construction Contracts only. However, as explained, this requirement may end up being analysed under the "beyond control" or "fault or negligence" of the contractor. In terms of Cibinic et al., this may be so because "the fact that the contractor knows or has reason to know of its probable occurrence may be pivotal in establishing that it could have taken alternative action. Thus, it may be concluded that the event was within its control or that it assumed the risk of its occurrence"[642].

As mentioned, the clause additions to the general requirements the type of events for which the contractor is entitled to an excusable delay. As may be seen in the transcription above, the clauses include strikes, weather, government acts, floods, fires, epidemics, embargoes, acts of

[641] 408 F.2d 424, U.S. Court of Claims (1855-1982) - 408 F.2d 424 (Ct. Cl. 1969)
[642] Cibinic et al (n. 32) 494

gods, amongst others. It is submitted that the content of this list is self-explanatory, and there will be no elaboration as to the meaning of quarantines or acts of God.

More relevant is the non-exhaustive character of the listed events. There is no express indication in the clauses that this list is exhaustive, in fact, from their drafting, their non-exhaustive character seems to arise because they indicate, before listing the events, that "[e]xamples of such causes include", from which could be interpreted that other such examples exist. Notwithstanding, Cibinic et al. explain: "[t]he courts have taken a very restrictive view of the types of non-enumerated events that will be classified as excusable".[643] They have explained that absent an enumerated underlying cause, delays "are very difficult to establish as excusable".[644] Adjudicators have generally held excusable delays only when, at least, practical impossibility has been demonstrated, and the contractor has not assumed the risk of such impossibility. This test is not applied when the cause is a listed event, which demonstrates a different treatment for listed and non-listed underlying causes.[645] The cause that has led adjudicators to applying different standards is not clear from case law; Cibinic et al have suggested two possible explanations. The first explanation is that the contractor is considered to have assumed the risk of the delay. The second is that such matters are considered not beyond control (under an *ejusdem generis* argument). This, it might be argued, may be based as well on a *pacta sunt servanda* and legal certainty reasoning, i.e., Courts are more willing to recognise excusable delays arising out from listed events since they are "merely applying" the literal content of the clause, whereas doing so for non-listed events demands a further interpretation/analogical reasoning/or extensive application of the clause. Nonetheless, regardless of the ultimate reason for such treatment, it is important to highlight that differing legal standards have been applied for listed and non-listed events, imposing a higher standard for the latter.

The most interesting characteristic of this risk-allocation clause, which differs from other legal systems relates to the split in the allocation of the consequences arising from the risk. In general, the clause keeps the economic consequences within the orbit of the contractor. In contrast, it allocates the time consequences to the government, in the sense that it grants the contractor more time to perform (depriving the government of the supply, work, etc).

[643] Cibinic et al (n. 32) 507
[644] Ibid
[645] Ibid

All other analysed legal systems allocate and are considerably more focused in general on the economic consequence of the risk rather than its time consequences. American law, on the contrary, seems, at least in the FAR and for fixed-price contracts, more focused on time than economic consequences. This, it may be argued, relates to the general attitude towards risk allocation that is, generally, more "severe" and considerably less flexible in this common law system when compared with civil law jurisdictions. However, and here is another hypothesis, granting more time to perform guarantees time for the contractor to accommodate to the realised risk and reduces the cost of assuming the risk. Certain works performed for six months may have a different cost structure than the same ones performed during a year.

Part IV: Overall analysis and conclusions

Chapter 10: Overall analysis and conclusions

The author warned, in the introduction, that there was a risk of the pears and apples type in this work. Throughout this thesis, contract clauses were compared with Acts and Regulations, and these with jurisprudential theories and concepts that are part of the Law in certain jurisdictions. Though this may give rise to some criticism, it is submitted that this is the only way to do comparative analysis when legal systems deal differently with the same or similar issues. This, in my understanding, does not reveal a fundamental impossibility to undertake meaningful comparative analysis; it simply demands the recognition that objects of study vary across borders and demonstrates that comparative analysis does not only imply, simply, comparing the same sources of law and the same "phenomena", but also require an effort to understand a system in order to address attention to the "right" sources and phenomena that are comparable between them.

Having said that, attention will be devoted to some comparative analysis and general conclusions. A disclaimer is needed: not all possible comparisons nor even the ones explained throughout this thesis have been replicated in this final chapter, and only those deemed more relevant are displayed. To present this overall analysis in an orderly manner, this chapter will be further subdivided into sections that aim at grouping together topics that present similarities. The first one will be devoted to common categories and concepts that are found in several analysed systems (10.2); the second section will systematise the main reasons to pay attention to public contract alterations from a procurement perspective, one of the main objectives announced in the introduction (10.2); and, finally, the third section will display some critical factors that national and international regulators could take into consideration in deciding on whether and how to establish limits to public contract alterations (10.3).

10.1 Common categories and travelling concepts: false friends for a comparative analysis?

This first part of the final chapter aims to demonstrate some common concepts and categories found in all or most analysed systems and aims at demonstrating the relevance of considering those categories when dealing with alterations to public contracts.

10.1.1. Unilateral and bilateral modification: Comparing categories and policies

One circumstance found in all selected jurisdictions relates to the divide between bilateral and unilateral modifications. It is impossible to ascertain its cause; whether this divide has origin in a common understanding or common history of European jurisdictions that permeated others, or it responds to the *rarity* that constitutes a unilateral modification in the context of contracts, a bilateral phenomenon par excellence. Nonetheless, it is important to highlight that attention is always devoted to these two categories. In this field, it seems important to pay attention to the fact that all analysed jurisdictions accepted unilateral modifications for public contracts, even if they did not so for private contracts. Notwithstanding, it is also important to mention that in all analysed jurisdictions, there is a policy that unilateral courses of action are exceptional and only when bilateral agreements cannot be reached. This may be founded on one or two ideas: contracts are to be managed bilaterally since they are a creature of consent, or public procurement is a market where contractors should not be scared away by unilateral impositions. The precise reason in each jurisdiction could not be found in a definitive manner.

A furthering in this thinking was found in the UK, where unilateral modifications are disappearing from some model contracts, and a limited right-to-refuse modifications seems to be taking its place. Thus, in the Services contract, contractors may refuse modifications but only if a ground is met; this right may be given in a more open-ended manner as is the case in the Supplies Terms. It could be argued that this request + acceptance, unless a ground for refusal is met, seems to be more aligned with modern contract law that generally seeks to resort to cooperation rather than unilateral courses of action, even for public contracts.

10.1.1.1. Rationales for unilateral modifications

The rationale used in each system to explain and justify the right varies. Thus, France relied on public service explanations, whereas the US justified its changes clause in the required flexibility of contracts. The UK did not use special explanations and simply relied on the acceptance of this institution in general contract law.

Sometimes there are similar considerations relating to the rationales. For instance, the French Council of State considered that the government had a unilateral power to modify the contract originally because the authority had "the faculty to provide this service [lighting] by means of electricity" [and not only gas]. Similarly, in the US, changing technology motivated the government to reserve the right to unilaterally alter the contract. In both cases, the power was conceived to ensure that the government had the faculty to benefit from technological developments without being curtailed by contractual arrangements.

Regardless of the rationale, it seems important to remind that not all jurisdictions in the world allow unilateral courses of action in general contract law. Thus, regulators must be aware of such situations when drafting or making recommendations at the domestic level. A private law approach that could be perceived as more efficient since it does not impose public law rigidities may lead to undesired results. That may have been the case under a purely private law regime for public contracts in France that, in pursuit of a flexible legal regime, may, at least in the past, have left authorities without unilateral rights due to the rigid conception of *pacta sunt servanda* and discretionary powers in national private law. This, although it may be done, it must be done purposely and in a supported manner and should not be the result of overlooking national contract law.

10.1.1.2. Limits to unilateral modifications

Moreover, limits are common and accompany unilateral powers to alter the contract. The way limits are voiced varies: cardinal changes, substantial modification, not to alter the object of the contract, etc. Nonetheless, the power is never unbounded.

Relating to the rationales, it is possible to present a reasoning in the sense that limits are similar in purpose in some selected jurisdictions. In France, for instance, lawmakers are willing to grant unilateral powers if they have limits protecting the party subject to this power. However, policies may also vary. In France, the standard acted as a limit to the Executive power aimed exclusively at protecting the contractor/citizen. In contrast, American Courts seem to protect the contactor and pursue further policies beyond it (avoiding favouritism and not paying primes for potential cardinal changes). Despite this difference, it is important to point out that even though the American system did not develop a French-type theory of the "Administrative Contracts", it did take into consideration that an unbounded right to unilaterally modify the Contract could have been an excessive burden to be borne by contractors, who would have, anyhow, charged the government for taking this risk.

Moreover, standards are similar between them because the original contract is considered to act as a limit to the power. The comparison needs to be made between the contract as agreed and the contract as modified. Thus, alterations may be classified as within or without the contract, like in the UK, which is similar in wording and apparently in logic to the Cardinal Change doctrine and to the different limits imposed by case law to the same power in French law.

It is also relevant to point out that the judge referred in the UK to the "non haec in faedera veni", which means I did not agree to these terms. This idea is similar to the novation/modification and object of the contract limits observed in French law. The idea, at its root, is that the right to modify the contract exists, but the contract cannot be altered in such a manner as to completely modify the terms to give rise to a new contract and subsequently to the defence presented in terms of this maxim.

Standards include factors observed in all systems: alterations cannot be 'so peculiar, so unexpected, and so different from what any person reckoned or calculated upon'. This could

be translated in these terms: alterations cannot surprise the contractor that agreed to perform the original contract. In general, phrasings between systems are similar. The comparison must allow concluding that the change was not drastic or profound, wording used in France and the US, or materially or substantially different, wording attested in three analysed regimes, EU, USA, and France.

Another idea that seems relevant to highlight is the consequence of modifications ordered outside the contract: quantum meruit compensation in the UK. A similar situation occurs in the US, where contractors performing modifications within the scope of the contract are entitled to receive an equitable adjustment as provided for by the FAR, whereas contractors performing changes outside the contract's scope, i.e., Cardinal Changes, are entitled to receive damages. The situation is similar in terms of compensations within the contract and outside the contract but different in the standard of compensation since quantum meruit is not the same as damages. In France, on the contrary, the contractor may refuse to perform the contract as modified if it implies a new contract, but a different compensation standard will not arise.

However, the conclusion that the contract acts as a limit on its own does not encompass the limits implied and construed for discretionary powers in England. In those cases, the contract is not taken as the main point of reference and unreasonableness (in the public law sense), and good faith play a major role in limiting discretion. It is difficult to conclude in *abstracto* whether using one or the other would result in different outcomes. It could even be argued that unreasonable or exercise in bad faith equals exercising alteration powers outside the contract. On this basis, it could be argued that this theoretical discussion is irrelevant. The argument that could be made is that good faith and unreasonableness can be used as standards to inform the analysis of whether the power was used outside the scope of the original contract. This is a reasoning that could be applied by English judges based on case law and might be a relevant consideration for regulators and judges beyond UK borders. It might even be of pacific application in civil law countries that recognise the overarching existence and application of good faith as a contract law principle.

Another coincidence between several systems lies in the temporal moment to assess the 'surprising character': the moment of concluding the contract. This appears to be a reasonable corollary of having the contract as a limit; if the contract acts as the standard/limit, the moment of conclusion appears as the reasonable time-standpoint.

10.1.1.3. Legal nature of the unilateral modification right/power

Another interesting difference lies in the legal nature of the power to unilaterally alter the contract. In some jurisdictions is considered a public law power, whereas in others is simply a unilateral contract power. As will be explained, this brings some differences worth highlighting and reveals fundamental divergences in legal reasoning between jurisdictions.

For instance, in France, it was regarded as an "exorbitant power" since it did not exist in private law. Nonetheless, the contractor, placed in a position of inequality, had special rules protecting him from the use, and potential abuses, of public law powers. On the contrary, the theory of exorbitant powers was not necessary for the UK, it is submitted, amongst other, precisely because this type of power was accepted as a regular clause in private law.

The history in the French system of unilateral modifications is presented in secondary sources as the history of case law relating to the recognition of a unilateral power to modify the contract and of its economic consequences. On the contrary, the history of unilateral modifications to public contracts in the USA is presented in literature as the history of contract clauses granting a right to modify the contract and dealing with its consequences. This 'slight' difference permits to appreciate the relative importance of legal sources in procurement, and more specifically in the law of alterations to public contracts, in each legal system.

On another matter, it might be argued that the same practical effect was obtained in different ways on both sides of the Channel. On the one hand, the UK referred to contractual clauses with contractual effects for unilateral modifications, whereas France referred to the theory of unilateral powers and economic balance. In addition, it is important to remember that French law arrived at the use of contractual clauses and model contracts for unilateral powers via the inclusion of such powers in the CCAG and the contracts themselves even before the UK.

A parallel might be drawn between these systems: it is a standard practice to include in model contracts and contracts a possibility for the contracting authority to unilaterally modify the contract. In these clauses, it is also standard to regulate the economic effects of the exercise of a unilateral modification.

Nonetheless, the theoretical underpinning of the powers is different. In the UK, this is based on a freedom of contract argument/private law, and in France, on a theory of specialised law for administrative contracts that possess distinctive means and ends. The latter, as explained, might have been a consequence of the limitations imposed by French private law.

Moreover, this theoretical difference has a practical consequence: in France the power will exist regardless of the lack of inclusion within the contract, whereas in the UK that unilateral faculty will only exist if contemplated within the contract.

This parallel allows drawing another one. In the USA, a power to unilaterally modify the contract might be understood to be part of the contract, even if not expressly included, under the Christian Doctrine. Therefore, the US system foresees the right for authorities to unilaterally modify their contracts generally and even if not foreseen in the contract. The legal reasoning is different since in the US the clause is part of the contract even if not included, and in France, the power is regarded to exist "outside" the contract. Notwithstanding, the practical effect is similar: a unilateral course of action not originally included in the contract is recognised in favour of the contracting authority. The US adopted an implied term approach as opposed to a public law power. Nonetheless, it is noteworthy that in both cases, the public law power and the implied term doctrine were developed by controlling bodies: The appeal boards and courts in the American system and the Council of State in France.

A conclusion that might be drawn between the different systems is that in all of them exists the possibility to unilaterally modify the contract. Nonetheless, the theoretical underpinning to guarantee might be different: contract law in the UK and the USA, and a unilateral "exorbitant power" in France. Nonetheless, the practical result is similar.

Moreover, it might be hypothesised that the need for a special theory and powers streamed from the limitations of private law and the existence of a special judge. Thus, in France, the analysed systems where private law does not allow unilateral modifications, a theory of administrative contracts with exorbitant powers emerged from case law of a specialised judge. On the contrary, where a unilateral course of action as a contractual term exists in private law frameworks (US and UK), such a theory did not exist.

Furthermore, in the UK, France, and the US, the use of model contracts contemplating the possibility of unilaterally modifying the contract has extended regardless of the theoretical underpinning. These clauses normally also govern the economic effects.

10.1.1.4. How the legal nature may affect from an international standpoint

As mentioned, France will imply the power as a matter of law, whereas that will not be the case in the UK, where it may be required to include an express contract term. This presents a difficulty from the point of view of international/regional law that may observe unilateral modifications clauses as review clauses, which seem to have been the case in Edenred. In that case, certain drafting of a review clause was considered against EU law. Notwithstanding, this may be criticised as follows.

The extended use of unilateral modification clauses without limits in the contract in private contract law in the UK (only those arising from case law will apply) makes it hard to argue that the same power granted to authorities might deter competitors from entering the market. In other words, the argument fails to explain how a contract clause widely used in private markets would deter competitors in public markets. This is reinforced when considering that, unlike private law, the law of public contracts does have limits set forth by Regulation 72 of the 2016 Regulations.

Similarly, an argument could be made in the sense that the analysis of the clause against transparency without knowing the actual impact of the exercise makes it impossible to determine whether the specifications were substantially changed as to amount to a new contract. The Court basically said that the power amplitude may act as a deterrent for certain suppliers and shall therefore be prohibited.

Nonetheless, ruling out the unilateral power to modify the contract if not drafted in a particular manner or treating it as a review clause under clause 72-3 might be problematic for several reasons. First, because directly analysing the clause and not its impact might render unilateral powers as the one granted in that clause, in Edenred, or as conceived in France generally illegal in the face of EU law. This is a sensitive practical issue, but not a major legal blow for EU law that will prevail over national laws. Second, in some cases, authorities might, absent this clause,

not have the right to unilaterally modify the contract. This is problematic in practice since authorities will be bounded by a contract with no power to modify it even though both parties agreed to it, and as demonstrated above, this power is generally reserved for authorities for several reasons.

Moreover, it is submitted that it will be a better approach to evaluate not the power on its own, but its exercise on a case-by-case basis, and with EU law limits as a background. This approach was not necessarily available in Edenred because it was pre-Pressetext and prior to the 2014 directives. However, currently, EU law has clear limits to modification of public contracts. Therefore, it might be argued that the power can be granted in an unbounded manner since transparency and equal treatment requirements are met by respecting EU limits set forth by Article 72 for modifications other than review clauses. This will allow authorities to have an unlimited power to modify the contract and be bounded to respect EU public procurement principles in using it by respecting Article 72.

This approach, it is submitted, also aligns better with the different national approaches of the jurisdictions analysed in this thesis that belong to the EU. Authorities in France do not need a clause authorising them to unilaterally modify the contract. Therefore, at least under national law, it can be argued that because the power is not granted by a contract clause, it is not bounded to respect the review clauses requirements set forth by Article 72. Therefore, the power to unilaterally modify the contract will be allowed if EU limits are respected in its exercise. However, the UK relies on clauses rather than public law powers to grant authorities the same right. In this manner, under national law, clauses to unilaterally modify the contract might be interpreted as belonging to the review clauses, which limitations are set forth by Article 72 of the Public Contract Directive.

Therefore, the exact same right might be understood narrowly in some jurisdictions under the only consideration that the legal basis for it is the contract and not “the law”. It is submitted that such divergences are not desired by EU law that generally aims to curtail the power of authorities to agree to, or impose, substantial modifications.

In addition, determining that unilateral powers to modify the contract shall generally comply with review clauses requirements will result in some modifications being prohibited as unilateral modifications but permitted as bilateral modifications. This divergence of outcomes,

it is submitted, is not justified under EU law that is concerned with the respect of public procurement principles rather than the protection of contractors. Moreover, as observed, the law on modifications in EU law completely overlooks the way modifications are undertaken and instead focuses on their effects. Therefore, there seems to be no reason to have a different legal regime for unilateral and bilateral modifications since their effect on competition and equal treatment is what matters.

Similarly, it is submitted, that complying with the review clauses' requirements unnecessarily limits contracting authorities' flexibility, and grants more negotiating power to contractors, who might force the authority to agree to more favourable terms to bilaterally accept a modification that could not be imposed unilaterally. From a national objectives' perspective, this might also contradict value for money and the public interest involved in public contracting.

Against the background, it is submitted that the best approach is to generally allow unilateral modification rights, not considering them as covered by the review clauses requirements and limiting their exercise based on other Article 72 limits. However, it is not impossible for the CJEU to consider that all powers, regardless of their legal basis, shall comply with review clauses requirements. However, this will require creating the legal fiction that unilateral modification powers that do not require a clause to exist are contractual clauses and shall be treated as such. Such a ruling will be problematic since continental jurisdictions that still rely on powers imbedded in the law will have to change their approach and carefully introduce unilateral modification clauses complying with review clauses requirements. This approach will prohibit well-entrenched national legal traditions in an unnecessary manner since, as mentioned, EU law should only be concerned with avoiding substantial modifications: an outcome that can be reached by relying on Article 72 alone.

To conclude, public procurement objectives are well served in unilateral modifications by respecting EU limits other than those established for review clauses. There is no need to treat this power as a review clause for those reasons.

10.1.2. Concepts travel around: transposition, accident, coincidence?

There is a conclusion that does not relate to the substantive analysis displayed throughout this thesis but could not be overlooked: the travelling of concepts. This can be termed a methodological observation since it only wants to call attention to the fact that sometimes the same concepts and wordings are found in one jurisdiction with different purposes or in different jurisdictions with similar or different rationales. It is impossible to ascertain the reason behind this phenomenon; nonetheless, as with bilateral-unilateral alterations, some commentaries will be made on this finding.

Perhaps the ideas that are most widely shared by systems and are used with different purposes are those of respecting the original agreement and the foreseeability of parties or third parties (competitors). Whether to protect the contractor from unilateral powers, from unexpected events or to protect competitors from substantial alterations, all legal systems used the duet original contract/intention and foreseeability (or reasonability to have allowed for). Once again, sadly, the reasons behind this could not be found. However, it might be hypothesised that they lay on common-shared ideas of what is a contract and what is covered by it that could be traced back in history.

On a similar matter, the French system anticipated conclusions on limits over bilateral modifications that the EU used later, even with similar wordings. Thus, the prohibition not to substitute the object of the contract resembles the concept of not allowing "substantial modifications". The idea of altering the essential conditions (qualitative criterion) could be considered an antecedent of the conditions that cannot be modified under Art. 72-4-a. Moreover, as mentioned, the essential conditions were firstly used in France in a context that seems to indicate that they are essential conditions that led the contractor to contract (*mutatis mutandi*) to participate in the award procedure. Similar limits, quantitative and qualitative, are also found in the US in the Cardinal Change doctrine.

Moreover, the French disruption of the economy of the contract is clearly resembled in Art. 72-4-b., which forbids modifying the economic balance in favour of the contractor. It is worth mentioning that the standard in EU law is not the disruption of the economy of the contract, but a 'modification', arguably a lower standard. In addition, this limit only applies if the economic balance is modified in favour of the contractor. This differs from French law, where

the disruption of that economic balance was precisely created to protect contractors from authorities. This difference in scope shows how a concept might be transposed from one legal order to another and how that concept is shaped and transformed by the latter legal system to adapt it to its own objectives and principles.

It must however be said that the fundamental principles from which the French judge and scholars derived their conclusions are a conceivable consequence of the EU legal framework. Thus, French law followed first a pathway opened by the very principles of EU law. In that manner, it can be argued that the EU legal framework influenced French law, which in turn opened a path that was later followed by the former.

Another interesting finding in this sense is the use of the EU, material modification, wording by the World Bank. The Bank ranks new contracts and amendments introducing a material modification to an existing contract in the same category, and consequently in none of those cases the Bank will finance it. Furthermore, the Bank stressed that a material modification needs careful assessment on a case-by-case basis, i.e. the material modification is a factual test that must consider all relevant and surrounding circumstances of the contract being altered. However, as mentioned, the purpose is different, not to prohibit such modifications but to limit financing and strengthen the sanctions system.

Within France, something similar happened. First, the Council of State recognised the existence of unilateral powers to modify the contract and established limits to this power to protect contractors in marchés publics. Second, the reasoning of the judge was "naturally transposed" to bilateral modifications but with a different purpose: to protect competitors and the award procedure. Third, the same logic was extended from marchés publics to other types of administrative contracts.

A parallel situation happened with the economic equilibrium of the contract. The same concept is used to justify compensation in the theories of imprevision and sujetions imprevues and to limit modifications. The rationale in all of them is to protect the common intention of the parties. In the case of modifications, the common intention is protected by not allowing "quantitative novations". In the theories that justify alterations caused by risks, the common intention is protected under a species of "rebus sic stantibus" clause.

Thus, these few examples, it can be argued, demonstrated that concepts are adopted and reprised within systems and between them with different purposes and even with variances. Again, a very interesting methodological commentary from a comparative perspective, even if not major conclusions could be derived from there. Although it cannot be tested, arguably, they may be a point of initiation when international agreements' conversations on the law of alterations are started, where they do not exist, or continued, where they do.

10.1.3. Different approaches in national law to the same international legal rules

Another methodological commentary relates to one issue already analysed: that similar rules may be interpreted differently at the domestic level. International regulators must assess the way they affect national systems since their reforms do not arrive in a vacuum but in jurisdictions that have their own traditions.

Only to present one example, it might be referred that EU law has different effects on national law modifications depending on the tradition. For instance, unilateral modification in the UK will have to comply with review clauses requirements because this right is introduced in contract-texts via contract clauses. In contrast, the power to unilaterally modify the contract might not have to comply with the review clauses requirements provided that the power exists in the Law and not as a consequence of contract clauses. In this case, it is the exercise of this power that will be limited by Article 72, and not the power in an ex-ante manner having to comply with the review clauses requirements.

Nonetheless, it is submitted that this difference in effects makes no sense from an EU perspective, and the difference in powers scope is not justified simply because the power is granted by the law or a contract clause. The issues caused by this divergence of interpretation have already been explained. The stress in this point is not substantive to this issue but general as to the different reading that the same rules may have when they are introduced into national legal systems.

10.2. Reasons to pay attention to alterations

The explanations relating to common concepts, common ideas, and differences between the analysed systems allow introducing a different topic: the reasons that have put alterations to public contracts at the centre of procurement.

10.2.1. Competition at the centre of procurement

Historically speaking, most analysed systems did not use to have alterations, especially bilateral ones, at the centre of their procurement preoccupations. Thus, the general idea seemed to be that parties had the freedom to modify their agreements. However, alterations now occupy a place in public procurement for different reasons, either to understand unilateral modifications or to limit bilateral ones for competition reasons.

Arguably, the most common rationale for paying attention to alterations is competition. The issue of alterations that materially act as contract awards; this is when alterations render the contract originally concluded materially a new one. Tests limiting alterations have been developed to protect competition and the award procedure. Generally, this means that the scope of the competition is considered via factual tests against alterations. The name and way tests are articulated vary between jurisdictions. Therefore, cardinal changes, substantial modification, and the alteration of the object of the contract respond to the same fundamental idea but have differences (slight or fundamental, depending on the point of view). The idea is: you shall not materially award a contract via an alteration. More about the niceties of these tests will be presented further below. For now, it is important to keep in mind that competition seems to be the *pierre angulaire* in alterations law relating to public contracts.

10.2.2. Competition is not alone

Although competition is a central concern and one directly arising out of the objectives of "modern public procurement systems", competition is not alone. A study of alterations, as the one displayed in this thesis, in my understanding, has demonstrated that further concerns and issues are at stake and are, or need, to be carefully balanced by judges and lawmakers.

Just to provide a few examples, it is common to observe a general concern relating to the flexibility that must be granted to contracting authorities to obtain value for money or settle contract-related disputes. Costs of terminating and re-procuring cannot be overlooked when an alteration amounting to a new contract cannot be concluded. It is less common, but was observed, that alteration rules may consider the objective of tackling corruption since alterations may be used to create a cap of money for the contractor and corrupt officers. Further, rules limiting alterations may also be used to prohibit renegotiations and restrain lowballing in the moments in which the contractor has more leverage to impose conditions on the authority. Another rationale, not common either, refers to the planning of the project. Restrictions may be imposed on alterations aimed at encouraging better planning and project structuring. Stricter limits to alter contracts may encourage better planning to avoid project failure and may also encourage better tenderers' assessment to prevent losses.

10.2.3. Balancing interests

Due to the multiple conflicting interests on not few occasions, a balance must be struck. As an anticipated conclusion, it is submitted that it is not desirable for the balance to be reached in an abstract and general manner but must be pursued in a particular and concrete (geographically and historically) fashion.

For instance, it seems more reasonable to have a more rigid and all-encompassing (regardless of the means) limit when corruption is an issue, when transparency and integrity are generally favoured over flexibility and discretion. On the other hand, strict limits do not seem to suit a reality where public officers are generally trusted, where flexibility is generally favoured over the risk of corruption, and where modifications are not in practice used to circumvent rules leading up to the award.

Given the evolution of procurement as a subject-matter, it may be hypothesised that the "right" balance shall consider preoccupations not only in *abstracto* but should also regard data to design the most appropriate rules. The set of data that should be generated, used, and the manner of doing so, clearly, exceeds the purposes of this work and may justify a new PhD thesis on the matter. This, nonetheless, it is submitted, does not impede to highlight the importance of data on the topic.

10.3 Designing limits to alterations: factors to take into consideration

The "*right*" balance that must be pursued based on the information could consider the following factors extracted from the analysis displayed in this thesis.

10.3.1. Procedural vs substantive approaches to limiting alterations

From a legal or contractual perspective, there are, at least, two ways in which contract alterations can be treated. First, there is the option of imposing specific legal substantive rules limiting alterations. There is a second one that relies on a more 'procedural'/institutional approach. Most analysed systems have in place what can be called a substantive approach to limiting alterations, which means certain alterations are not permitted under the law to protect procurement or contract principles. Nonetheless, the OECD and the UK used a different method in some of their model contracts that could be called a "procedural approach". This, basically, means a system of records and approvals when altering the contract.

The "procedural" approach may exist on its own and be meant to grant transparency where no substantive limits exist. Moreover, an argument may be made in the sense that this procedural approach may be put in place to create a transparent environment in which alterations are subject to approval and risks of violation of substantive standards are lowered. Thus, contracting authorities, when only subject to substantive limits, may include in their contracts such procedures as a manner to mitigate litigation risks relating to contract alterations.

More generally, subject to the particularities of each legal system, arguably, it can be attempted to mix procedural and substantive limits, granting in this manner transparency, via the procedures, and respect to other procurement principles, via the substantive limits.

10.3.2. Case-by-case test vs abstract approaches

Arguably all systems are placed in a continuum in limit matters that goes from purely abstract limit to case-by-case analysis.

Most analysed limits were based on general rules and general standards that were factual, in the sense that they analysed surrounding circumstances to observe whether the alteration was material, cardinal, etc., or not. In this context, despite criticisms, possibly the EU legislator took all these factors into consideration and decided to have a 50% fixed limit to alterations. With this, legislators privileged legal certainty over flexibility in the system and over case-by-case solutions that could offer results more adapted to the contract and the surrounding circumstances. On the other hand, the US relies on a test with no proportion or percentage of the contract that could be altered. Each system, it is submitted, can balance differently the interests at stake.

An isolated comment, perhaps methodologically inappropriate but certainly interesting relates to the 50% in different scenarios, France and the EU. There seems to be a 'tacit agreement' or 'shared idea' in the 'international procurement community' that 50% is an adequate limit to alterations. This idea needs to be put under surveillance to analyse its accuracy or random character.

Another possibility is not to have an abstract test but a case-by-case limit. For instance, the system could provide for an analysis where the different interests at stake are balanced in concrete and not in an abstract manner; this seems to be the OECD approach or the pre-EU UK one. This possibility might bring advantages, but it might also be against predictability, a common aim of many legal systems.

A third way may be to provide for flexible limits. Thus, a material alteration test may exist, but exceptional circumstances may allow to favour flexibility, for example, via a proportionality test. In those cases, extreme cases for "beyond threshold" alterations may be procedurally controlled. Thus, a general rule granting legal certainty would be in place: i.e. a 50% limit, but flexibility be enhanced in exceptional cases. This might be justified, for example, since favouring flexibility may be necessary to end a controversy or due to the urgency of delivery despite the impact on procurement principles. This can be caused, for example, by the sensitive nature of a project: e.g., water provision. Criticism may arise since the nature of the project might change legal rules. Nonetheless, in some cases, it may be justifiable given certain circumstances, e.g., human rights.

Although legal certainty might be affected by this flexibility, it may be considered a desirable measure for some jurisdictions/cases, especially under exceptional cases where re-tender might not be justified. This might be the case: i) when there is no other tenderer in the market; ii) no other tenderer would be interested in the contract as altered; iii) there is no impact on the economic balance of the contract in favour of the contractor as to create integrity concerns; iv) the costs of termination and re-tender are not reasonable in the face of the value of the alteration and the contract as a whole; v) human rights are at stake. In this manner, criticism relating to unsensitivity to human rights or costs would disappear by having this kind of "beyond threshold" flexibility.

Against the background, it is submitted that for the review system to guarantee efficiency in a manner that respects other objectives of the system, it is necessary to consider re-tendering. In deciding this re-tender versus alteration, several factors can be taken into consideration: the possibility to independently re-tender the alteration; the transaction costs of both methods of provision; the effects on competition of the alteration; the compatibility needs between the original project and the "altered" one; the existence of competition "subrogates" like benchmarking, amongst other. Another important element to consider is the potential existence of low-balling occurring via alterations. It might be argued that when low-balling is detected, the balance could be leaned towards termination and even sanctions to the contractor.

However, each procurement regulator must take into consideration the specific procurement system that he is dealing with to favour a more flexible OECD-type or a more rigid EU-kind approach to alterations.

10.3.3. Cardinal, substantial, and radical alterations similar tests, different purposes

Several analysed tests are similar in wording and even in purpose. In this conclusion, the similarity of the contract acting as a parameter to determine limits to unilateral modifications was already noted. However, these similarities must not be overstated since, in some situations, tests that appear to be similar are used for different purposes and may have diverse results.

For instance, the 'Radical Change' test, used in the UK for frustration, resembles several other tests both in the UK and other systems. Thus, it resembles the American Cardinal Changes

Doctrine for both limit to unilateral powers and limit to modifications to respect the award procedure. Similarly, it resembles the limits to unilateral modifications found in the UK. Moreover, this Radical change test seems to encompass a similar standard of analysis that the one provided in French law to award compensation for unforeseen circumstances, i.e. l'imprevision and limit unilateral modification powers. This allows introducing two ideas.

First, it allows arguing that there is an idea present in all analysed legal systems in the sense that the contract generally acts as a standard to determine limits both to unilaterally modify the contract and to respect the award procedure. This point was already noted in the first part of this final chapter.

Second, it might be argued that a 'radical change' in the circumstances surrounding performance will excuse performance in the UK, whereas it might still require performance but authorise compensation under l'imprevision theory in France. Therefore, lawmakers must be aware that limiting alterations to public contracts might inadvertently create situations where contractors are obliged to perform the contract but without the right to obtain compensation. In contrast, in a different jurisdiction, the contractor under the same circumstances may be excused from performance altogether.

Moreover, lawmakers must balance whether the circumstances shall authorise compensation and require performance with limits (as seems to be the EU approach) without limits (as was the traditional French approach) or if it would give rise to frustration or similar doctrines (as it used to be the UK approach). In the latter case, it might further be decided whether bilateral modifications might avoid frustration by granting additional payments.

10.3.4. Objective, general and whole-encompassing test

One common characteristic of tests is that they are objective, in the sense that intention is not relevant. Thus, the intention that appeared in early EU cases completely disappeared in Pressetext and the 2014 Directives, and other jurisdictions never considered the intention to circumvent the law. As mentioned, by establishing an objective test, it might be argued that predictability increases. By taking intention out of the equation, the standard, and the subsequent burden of proof, are reachable; demonstrating an intent to renegotiate essential

terms might be difficult. Moreover, it is submitted, the achievement of the principles and objectives cannot be pursued only when the parties intended not to do so but optimised to the largest practicable extent.

Another interesting point relates to the type of alterations covered by the limits. Tests may be general in the sense that they disregard the legal device used to materialise the alteration. It may be undertaken via a modification (bilateral or unilateral) stricto sensu, settlement agreements (like in Finn Frogne) or via accepted sub-standard performance and still be within the scope of attention of lawmakers and regulators.

In most jurisdictions, tests have been applied in the field of bilateral modifications. Notwithstanding, nothing in the rationales or logical structure of the rules implies that they will not apply to unilateral modifications or even for alterations following the realisation of risks, a point that will be elaborated below. The reasons behind the fact that not many cases on limits to alterations relate to unilateral modifications or risk realisations are, however, unknown and would require further research. A possible, not conclusive, reason may relate to factors such as the general policy of preferring bilateral over unilateral modifications.

Another relevant point to be made regarding the covered areas refers to the de-escalation. Most cases have addressed the issue of different elements in the contract or bigger contracts when compared to the awarded ones. However, the issue of scaling-down contracts, with the notable exception of Finn Frogne, has not been addressed in-depth by the selected systems. However, that case revealed that the opposite is also possible and, perhaps, as problematic: a contract may become smaller during the performance, which may have led to a completely different pool of tenderers being admitted to, or interested in, the project. Furthermore, this type of standard also might help avoid corruption; it is plausible to use a bigger project to exclude potential smaller tenderers and, after the award, scale it down, adjusting it to the real needs of the authority. Subsequently, law and policymakers need to pay closer attention to this issue to include, or decide not to, rules on the matter.

More generally, the circumstance, that means are not important, is not extended to all analysed jurisdictions, or at least no evidence of this was found. For that reason, it may be relevant for lawmakers or controllers to consider further if they may be well-served if the scope of the test is widened.

Finally, it must be mentioned that when limits apply to all types of alterations, the negotiating capacity of authorities may be hindered. That was the argument presented in Finn Frogne relating to settlement agreements and is one that regulators must consider. This is so since limiting in this manner, the negotiating capacity may oblige authorities to terminate the contract, assuming breaking costs, when they have limited negotiating capacity, and contractors may be aware. Thus, limiting negotiating capacity may strengthen the negotiating position of either party (depending on the facts), and lawmakers must consider how to balance the interests at stake.

10.3.5. Substandard performance and corruption

Relating to the possibility of controlling corruption via the law on alterations, an argument was found in the sense that no sub-standard performance shall be accepted, and competitors could control it. By including acceptance of under-performance within the concerns, a further advantage is obtained: competitors might help ensure that contractual conditions are honoured. This helps honour the competition held in the award procedure. Similarly, corruption becomes more difficult; competitors would challenge under-performance since they, most likely, do not want unmerited profit to be created for one of their competitors.

An argument might also be made in the sense that allowing competitors to review the management stage, including performance in accordance with contractual terms, reduces the costs of supervision for controllers of the system. The position defended in this point is that considering that the law on alterations applies to under-performance will bring for a great part of the management stage all the benefits that the remedies system has already brought for the award stage. Nonetheless, also the undesired consequence may arrive, such as delays due to litigation.

This is an important consideration that appears adequate when the benefits of a remedies system overcome the undesired consequences. On the other hand, a more flexible test, or simply not allowing such control, might be appropriate where accepted under-performance is not generally used to circumvent procurement law. Moreover, in cases of control of under-performance, contract clauses may help hinder competition concerns, for instance, avoiding

extra-unmerited profit via reductions of income. In any case, it is submitted, only claims relating to material differences of the quality, and not minor sub-standard performance, shall generally be successful since the authority shall retain some degree of flexibility. This is so, of course, unless corruption could be demonstrated.

10.3.6. Rules allowing alterations when facing unforeseen circumstances

Systems tend to be more flexible regarding alterations when projects encounter unforeseen circumstances. This, arguably, stems from the idea that, sometimes, the balance must lean towards a more flexible approach.

In this exercise, it is important to consider whether it is worthwhile to demand termination and re-tendering when facing unforeseen circumstances like the ones giving rise to frustration or imprevision. For instance, using EU law parlance, provided that the contract is a "new one" and would have allowed different tenders or attracted different tenderers, the contract could be required to be terminated and retendered. However, any contractor in the same situation would have faced the same circumstances and would have demanded additional payments or would pursue a frustration claim. Then the doubt arises as to whether re-tendering should generally be required.

This is especially relevant in some projects where several unforeseeable events are likely to arise in the life of a project by its nature. Thus, lacking these sorts of rules contracting authorities might be faced with the absurd need to terminate and re-procure the contract several times, every time a new event arises. The law simply cannot have this practical effect, especially for complex projects. However, concerns about equal treatment remain, especially because contractors might negotiate more favourable terms than the original ones.

It can be argued that lawmakers must pursue a balance between the award procedure and competition concerns versus the efficiency, value for money, and efficacy preoccupations.

In this regard, it might be said that the performance plus compensation approach is better from an efficiency and efficacy perspective since the authority may indeed demand performance and pay compensation facing unforeseen circumstances. However, this approach would disregard

other competitors that might have been interested in the contract as performed after the emerging circumstances arose.

It is submitted that the best approach would be a case-by-case analysis to determine whether competition and award procedure preoccupations overrule value for money and similar concerns. To provide one example, under the current Covid-19 pandemic, a case-by-case analysis of many contracts could throw that value for money, efficiency and efficacy concerns overcome, all things considered, award and competition preoccupations. Furthermore, benchmarking might indicate that the current contractor is offering a competitive price, and it avoids terminating and re-procuring (which in addition implies termination plus transaction cost). This situation might be analysed from two different perspectives.

First, if competition and the award procedure are seen as a means to achieve value for money and good contract terms, in that particular instance, competition concerns do not overrule efficiency and public needs concerns since benchmarking indicates so.

Second, if competition is an objective on its own or a means to open public markets (as in the EU), it is harder to argue that benchmarking would suffice to justify continued performance. In that case, it might come into play the object of the contract. Thus, if it is an important tunnel, road, hospital, etc., required with a certain degree of urgency, then efficiency might be privileged over competition concerns. On the other hand, if there is no fundamental/urgent public need to be met, it is harder to argue that efficiency is to be privileged over other concerns.

Moreover, for certain countries, budgetary preoccupations might come into play and value for money and continued performance, taking into consideration the breaking costs, might be privileged. In that case, integrity would require benchmarking the price or compensation to be granted. Thus, budgetary constraints might overrule competition concerns, but for integrity reasons benchmarking might be demanded. Notwithstanding, it might be hard to permanently have a particular case-by-case assessment of efficiency/VfM v competition/award-procedure concerns. Thus, lawmakers may decide to impose their own *in abstracto*, and *ex ante* analysis as the EU legislator seems to have done in Article 72-1(c). It is important to take into consideration that the 50% of the Public Contract Directive was not included in the Public Utilities and Concession Directive, which might indicate that more flexibility is required in

those sectors precisely due to the ‘sensitive’ nature of those contracts. It might also be simply that more flexibility is generally granted under those directives.

However, these limits struck a balance under an EU perspective exclusively and did not predetermine an outcome or a particular assessment that shall be undertaken by contracting authorities when deciding, within the margins of EU law, whether to modify a contract, have a new parallel contract, or terminate under a termination for convenience or similar clause and re-procure the project.

A hypothesis may be attempted in the sense that an economic balance restriction could be included even when unforeseen circumstances arise. Currently, this is not the case in any of the analysed systems. For instance, in the EU, the economic balance test, found for other alterations, is not found for unforeseen circumstances. However, an argument may be made in the sense that in this area, the economic balance should not be changed, or more favourable terms agreed. This argument can be based on the very principles: alterations must be allowed for unforeseeable circumstances, but such alterations must respect the principles of equal treatment, transparency, and competition. A more flexible approach has been advocated by Arrowsmith, who argues that the principle of proportionality can be used to control potential abuses for modifications under the unforeseeable circumstance exception. Similar arguments could be drawn for other systems.

Moreover, countries and international organisations concerned with corruption and lowballing might introduce a rule forbidding changing the economic balance of the contract in favour of the contractor even when facing unforeseen circumstances. As mentioned, alterations can be used to create a cap of money for corruption or remedy loss-making situations caused by low-balling.

On a different issue, when alterations are allowed due to unforeseen circumstances, even then, the original risk allocation must be enforced since a different risk allocation than the one originally agreed upon might be a substantial modification. This may be especially problematic in lowest cost awards since imprevision and disruption, if calculated against the original price, can undermine the whole procurement procedure. This might disregard the existence of insurances and price premiums charged by other bidders. Thus, judges, and third parties, might

be generally well served by analysing the foreseeability and the disruptive nature of an event considering all the procurement documents, including other bids different to the awardee's.

10.3.6.1. From unforeseen circumstances to the reasonability of allowing for

Most analysed jurisdictions use the concept of unforeseen circumstances. However, such a concept in the 21st century presents blurrier borders than ever in the past. Most phenomena arguably are foreseeable in the sense that their occurrence can at least be imagined. For that reason, it is important to underline that NEC4 relies on the 'chance and reasonability of allowing for it'. An argument can be presented in the sense that the latter concept is more commercially oriented since they consider the usage and practice in construction contracts or the sector. To give an example, it seems that it would not be reasonable to allow for contamination risks in housing development contracts unless data provided by the client expressly advise doing so. On the other hand, in projects like the one in Obrascon, the contamination risk was present and included in the data provided by the Client. Therefore, the reasonable course of action is to review the data and allow for the physical condition.

Moreover, in other systems, the concepts of foreseeability seem to be interpreted similarly. Thus, in the US, the standard of foreseeability expects contractors to take "ordinary preventive action", which is "reasonable to ask for a normal contractor". In this sense, foreseeability is not an in *abstracto* legal criterion without any economic basis but, arguably, has some economic or commercial element. This argument may be made on the basis that what is reasonable to ask, or ordinary preventive actions are precisely those that are "commercially" sensible. In this manner, it is submitted, that this concept of foreseeability approaches the NEC 4 standard of the "reasonable to have allowed for" since it does not suffice to be prophetically or "merely" possible to be regarded as foreseeable for the purposes of the excusable delay clause**.**

Similarly, in the EU, as mentioned, relating to the concept of foreseeability, there is limited case law and no definition in the law, which might render important the concept of recital 109. From the recital is important to mention that the foreseeability takes into consideration the available means, the nature and characteristics of the project, good practices in the field in question, and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value.

10.3.6.2 Problematising review clauses and jurisprudential theories on unforeseen circumstances

In this matter, another topic that deserves attention relates to review clauses. EU law allows wider alterations where review clauses exist. This circumstance is grounded on the idea that alterations undertaken in the framework of review clauses grant more transparency since they were known by competitors from the moment of competition, and alterations via judicial decision are ex-post, and so are later mutually agreed alterations. In this manner, it was said that the judicial decision creates the following alterations.

First, it introduces an ex post facto alteration to the price agreed by the parties. Second, the judge altered the risk allocation made and agreed by the parties. Therefore, the judge is re-allocating the risk to the administration by granting compensation. Third, the whole point of the fixed-price contract is to allocate all risks to the contractor. Thus, by compensating, the judge creates a mechanism to change from a fixed-price contract to a cost-plus contract. Courts are not only adjusting the price of the contract or distorting the risk allocation but changing the very type of contract from fixed-price to cost-plus where no risk is bear by the contractor. This is true, at least for some conditions (see ground conditions in France).

In that manner, contractors will not have to bear all the losses that might later impact the prices of futures contracts awarded to the same contractor. However, such an approach seems hard to reconcile with EU and trade objectives. Likely, suppliers take the price of the contract, the risk allocation, the type of contract (fixed-price or cost-plus), and the exculpatory clauses into consideration to participate in an award procedure or not; they certainly determine the characteristics of their offer.

There might be little doubt that these alterations have an impact on the award procedure. Arguably, had the contract been advertised as a cost-plus contract where no risk – for instance, for ground conditions - must be bear by the contractor, suppliers could have submitted a different offer. In addition, other suppliers might have been interested in the contract as altered. Some examples might be offered: First, some competitors might have avoided participating in the award procedure due to a risk allocation in a fixed-price contract with exculpatory clauses

that expose them to unlimited liability. Second, competitors might have offered a bidding price higher than the awardee precisely because they were charging a contingency or price premium as a buffer in case ground conditions were dramatically different than expected. A higher price might also have been charged to pay for insurances covering ground conditions risks. In this case, the alterations will undermine the whole award procedure, especially if the award criterion was the lowest price. In fact, by taking the original price agreed by the parties to observe if the risk disrupts the economy of the contract, the judge disregards that other competitors might have had a better judgement in assessing the risks and, for that reason, offered a higher price and were therefore not awarded the contract.

Against the background, someone could argue that the idea that contract clauses dealing with unforeseen circumstances respond better to procurement principles than judicial alterations is true. Moreover, the idea was partially accepted when the division of *intra-contracto* and *extra-contracto* alterations was adopted. The fundamental idea is that some alterations are provided in the contract, whereas others are not.

Nonetheless, a fundamental question remains whether the ideas behind the assumption are accurate. It is difficult to conclude if EU requirements for review clauses grant more transparency than the criteria to apply theories such as l'imprevision that are well established in French law and where a sizeable body of case law exist. It is hard to argue that review clauses grant more transparency when contractors know the theory as well, if not better, than they do a particular review clause (possibly without case-law). This is especially true when there is a long-standing implementation and interpretation of theories versus contract clauses that recently came into play and may vary from authority to authority. On the other hand, obviously, case law and experience with the clauses may arise over time, and arguably more information can be included in contract clauses.

Moreover, it is important to remind that review clauses may be designed to deal with arising unforeseen circumstances, and the clause must provide for potential alterations. The question is whether the uncertainty elements that are, no doubt, found in jurisprudential theories are not present in the elements of the clauses or in the way they will be applied. Or, it could be argued that the theory could be seen as a sort of implicit clause whose elements have been delineated, somehow clearly, by decades of case law.

At this point, it may be argued that *ex post facto* controls of the application of clauses or theories such as l'imprevision are more respectful of national contract law traditions and, arguably, may lead to similar results. These controls, it is proposed, may focus on the effects of the theory/clause in the case rather than whether they exist or the manner they are drafted or conceived. This, however, does not mean that no standard shall exist; it means that both clauses and theories/doctrines may exist as a legal ground for alterations and courts or boards would control them based on the same legal standards such as material modifications, cardinal changes, or any other standard adopted or developed in a jurisdiction or international legal framework but based on effect. Nonetheless, this effect-based control may be problematic in some jurisdictions since, in France, l'imprevision is claimed by contractors after the performance, and by that moment, the application of the test may be meaningless.

All in all, arguably, it has been demonstrated and could be presented as a conclusion to this conclusive chapter that the law of alterations of public contracts is not, anymore, exclusively a creature of contract law and has become a field where procurement concerns are in the rise and clash between them, as well as with pre-existing national contract law and traditions. More seems to come on this in the forthcoming future. Hopefully, some of the research and considerations displayed in this thesis will be helpful in these future conversations.

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