Meijers on imprévision in 1918, in 1937, in 1950, and today

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Kees Bezemer ▪

1 1918

The eminent Dutch jurist E.M. Meijers [1880-1954] devoted three larger publications to the subject of *imprévision* (fundamental change of circumstances). All three were published at crucial moments in European history: the year the First World War ended, the year of the German bombardment of Guernica, and the year the Cold War became violent. This was not altogether accidental. The first publication was part of a report presented, in Dutch, to the Dutch Society of Jurists in 1918.[1] Until then, our subject had been a sleeping doctrine waiting to be kissed to life. Meijers realised its importance for the aftermath of the war, and presented his point of view together with the necessary historical and comparative arguments. Not everybody will have noticed the topical interest of the subject – the Dutch had been allowed to continue their slumber as a neutral nation during the war. However, Meijers immediately saw the chance for a revival, on a purer basis, that is. He explained that the *imprévision* doctrine was intimately connected to devastating wars and to natural law doctrine.[2] The latter because of its stress on the intention of the parties, be it explicit, or implicit, as the *clausula rebus sic stantibus* is based on a presumed intention of the parties to a contract.

Having paved the way in a few lines, it was not difficult for Meijers to show how the idea of *imprévision* in the past had been put into practice in Germany, France, and England. He ended this part of his report with the question: what to think of the judicial decisions of these three countries? Answer: they certainly have a practical value, but what about their scientific value? What followed was an argument against the use of the *clausula rebus sic stantibus* as a solution to the *imprévision* problem.[3] Meijers concluded that

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1 A French translation of the relevant part of the report entitled 'Essai historique sur la force majeure' has been published in E.M. Meijers/R. Feenstra & H.F.W.D Fischer (eds.), *Études d'histoire du droit. Vol. IV*, Leiden: Universitaire Pers Leiden 1966, pp. 27-51, which is the version I quote.

2 Meijers 1918, p. 29.

3 Meijers 1918, pp. 38-40.

all these decisions were only in appearance based on the presumed intention of the parties. In reality they were equitable solutions in a more palatable disguise. So away with this fiction and back to the original meaning the Romans gave to equity in their bona fide contracts. He meant an objective equity, irrespective of the (subjective) intentions, real or presumed, of the parties to a contract.

A mere five lines were spent on the Dutch situation: 'In our country, however, the clause is superfluous. Theoretically unsound and limitless, it would do more bad than good'. Meijers then referred to a provision of the Dutch Civil Code (art. 1374 par. 3) which should allow a Dutch judge to make equity prevail in exceptional cases. That was all. Nothing about judicial decisions of the past. But there was an expectation for the future in it. It took almost twenty years before he made another attempt to influence Dutch judicial practice. He had grown impatient, and was not pleased with the decisions of the Dutch Supreme Court. And he was not the only academic jurist who was not. In a note on one of its notorious decisions he could mention that Scholten and Van Oven, both leading jurists, were on his side.[4]

In 1936 a report had been presented to the Dutch Society of Jurists, which defended a view on *imprévision* that in its essence did not differ much from the practice he had been fighting against.[5] It was time for action.

2 AMSTERDAM 1937

Meijers's second publication on *imprévision* – based on a speech given at the Royal Dutch Academy of Sciences in Amsterdam – , appeared in 1937. Its title was 'Goede trouw en stilzwijgende wilsverklaring' (Good faith and implied condition).[6] It was an attempt to convince, indirectly, the judges of the Dutch Supreme Court that their interpretation of the concept of 'good faith' in the law of contracts was too narrow. In 1923 a spark of hope had shimmered when the Dutch Supreme Court decided that if someone acts incorrectly in the

4 See Dutch Supreme Court 2 January 1931, *NJ* 1931, 274 (*Mark is Mark*). This case emerged because of the extreme monetary inflation in Germany after WW I.

5 M. Bregstein, 'Moet den rechter de bevoegdheid toekomen verbintenissen uit overeenkomst op bepaalde gronden, zooals de goede trouw, te wijzigen? Zoo ja, in welke gevallen en in hoeverre?', in: *Handelingen 1936 der Nederlandse Juristen-Vereeniging, deel 1, tweede stuk*, 's-Gravenhage: Belinfante 1936. Bregstein said that a gap ('leemte') in a contract could be filled by a judge on the basis of good faith. This complement should be derived, however, from the presumed intention of the contracting parties.

6 *Mededeelingen der Koninklijke Nederlandsche Akademie van Wetenschappen, Afd. Letterkunde, Deel 84, Serie B, no. 5*, Amsterdam: Noord-Hollandsche Uitgevers Maatschappij 1937; reissued in E.M. Meijers, *Verzamelde privaatrechtelijke opstellen. Derde deel (Verbintenissenrecht)*, Leiden: Universitaire Pers Leiden 1955, pp. 277-300. I quote the latter version.

performance of a contract he acts against good faith, even if he is not aware of the incorrectness of his behaviour.[7]

The claimant had insured a sire named Artist de Laboureur against the consequences of roaring, a serious horse disease. In the contract it was stipulated that a board of the insurance company was to decide about any damages to be paid. The horse was affected by the disease but the insurance company refused payment. The Dutch Supreme Court ruled that not only the (subjective) outlook of the members of the board, but also the presumed intention of the parties about a performance according to good faith had to be taken into account.

Meijers considered the decision a step in the right direction, because the Dutch Supreme Court seemed to have returned to an interpretation of good faith in the sense of classical Roman law, that is (objectively) taking into account all the circumstances relating to a contract and its performance.[8] The winds of change did not blow for long through the stately rooms of the Dutch Supreme Court in The Hague. As of 1925 an impressive series of decisions reconfirmed the idea that good faith cannot put aside or even change the contents of a contract.[9]

Thus classical Roman law was used by Meijers to convince the honourable judges that their moment of weakness in 1923 stood in a very respectable tradition, of which later generations unfortunately had not appreciated the merit. Knowing this would not be enough, Meijers called in the help of some of his learned colleagues who had tried to make sense of the not particularly transparent case law of the Dutch Supreme Court.[10] Needless to say that none of them had succeeded in shedding the necessary light on the subject matter. To put even more emphasis on the seriousness of the matter, Meijers then set out to add a dose of comparative law to legal history. He did find some support for his view on good faith in contemporary French law in the sense that also in France a judge was entitled to explain the express terms of a contract according to the implied common intention of the parties. Meijers gave an historical reason for this still restricted interpretation of good faith both in France and in the Netherlands: in the course of time the application of equity tends to result in rules that take the place of equity and introduce a strictness that equity was meant to correct.[11] The suggestion is clear: this historical process can be reversed and the original meaning of good faith restored.

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7 See Meijers 1937, p. 281.

8 Among legal historians this was the generally accepted view about Roman law. See H.R. Hoetink, 'De beperkende werking van de goede trouw bij overeenkomsten', *Tijdschrift voor Rechtsgeschiedenis* 1928-8, pp. 417-438.

9 Meijers mentions fifteen decisions of the Dutch Supreme Court for the years between 1925 and 1936. See Meijers 1937, p. 281 n. 4.

10 Meijers 1937, pp. 282-283.

11 Meijers 1937, pp. 284-285. In 1918 Meijers had not given this historical explanation

All these deeper insights into the workings of law in history were only a preparation for dealing with what would seem to be the legal culture most resistant to the acceptance of good faith as a means to curtail the express terms of a contract: the English legal culture. Neither common law nor equity authorised an English judge to bring about a material change in a contractual obligation with a plea of good faith. Also in this case Meijers came with (historical) explanations: English law would have needed a stronger emphasis on legal security and *pacta sunt servanda* in order to counterbalance the freedom of judges to develop their own rules.[12] It will be clear that this excursion into the territory of comparative law had as yet not offered much scope for a renaissance of the original Roman-law interpretation of good faith. To increase the sense of urgency Meijers therefore referred to the actual economic and political situation in Europe, meanwhile keeping a secret weapon near at hand for the decisive turn of his argument.

When Meijers delivered his speech among his fellow members of the Royal Academy the effects of the economic crisis of the thirties (of the 20th century) were still badly felt. In France as in the Netherlands, and even in England, the legal community discussed the question whether a fundamental change of circumstances should have any impact on the obligations of a contract made in less barren times. It is not without significance for the general atmosphere in the Netherlands that two years earlier a colleague and friend of Meijers, the historian Johan Huizinga [1872-1945] had published a book entitled *In de schaduwen van morgen* (In the Shadow of Tomorrow), which had an enormous success, also abroad, and painted the future of European culture in dark colours, not so much because of the economic crisis and the threat of the totalitarian regimes of Germany, Italy and Soviet Russia as because of its own intellectual weaknesses.[13] I doubt whether Meijers agreed with Huizinga's rather old-mannish analysis. He would certainly have paid more attention to the social and economic aspects of the crisis. It does not matter: the feeling of being witness to a cultural crisis was widespread among the intellectual elite.[14]

12 Meijers 1937, p. 286.

13 The book appeared in 1935 in Dutch and was reprinted several times. Translations followed soon: German (1935), English, Spanish, Swedish (all 1936), Italian, Norwegian (both 1937), Hungarian, Czech (both 1938), French (1939).

14 Even the literary critic Menno ter Braak [1902-1940], who always had problems with Huizinga's noncommittal professorial attitude, wrote a favourable review although he was critical of Huizinga's use of the concept of 'culture'. See his *Verzameld werk.Vol. 5*, Amsterdam: Van Oorschot 1980, pp. 625-631. The erudite Amsterdam professor of Roman law Hoetink also had reserves of a more historical nature. See P.B.M. Blaas, *Henk Hoetink (1900-1963), een intellectuele biografie*, Hilversum: Verloren 2010, pp. 70-71. Recommended reading is the essay '*Kan de tijd tekens geven?*' by Hermans, in which Huizinga's fear of cultural decline is placed in a tradition of irrational fear of technological change. See W.F. Hermans, *Van Wittgenstein tot Weinreb. Het sadistische universum 2*, Amsterdam: De Bezige Bij 1970, pp. 86-109 (at 92-109).

This is not the place to elaborate on the details, but up to this moment Meijers had along the lines of classical rhetoric prepared his audience for the decisive argument that should overcome all doubts. His speech had reached the rhetorical moment of the *confirmatio*. It was time to place the secret weapon in position.

3 THE IMPLIED CONDITION

Legal cultures, Meijers argued, which do not allow much scope for good faith or equity usually have another concept to mitigate the extreme consequences of contractual obligations: the implied condition. There followed an impressive panorama beginning with the early reception of Roman law in the twelfth century, when the classical view on good faith was soon reduced to a dim existence whereas at the same time the implied condition began its unstoppable rise.[15] In the civilian tradition of legal science the concept *clausula rebus sic stantibus* and the maxim *cessante causa cessat effectus* began to spread their wings over areas of law they never had been intended for. The implied condition also moved up to the centre of the law of contracts and remained there for centuries as a companion of the *pacta sunt servanda* principle.[16]

It is not necessary to discuss Meijers's interesting remarks about the developments in France and England, their aim being evident: also in these countries there were and are possibilities to tackle the problem of *imprévision* by means of the concept of implied condition. These remarks had another purpose as well: to prepare his Dutch audience for a renewed, if possible decisive attack on the Supreme Court. Meijers gave several examples of the use of the implied condition by Dutch judges as a tool to adjust the binding force of an obligation, including a few decisions by the Supreme Court itself, in which it all but used the concept, and, against its own doctrine, admitted that strict adherence to contractual obligations would in unforeseeable and fundamentally changed circumstances lead to unfair consequences.[17] Meijers: why does the Supreme Court not say so in similar cases? This is, of course, a typically 'continental' question. An English judge would always find some reason why in another case he should decide differently. And Meijers knew this, but he had reached the rhetorical phase of the *refutatio*, which was not only intended for jurists belonging to the civilian tradition.

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15 Meijers 1937, pp. 287-289.

16 For a recent overview see A. Thier, Legal history, in: E.H. Hondius & H.C. Grigoleit (eds.), *Unexpected Circumstances in European Contract Law*, Cambridge: Cambridge University Press 2011, pp. 15-32. In the context of our subject it should be mentioned that the first author who rejected the *clausula* in its entirety was not a German but Cornelis van Bynkershoek [1673-1743], a member of the Supreme Court of Holland and Zeeland since 1704, and its president as of 1724. See already Meijers 1918, p. 29 note 11 and p. 31.

17 Meijers 1937, pp. 290-295.

If I may summarise what Meijers implicitly said to refute all possible objections: why all this fuss about good faith? Behind the 'mask' of the implied condition you will always find the same idea when it comes to its application to a specific case. Away with this artificial construct! Admittedly, the concept of implied condition has advantages in practice.[18] But a just and fair legal system requires a kind of justice that is not derived from the supposed will of the parties to a contract. As it was in good old Rome. In this *refutatio* we see the 'decent man' (fatsoenlijk mensch) appear for the first time. This is a person who does what he should do (or omit to do) according to objective standards of justice, regardless of his intentions, be they real or presumed. He is the ideal contracting party who knows that law is more than the subjective intentions of the parties.

It is not by accident that Meijers used the term 'decent man'. The essayist Menno ter Braak [1902-1940] had given currency to it – as *honnête homme* – in two of his books, in the latter of which he accepted 'fatsoenlijk mensch' as its Dutch equivalent. That book had appeared at the beginning of 1937.[19] I suppose in his speech Meijers wanted to show he was worried too about the events in Germany and other countries. In 1936 he had been reluctant to sign a declaration of Ter Braak and seven other Dutch intellectuals against the threat of National Socialism to society, culture and science.[20] I do not exclude that Meijers thought it wiser not to sign, as the signature of an assured victim of National Socialism might weaken the effect of the declaration. We will see this decent man reappear in a slightly different shape in the speech Meijers gave in 1950, *after* WW II.

The *peroratio* was brief and realistic: the implied condition in its various forms will not disappear soon because of its practical advantages, but legal science should not give in and continue to defend the good faith of Roman times.[21] The audience will have applauded politely but wholeheartedly. These were words of wisdom in a world full of war and the threat of war. Even Eggens [1891-1964], who did not share Meijers's approach to law, and who is reported to have said 'wat zou ik willen dat ik de hersens van Meijers had, want ik zou er nog mee kunnen denken ook' (I wish I had the brains of

18 Meijers writes that for judges the implied condition offers better possibilities to change the law without openly saying so. And parties will be more inclined to accept a decision based on their supposed own will than on an abstract kind of justice. See Meijers 1937, pp. 297-299.

19 The former book was *Politicus zonder partij* (Politician without a Party) of 1934. The latter was entitled *Van oude en nieuwe christenen* (Of Old and New Christians). The *honnête homme* is discussed on page 32 to 49 of the Rotterdam first edition of 1937. The translation 'fatsoenlijk mensch' can be found on page 48.

20 See Blaas 2010, pp. 72-74. Meijers, and some of his Leiden colleagues also, refused to sign another more successful protest later that year. To the disappointment of one of its initiators: Hoetink. See Blaas 2010, pp. 74-78.

21 Meijers 1937, p. 300.

Meijers, because I would also use them to think),[22] in 1958 spoke of a magisterial speech.[23] We cannot deny that Meijers did have foresight: neither he nor Eggens lived to see the Dutch Supreme Court switch over to the view he had defended so eloquently.

4 ROME, JULY 1950

In 1940 war did not pass over the Kingdom of the Netherlands, and as a Jew, Meijers was one of the marked victims of the German occupation. He lost his professorship at Leiden University and was deported with his family to a concentration camp. They survived and he returned, his spirit apparently unbroken. He resumed his position at the university but not for long, because in 1947 he received a commission from the Dutch government to prepare a new codification of private law, a long-time wish of his. It did not keep him from publishing and maintaining his contacts with foreign jurists. In the context of the latter Meijers returned to the subject of change of circumstances. In July 1950 he made a speech (in French) at the *Congrès international de droit privé (Unidroit)* in Rome about the binding force of contracts and their modification in modern law.[24]

It was briefer than the 1918 and 1937 speeches, and more practical.[25] After stating that the theory of *imprévision* and the doctrine of frustration are especially important in periods of economic instability, as the world had seen after the First World War, and that state intervention had become more common, also in contractual relations, Meijers immediately enumerated four solutions to the problem posed: 1. the implied condition 2. the principle of good faith 3. statutory rules for specific cases 4. statutory rules of a more general character. Each of these solutions was discussed briefly and illustrated with examples from history and from various European countries, as only a scholar of the stature of Meijers could do. Although there were some examples from

22 The source of this quote is G.E. Langemeijer, at the time Eggens's colleague in the Dutch Supreme Court. See J.M. van Dunné, P. Boeles & A.J. Heerma van Voss, *Acht civilisten in burger*, Zwolle: Tjeenk Willink 1977, p. 135.

23 See J. Eggens, *Over het fingeren van rechtsficties* (speech Amsterdam 24 februari 1958), Haarlem: Erven F. Bohn 1958; reissued in *Verzamelde privaatrechtelijke opstellen. Deel 2,* Alphen a/d Rijn: Samson 1959, p. 314-328; reprinted in H.C.F. Schoordijk & J.M. Smits (eds.), *Eggens bundel*, Overveen: Belvédère 1998, pp. 440-454 (on p. 453). Eggens speaks of an organic whole ('organisch geheel'). He does not seem to have noticed the rhetorical structure of this organic whole.

24 The title was: 'La force obligatoire des contrats et ses modifications dans les droits modernes'. The easiest way to consult it is in R. Feenstra, H.F.W.D. Fischer, M.E. Blok & F.B.J. Wubbe (eds.), *Bibliographie der geschriften van Prof. mr. E.M. Meijers*, Leiden: Universitaire Pers Leiden 1957, pp. 297-309.

25 It contains elements of both previous speeches, and not only of the 1918 speech, as the editor's note to the latter would seem to suggest. See Meijers 1918, p. 27 n. *.

Dutch practice and doctrine, and from England and France, several other countries were mentioned as well: Germany, Switzerland, Belgium, Hungary, Poland, Italy, Greece, and Egypt (its brand-new decidedly French Code civil of 1949). Everybody who is familiar with Meijers's drafts for the new Dutch private law code will recognise his comparative method.[26]

This method not only involved a list of countries and their particular solutions, it was immediately followed by a list of the common elements in their doctrine and statutory law. Meijers noted five common elements for a plea of *imprévision*: 1. unforeseeability 2. exceptionality 3. not due to the debtor's fault 4. beyond his normal sphere of risk 5. excessively onerous for the debtor to comply with.[27] A few remarks were added about Swiss, French, English, and German case law insofar as each of these countries had adopted concepts of a (slightly) different nature.

After some remarks on the various possible effects of *imprévision* on a contract, Meijers came to the quintessential question: which of these solutions is to be preferred? Meijers: a solution that suits all (European) countries mentioned cannot be given. A sobering answer. Probably also a realistic one if you consider the political situation in 1950. The European countries (except for Switzerland) were impoverished and were only beginning to regain their economic strength. In spite of a serious weakening of some colonial empires (India and Pakistan 1947, Indonesia 1949), most European countries still thought of themselves as masters of the world. The first armed conflict of the Cold War had only recently broken out (Korean War 25th June 1950). Who would like to be reminded of the hardships of war and economic crisis, and think about their possible effect on contractual obligations? Meijers did not say so, but his stress on the relation between economic (in)stability and the doctrine of *imprévision* must have made him realise that the moment for a unification of European law, the theme of the conference in Rome, was not ideal. So he came to what in its essence was a moral appeal.

He returned to his ideal of the Roman *bonae fidei* contracts in their original shape, as he had done in 1918 and 1937. Countries that honoured this concept should perhaps make some additional statutory law to specify the conditions to be met for a plea of *imprévision*. Thus the legislator might help the judiciary to get a more precise idea of the situations that were envisaged. But please, not too much: the legislator should not encroach upon the principle of *pacta sunt servanda*, as it is understood by decent people (*honnêtes gens*), even in unforeseen circumstances.[28] These decent people had also appeared in Meijers's 1937 speech, in that case, however, to argue that a decent man is

26 On this method see in particular V.J.A. Sütö, *Nieuw vermogensrecht en rechtsvergelijking – Reconstructie van een wetgevingsproces (1947-1961)* (thesis Leiden), Den Haag: Boom Juridische uitgevers 2004.

27 Meijers 1950, p. 307.

28 Meijers 1950, pp. 308-309.

someone who acts according to objective standards of justice, also if the circumstances have dramatically changed. I use the word 'however', because I feel there is a shift of emphasis in Meijers's view on *imprévision* probably connected with his activities as a legislator and perhaps his experiences in wartime and thereafter.[29]

This time the learned audience will also have applauded the masterly analysis and the very cautious recommendations. It should be remarked that this audience consisted for the larger part of jurists from civil-law countries.[30] The only British speaker gave a paper on the trust in English law. The United States were represented by Hessel E. Yntema, who spoke about the bill of exchange.[31] It need not surprise us that less attention was paid to the Dutch situation than in 1937. Still, the chances for a change in the direction Meijers aimed at were certainly better there. He was working hard on his draft for the new codification, and almost two years later the Dutch Minister of Justice, on behalf of Meijers, sent a list of questions ('Vraagpunten') to the Council of Ministers. One of the questions was: should there be a provision (in the new code) for the case in which unforeseen circumstances make the performance of a contract extremely onerous for one of the parties? An answer was given by a standing committee of the Dutch parliament. It said that in such a case the debtor should be able to ask the judge to modify or set aside the contract. The Lower House of Parliament had a meeting about it on July 2nd of the year 1953, in which Meijers replied to the remarks of some of its members and in which the answer of the committee was accepted without a formal vote.[32] It was the last public statement Meijers made about *imprévision*.

5 THE FINAL RESULT

Meijers continued with his work on the new codification until his death in 1954. He left drafts in various stages of completion. The draft for Book 6 (law of obligations and contracts, general part), in which the provision on *imprévision* was to have its place, was all but finished. The work on this book was carried

29 After the war Meijers fought a bitter battle against the bankers and stockbrokers who had profited from the confiscation of Jewish property by the German authorities. These people were in every respect the opposite to *honnêtes gens*. In an article that Meijers wrote about a proposal for compensation of the victims or their surviving relatives his restrained anger is palpable when he speaks of 'deze personen' (these persons) and 'deze heren' (these <ungentle> men). See E.M. Meijers, *Het voorstel van L.V.V.S. aan haar schuldeisers*, Zwolle: Tjeenk Willink 1950, p. 11.

30 This can be gathered from the report published in the *Revue internationale de droit comparé*, Octobre-décembre 1950 (Vol. 2 no. 4), pp. 703-707 (available on the Internet on the site of *Persée.fr*)

31 Yntema was of Dutch (better: Frisian) descent and knew Meijers well, especially because of their shared interest in the history of private international law.

32 *Handelingen II* 1952/53, pp. 2766-2772.

on by three persons each of whom had been allotted a part of it. This made a revision by a fourth person necessary. For our purpose the exact details of the legislative process are not important. Only this: what in 1961 was presented as Meijers's draft reveals the spirit of its original author. The relevant provision was (in translation):[33]

> 1. Upon the request of one of the parties, the judge may modify a contract, or set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the cocontracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form. The modification or the setting aside of the contract may be given retroactive force.
> 2. A request as referred to in par. 1 is refused to the extent that the circumstances invoked by the plaintiff are accountable to him according to the nature of the contract or common opinion.
> 3. For the purposes of this article, a person to whom a contractual right or obligation has been transferred, is assimilated to a contracting party.

In the commentary on this provision the hand of the master was still visible as well.[34] We find references to the codes of Egypt, Greece, Italy, and Poland, to which Meijers had referred in his 1950 speech in Rome. The discussions that followed about this draft and its commentary need not keep us.[35] What counts is the final result. This was achieved in 1992 when the bulk of the newly codified law of property was put into force. The relevant provision is article 258 of Book 6. It states:[36]

> 1. Upon the demand of one of the parties, the judge may modify the effects of a contract, or he may set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the cocontracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form. The modification or the setting aside of the contract may be given retroactive force.
> 2. The modification or the setting aside of the contract is not pronounced to the extent that the person invoking the circumstances should be accountable for them according to the nature of the contract or common opinion.
> 3. For the purposes of this article, a person to whom a contractual right or obligation has been transferred, is assimilated to a contracting party.

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33 For this translation I owe much to the translation mentioned in note 36.

34 For both the draft and the commentary I used M.M. Olthof & J.W. du Pon, *Parlementaire geschiedenis van het nieuwe Burgerlijk Wetboek, Boeken 3,5 en 6*, Deventer: Kluwer 1982, pp. 771-774 (Artikel 6.5.3.11).

35 For a detailed discussion see J.M. van Dunné, 'De goede trouw in het Gewijzigd Ontwerp Boek 6 Nieuw BW', *WPNR* 1976 (5371), pp. 747-755; reissued in J.W.M.K. Meijer et al. (eds.), *Normatief Uitgelegd, Verzamelde privaatrechtelijke opstellen van J.M. van Dunné*, Deventer: Kluwer 2006, pp. 849-863.

36 Translation of P.P.C. Haanappel & E. Mackaay, *Netherlands Civil Code, Book 6*. It can easily be consulted on the Internet.

As anybody can see, the differences between the draft and the final version are minimal and a matter of wording. It can be said without reservations that eventually Meijers had his way in the sense that the Dutch Civil Code contains a provision about *imprévision* based on the principle of good faith (in modern terminology 'reasonableness and equity'), sufficiently specified to give a judge the necessary guidelines for a balanced judgment.

In Dutch case law his victory came earlier. There is no unanimity about this. According to some authors it happened in 1967 when the Dutch Supreme Court decided that under certain circumstances an appeal to an exculpatory clause can be excluded.[37] This meant that an express provision in a contract can be set aside. In 1976, in a similar case, the Dutch Supreme Court ruled that under such circumstances an appeal to an exculpatory clause is against the requirements of good faith.[38] These two cases were not downright cases of *imprévision*. The first decision of the Dutch Supreme Court where a fundamental change of circumstances was the reason to set aside a contract was taken in 1977. It concerned a physician who had an unlimited contract with the Dutch National Health Service. The physician had committed fraud with his account bills and the Health Service wanted to terminate the contract, but the contract contained no clause about this. The Dutch Supreme Court ruled that under these unforeseen and very serious circumstances, according to criteria of reasonableness and equity, the physician should not expect the contract to be maintained in its unlimited form.[39] The attentive reader will recognise the phrasing of the 1961 draft.

By 1984 there was no longer any doubt about the existence in Dutch law of a plea of *imprévision* based on good faith.[40] Meijers had finally beaten the resistance against his view on *imprévision*. That the judges declared that unforeseen circumstances should not be assumed too easily was not something he had not acknowledged.

6 What if Meijers had lived today

At the moment of Meijers's death this was all beyond the horizon. Still, it would be interesting to know what a great jurist like Meijers would have to say about today's situation.

37 Dutch Supreme Court 19 May 1967, *NJ* 1967, 261 (*Saladin/HBU*).
38 Dutch Supreme Court 20 February 1976, *NJ* 1976, 486 (*Pseudovogelpest*).
39 Dutch Supreme Court 16 December 1977, *NJ* 1978, 136 (*Ziekenfonds*).
40 Dutch Supreme Court 27 April 1984, *NJ* 1984, 679 (*Nationale Volksbank – Sipke Helder*).

WARNING: THIS SECTION CONTAINS FICTIONAL MATERIAL

As I do not possess a time machine to go back to him, the only way to know this is to let him embark on a time machine and come to us. First of all, a preliminary question has to be asked: is the European world we live in fundamentally different from the Europe of 1950? Sure, there is a European Union now, and there is European legislation in some areas of private law. But a general provision on the subject of *imprévision* only exists in the form of drafts, usually called principles. Europe still is a loosely organised set of countries, and the essential prerequisite for a unification of the law, a political union, is lacking as ever before. What keeps them together is economic profit and wealth. And economic profit and wealth can be subject to forces beyond the control of even the largest countries. Here we touch on Meijers's deeper view on *imprévision*: it is connected to economic (in)stability and to the possibilities of state intervention. We would have to tell him about the financial crisis of the autumn of 2008, and about its effects on the European countries. He would be bitterly reminded of the war to hear that those who profited from dubious financial constructions, and were the main cause of the crisis, in Europe as a rule were saved from bankruptcy by the taxpayers, who, as a rule, had seen little money coming to the state treasury when fortunes were made before the crisis broke out. The taxpayers had to be grateful that their savings had not disappeared into the black holes of banks going bankrupt. The 1929 crash has had worse consequences, indeed, but new threats to economic stability have emerged: European countries that do not obey the rules that are necessary to keep up a common currency. Again the taxpayer sees that public funds are spent on institutions that are supposed to protect his interests, this time to save disobedient countries and indirectly the banks that have bought their government bonds. No debt reductions as yet, only postponement of payment: the *pacta sunt servanda* principle saved! To save countries that did not keep to it.

What would Meijers say to this, having had some time to collect the necessary information, which did not take him long? He produced a small checklist containing the following points:

1. *pacta sunt servanda* is the rule, a plea of *imprévision* the exception
2. a plea of *imprévision* cannot be made by a party at whose risk it is
3. a statutory provision should be based on objective criteria
4. a statutory provision should contain some specifications as to its application

Then he continued. 'If there are still *honnêtes gens* these days, they should know that, as a rule, they should keep their promises. Only in exceptional cases may a judge decide otherwise on the basis of objective criteria. The Romans did so too. Talking about the Romans: recently there has been a discussion in South Africa, a country where civil law and common law go side by side, about the

exceptio doli generalis as a remedy in cases of *imprévision*.[41] In Roman times this *exceptio* was available to a defendant who claimed that his plaintiff was not acting in good faith by bringing an action against him under the given circumstances. In itself this remedy would be fitting to some cases of *imprévision*, and I do not object to the modern use of old concepts. This *exceptio*, however, has the smell of strict law about it. It was superfluous in cases where a *bonae fidei* contract was involved, and we had better not revive *that* part of the Roman law heritage, as all our contracts are considered to be *bonae fidei*.'

Meijers had again shown his mastery of the subject and was about to go back into his time machine ('My time has run out. I have to leave.'). Somebody said: 'One last question please: what do you think of the article about *imprévision* in the DCFR?' What exactly happened I do not know to this day. All I can remember is that he turned away his face from the people listening to him, and carefully entered the vehicle. The last words I am sure I have heard him say before its door closed noiselessly were: 'It is ….'. About the following word there was and is no agreement. Some imagined having heard 'futurism'. Others thought it had been something like 'bull …'. Personally, I do not believe that Meijers would have put it so strongly.

7 EPILOGUE

As I do not believe in what-if history, we have to return from an imagined present to the actual present. In fact they do not differ much. If we take a look at the juristic analysis of the *imprévision* problem by an authority like Treitel, we see the same elements as those mentioned by Meijers.[42] There is something perennial about the relationship between the principle of *pacta sunt servanda* and the concept of the *clausula rebus sic stantibus*, at least since the sixteenth century. Today's solutions go back to that period. And every country cherishes its own of the limited number of solutions. There are no new solutions. The *exceptio doli generalis* mentioned in the preceding section is another example of these voices from the past. Every survey of the doctrine and practice of the various European countries will show remarkable similarities to the one Meijers gave in his 1950 speech. And always it will be said that the various solutions

41 This is not (science) fiction. The discussion has been rekindled through a note in a decision of the Constitutional Court (Crown Restaurant v Gold Reef City Theme Park, 6 March 2007). The Supreme Court of Appeal, which thought it had buried the *exceptio doli generalis* as a 'superfluous, defunct anachronism' (See Bank of Lisbon and South Africa v Ornelas; 30 March 1988), returned to the subject last year (Bredenkamp v Standard Bank; 27 March 2010). Again this court tried to silence the minority judgment in the 1988 case. It is doubtful whether this will be the end of the discussion. Cf. R. Zimmermann, *The Law of Obligations*, Cape Town/Deventer: Juta/Kluwer 1992, p. 677. All the South African cases mentioned can be consulted on the Internet.

42 See G.H. Treitel, *The Law of Contract*, London: Sweet & Maxwell 1995, pp. 832-837.

are *essentially* the same and appear to be growing nearer to each other. This is not true. Legal traditions are very tough and hard to change, as Meijers's own experience has shown. Only political power can effect a change if there is not some intrinsic necessity that compels people to abandon their cherished and familiar ways.

At this moment the market value of Europe, also in terms of political power, is not very high. This may change, as everybody knows. Especially crises are recommended as a means to promote cooperation. The financial crisis of 2008 is bearing fruit in the sense that large banks are now forced to keep larger reserves. This certainly is important, as some other measures are about supervision of the credit system. But this is public law born out of the necessity to prevent the downfall of banks that are essential to the credit system of a country. In private law it works differently, more slowly, especially if it concerns 'old law'. Meijers has been able to influence Dutch case law with his draft on *imprévision*, and, of course, when it had gained force of law. It was the chance of a lifetime. Such chances are very rare. I do not expect it to be repeated soon on a European level. Where Meijers had to fight on one front, their number are manifold now. Should it occur nonetheless, it would be a typical case of *imprévision*.