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2 | The role of the court and of the parties in adapting a contract to unforeseen circumstances

Jaap Hijma [■]

1 INTRODUCTION

In the course of time the position of the judiciary vis-à-vis the legislator has gone through considerable changes. Well over two hundred years ago the court was depicted as the mouth of the written law (*la bouche de la loi*).¹ In modern civil law its role has become more and more important. Nowadays the judiciary can rather be portrayed as a partner to the legislator, each of them playing a different role: the legislator provides the framework and the general rules, the court ensures a just and proper application in the concrete cases which are brought before it.

In the new Dutch Civil Code (DCC), enacted nearly twenty years ago,² this partnership is clearly visible. In various contexts the legislator equips the court with the power to decide whether a certain juridical consequence shall or shall not occur ('The court may [...]'). Such a power to *decide* is stronger than the standard power to *assess*, which a court has as a consequence of its task to judge. The latter 'power', present throughout the judgment process, embodies no more than a latitude. Especially with so-called open criteria, however, this latitude can be substantial.

This essay serves to analyse (the power and) the role of the court,³ in connection with that of the parties, when a change of circumstances occurs that undermines an existing contract.⁴

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1 Ch. de Montesquieu, *De l'esprit des lois*, Paris 1748.

2 The central Books 3, 5 and 6 of the *Burgerlijk Wetboek* were enacted 1 January 1992.

3 The essay comprises a continuation of some of the thoughts developed (in Dutch) in Jac. Hijma, *Het constitutieve wijzigingsvoornis*, inaugural lecture Leiden, Deventer: Kluwer 1989; Jac. Hijma, *Imprévision*, in: M.E. Franke c.s. (eds.), *Europees contractenrecht*, BW-krant Jaarboek, Deventer: Kluwer 1995, pp. 57-69.

4 The consequences of unforeseen circumstances are the subject of some interesting comparative law studies published recently: E. Hondius & H.C. Grigoleit (eds.), *Unexpected Circumstances in European Contract Law*, Cambridge: Cambridge University Press 2011; R. Momberg Uribe, *The effect of a change of circumstances on the binding force of contracts*, diss. Utrecht, Intersentia 2011.

2 REASONABLENESS AND FAIRNESS; UNFORESEEN CIRCUMSTANCES

The judicial ‘power’ to assess reaches its zenith in article 6:248 DCC, which establishes a dual effect of *reasonableness and fairness* (i.e. the unwritten law between a debtor and a creditor). In the first place reasonableness and fairness, like the law or usages, bring a useful tool to fill the gaps the parties left in their contract. In the second place reasonableness and fairness are endowed with a derogating power. The overall character of the latter demonstrates the paramount character of reasonableness and fairness under the Dutch law of obligations.⁵

*Article 6:248 DCC*⁶

1. A contract not only has the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, apply by virtue of law, usage or the requirements of reasonableness and fairness.
2. A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.

Reasonableness and fairness produce their effects *ipso iure*, without the intervention of a court.

Various Civil Code provisions contain elaborations of this general concept of reasonableness and fairness. Among them is article 6:258 DCC, governing the occurrence of unforeseen circumstances.⁷

Article 6:258 DCC

1. Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.
2. The modification or the setting aside shall not be pronounced to the extent that it is common ground that the person invoking the circumstances should be accountable for them or if it follows from the nature of the contract.
3. For the purposes of this article, a party to whom a contractual right or obligation has been transmitted, is treated as a contracting party.

⁵ Likewise art. 6:2 DCC regarding all (so also non-contractual) obligations.

⁶ When citing Dutch Civil Code provisions I adopt the English translation by H. Warendorf, R. Thomas and I. Curry-Sumner, *The Civil Code of the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2009.

⁷ A concise commentary on this Dutch article is provided by W. Wiggers, in: Hondius & Grigoleit 2011, pp. 70-76. For a comparison with article 6:111 PECL see D. Busch, in: Busch c.s. (eds.), *The Principles of European Contract Law and Dutch Law*, Nijmegen & The Hague/London/New York: Ars Aequi Libri & Kluwer Law International 2002, p. 285-289. In the Dutch language see inter alia E. Baan & W.L. Valk, in: E.H. Hondius & R.J.Q. Klomp (eds.), *Verbindtenissenrecht*, loose-leaf, Deventer: Kluwer, Art. 258.

At least two aspects catch the eye. Firstly that the occurrence of unforeseen circumstances is governed by the standards of reasonableness and fairness, mentioned already in article 6:248 DCC. Secondly that with regard to unforeseen circumstances reasonableness and fairness do not produce their effect *ipso iure*: it is the court itself which, by means of its decision, modifies the effects of the contract or sets the contract aside.

3 RATIO OF COURT INTERVENTION

Why did the Dutch legislator devote a separate provision to the appearance of unforeseen circumstances, instead of leaving the subject simply to the general regime of reasonableness and fairness? The question arises the more because the Minister of Justice of that time observed that it would be possible to reach a comparable result by means of the derogating effect of reasonableness and fairness, if necessary combined with their supplementary effect.⁸ Indeed it is plausible that an interplay of derogation and supplementation within the frame of article 6:248 DCC can lead to any thinkable result.

As the parliamentary history shows, the predominant reason for adding article 6:258 DCC was that for determining the consequences of unforeseen circumstances the legislator prefers a constitutive court decision to the *ipso iure* effect of article 6:248 DCC. The difference is considered appropriate because changed circumstances lead to a definitive new arrangement of the contractual relations. This implies a deep intervention; moreover, many cases will be rather complex so that various solutions are possible.⁹ So it is for reasons of legal certainty that the legislator here prefers a constitutive court verdict to a declarative one.

4 DISCRETIONARY POWER?

Article 6:258 DCC requires 'unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form'. This formula not only makes up a threshold for a court intervention, but simultaneously contains the standards which govern such an intervention. As a result the powers of the court are limited.

In the first place, both the Dutch legislator and the Dutch Supreme Court emphasize that the judiciary shall adopt a reserved attitude towards the alteration or termination of contracts. Reasonableness and fairness demand

⁸ *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer: Kluwer 1981, p. 973.

⁹ *Ibid.*, p. 974.

first and foremost that the parties are bound according to the contract they concluded; therefore the requirements of article 6:258 DCC will only (very) rarely be met.¹⁰ In the second place, if according to reasonableness and fairness a party may not expect the contract to be maintained unmodified, the court will be *obliged* to modify or terminate the contract.¹¹ The expression ‘the court may’ does not imply a real discretionary power, in the sense that courts would be free to dismiss the demand wilfully or to push forward their personal views. It actually indicates the possibility of an adaptation or setting aside in the specific way of a court decision. In this view the emphasis is not on the word ‘may’, but on ‘the court’: *the court* may adapt the contract or set it aside, by means of a constitutive verdict.

5 CONTRACT MODIFICATION; AN ILLUSTRATION

In this essay I will concentrate on the option of a *modification* of (the effects of) the contract. A case study may illustrate that in view of changed circumstances this can be an attractive solution.¹²

KBB, a chain store business, concludes a development contract with the municipality of Utrecht: Utrecht will (in due time) provide a site ready for building, KBB will establish an ambitious Bijenkorf store there. The preparation of the building site takes a number of years. After completion KBB remains inert. When the municipality demands the building of the store, KBB argues that in view of the dramatically changed circumstances it cannot demand performance. In the years that passed the population of Utrecht grew less than expected, the purchasing power generally declined, the public with greater purchasing power left the city, and a number of competing shopping malls were established. In the present circumstances the fulfilment of the large-scale plan will prove highly loss-making for KBB. The municipality takes the view that such difficulties belong to the normal risks of entrepreneurship, adding – hardly delicately – that this holds true even if it would result in the downfall of the entrepreneur.

The District Court rules that KBB is bound by the contract (*pacta sunt servanda*). The Court of Appeal, however, holds the opinion that the city, according to standards of reasonableness and fairness, may not demand the contract to be fulfilled unmodified. The Court holds that the fact that the city cannot demand performance of the original contract does not imply that it can demand nothing at all. The contract obliges KBB to investigate other possib-

10 *Ibid.*, p. 969; Dutch Supreme Court 20 February 1998, NJ 1998, 493 (Briljant Schreuders/ ABP).

11 Provided one of the parties so demands; see *infra*, nr. 6.

12 The case was decided by the Amsterdam Court of Appeal (Hof Amsterdam 6 May 1982, nr. 314/81). Its decision was not published as such, but is cited extensively by P. Abas, *Rebus sic stantibus*, Deventer: Kluwer 1989, pp. 202-205.

ilities and varieties of performance, to serve the contract in a new way that is meaningful for both parties. Eventually the Court directs an appearance of the parties, to research in what way KBB can still be held to deliver a performance.

A few years afterwards a more modest Utrecht Bijenkorf store is festively opened.¹³

6 'UPON THE DEMAND OF ONE OF THE PARTIES'

The Bijenkorf case arose when the former Dutch Civil Code, enacted in 1838,¹⁴ was still in force. An adaptation of the contract by the court was not a valid option then. Under the operation of the present Code, article 6:258 DCC enables the court to adapt the contract itself. According to this article the court is only entitled to do so 'upon the demand of one of the parties'. So either KBB, or the city of Utrecht is needed to activate the judicial power. Such a party demand can take various forms, both formally and materially. As far as the contents are concerned, it can range from very abstract on the one hand (e.g. 'such an adaptation of the obligations as the court will seem fit') to very concrete on the other hand (e.g. 'a price reduction of € 1000').

Concrete demands

Let us start with the more concrete demands. Suppose that, in the above-mentioned case, KBB agreed with Utrecht to establish a three-storey Bijenkorf (a luxury store). Circumstances deteriorate seriously. Utrecht requires performance of the contract as it is, but KBB demands (a termination or) an adaptation by the court, thus that KBB will be obliged to establish the three storey-store not of the Bijenkorf formula but instead of the less glamorous HEMA formula, which aims at a lower market segment and consequently holds much better prospects. The court ponders on the various solutions. Eventually it reaches the conclusion that in this case the establishment of a smaller, two-storey, Bijenkorf store would be the adequate result. The court attempts to lead the parties in this direction, but they stick to their views. So three opinions compete: that of the municipality (a three-storey Bijenkorf), that of KBB (a three storey HEMA) and that of the judging court (a two-storey Bijenkorf).¹⁵ From here on, different ways of reasoning can be followed.

Some will argue that every demand as meant in article 6:258 DCC puts the matter completely into the hands of the court, thus that the court – once it is activated by the party demand – can freely pursue its own point of view.

13 *NRC Handelsblad* 26 November 1984 (mentioned by Abas 1989, p. 205).

14 This former Dutch Civil Code was largely derived from the French Code civil (1804).

15 For reasons of lucidity these alternatives are rather stylized.

In my opinion this argument pays too little tribute to the fact that the phrase ‘upon the demand of one of the parties’ principally serves to make the court dependent on the party views which are presented to it. The party demand does not only trigger the court decision, but simultaneously confines it. To that extent the court is obliged to turn to the solutions mentioned by the parties.¹⁶ But how shall it treat these?

The first option is, that the court will reject any demand which does not (sufficiently) indicate the outcome it considers best. Thus the risk rests with the party refusing to fulfil the contract, *in casu* KBB. If this party fails to suggest the ‘right’ solution (i.e. the solution the court thinks fit), its demand for adaptation of the contract will be denied; as a result it will have to perform the contract as promised.

The second option is, that from the various solutions which the parties bring up the court will choose the one that, in its opinion, comes *closest* to what the parties are entitled to expect from one another according to reasonableness and fairness. If the establishment of a HEMA store qualifies as *more* than an unmodified contract fulfilment, the court will choose that relatively best solution, even though it is convinced that a third solution (a smaller Bijenkorf store), which is not brought up by one of the parties, would be preferable. The raising of a better alternative by party A thus shifts the risk to party B, in the sense that A’s suggestion will prevail unless B provides the court with an even better proposition.

I recommend the second approach. Principally a second-best result is to be preferred to the (possibly) worst outcome. Moreover: in the first system one party can sit back and hope the other party proposes a ‘wrong’ solution that is rejected by the court, as a result of which the other party stays bound to fulfil the contract as it is. In the second system the party who is confronted by a better demand, is urged to show its cards and produce an even more suitable alternative.

General demands

When a party brings up an adaptation request of a more general nature, the situation will not be as delicate. Suppose KBB demands its obligations to be reduced to the establishment of ‘a considerably smaller department store’, or simply demands a reduction of its obligations, leaving the elaboration to the sound insight of the court. This kind of demand provides the court with every opportunity to reach the result that, in its opinion, is dictated primarily by reasonableness and fairness (i.e. the smaller Bijenkorf store). If a party feels

16 A similar opinion is given by M. Mekki & M. Klopfer-Pelèse, *Hardship and Modification (or ‘Revision’) of the Contract*, in: A.S. Hartkamp c.s. (eds.), *Towards a European Civil Code*, Alphen aan den Rijn & Nijmegen: Kluwer Law International & Ars Aequi Libri 2011, p. 679.

insecure about the outcome it prefers, it will be wise to formulate a subsidiary demand in general terms.

7 COMPLEMENTARY ROLE OF ARTICLE 6:248 DCC

Does the general article 6:248 DCC (reasonableness and fairness)¹⁷ play a role in cases of unforeseen circumstances? The fact that article 6:258 DCC was created to put these matters into the hands of the court¹⁸ points to a negative answer. Where a more specific article exists, the general article will withdraw (*lex specialis derogat legi generali*). Moreover, if reasonableness and fairness still have their effect *ipso iure*, the constitutive judicial verdict referred to in article 6:258 DCC becomes an oddity. The conclusion that the court on the one hand is dependent on a party demand (art. 6:258 DCC), but on the other hand can simply observe modifications by reasonableness and fairness (art. 6:248 DCC), is contradictory.

These observations do not implicate that there is no place at all for article 6:248 DCC in cases of changed circumstances. Let us return to the Bijenkorf case. Unforeseen circumstances have occurred implying that the city may not expect the contract to be maintained unmodified. But what is the city entitled to expect then? As discussed above, various results are possible; it will not be easy to determine which of these is 'the perfect option'. The court considers a reduced Bijenkorf store the best solution. If reasonableness and fairness automatically modified the contract in that way, KBB would not realize that it is obliged to establish that smaller store, and the city would not realize that it can demand that (and only that) performance. Such an 'invisible' outcome is neither attractive nor reasonable and fair.

A different approach seems preferable: what the parties are entitled to expect from one another is that they strive, in consultation, for a mutually acceptable solution. The parties may expect that the contract is put on the table to exchange the old certainty for a new certainty. The party seeking performance of the original contract has the advantage. The law will honour its claim until the *other* party – needing adaptation – has taken a proper initiative. In view of articles 6:248 and 6:258 DCC the pursuit of performance must be *unacceptable*. This severe demand will only be met if the other party does not simply refuse performance but takes a constructive attitude.¹⁹ If the other party shows insufficient initiative, the first party is entitled to pursue the contract in unmodified form. *This* effect of article 6:248 DCC is not blocked by article 6:258 DCC. On the contrary, interpreted like this, the articles are complementary and constitute a coherent system.

17 Cited *supra*, nr. 2.

18 See *supra*, nr. 3.

19 With the exception of cases in which a termination of the contract is the obvious solution.

In view of these considerations article 6:258 DCC does not, as a *lex specialis*, push article 6:248 (2) DCC aside. It is no *lex specialis*, but rather a *lex suppleta*, indicating that – next to the parties themselves – the court too has the power to modify the contract or to set the contract aside. Such a dual system, consisting of an extrajudicial and a judicial component, is not uncommon under Dutch law.²⁰

8 OBLIGATIONS AND OBLIEGENHEITEN; PRINCIPLES

In the system depicted the duties of both parties to reconsider the contract do not have the character of real obligations. They are duties of a lower grade, usually labelled *Obliegenheiten*: if a party does not comply, this does not constitute a failure and the party will not be liable because of nonperformance. The sanction is more subtle: reasonableness and fairness prevent the (first) party from invoking the unforeseen circumstances so that it stays obliged to perform the contract as it is, respectively reasonableness and fairness prevent the (second) party from invoking the original contract so that it cannot demand its fulfilment.

Some other legal systems establish real obligations to (re)negotiate when unforeseen circumstances occur. A prominent example lies in the Principles of European Contract Law (PECL).

Article 6:111 PECL

Change of circumstances

[...]. If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or ending it [...]. If the parties fail to reach agreement within a reasonable period, the court may: [...] award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

The recently published Draft Common Frame of Reference (DCFR) shows a more restrained approach.

Article III.-1:110 DCFR

Variation or termination by court on a change of circumstances

[...] Paragraph (2) applies only if: [...] the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

20 Cf. art. 3:49 DCC (annulment), art. 3:54 DCC (modification in case of undue influence), art. 6:230 DCC (modification in case of mistake) and art. 6:267 DCC (setting aside because of nonperformance).

The accompanying commentary mentions that the solution chosen in the PECL is criticized as ‘undesirably complicated and heavy’. The DCFR takes account of these criticisms by not imposing an obligation to renegotiate on the parties, but making it a requirement for a remedy that the debtor attempted to achieve a proper adjustment of the contract. ‘There is no question of anyone being forced to negotiate or being held liable in damages for failing to negotiate’, the commentary stresses.²¹

The authors of the DCFR also refer to the UNIDROIT Principles of International Commercial Contracts (PICC), which in their opinion ‘adopt a similar basic approach but use a slightly different drafting technique’.²² This estimation seems questionable. The PICC-provision reads:

Article 6.2.3 PICC

Effects of hardship

In case of hardship the disadvantaged party is entitled to request renegotiations. [...].

The phrase ‘entitled to request’ suggests an obligation, which can give rise to claims for performance and damages because of nonperformance.²³ In this interpretation (this part of) the PICC regime is closer to that of the PECL than to that of the DCFR.

It is interesting to learn that the youngest principle-like project, the Feasibility Study of the Expert Group on European Contract Law, sticks to the existence of obligations.²⁴

Article 92 Feasibility Study

Change of circumstances

[...] If, however, performance becomes excessively onerous because of an exceptional change of circumstances [...], the parties have a duty to enter into negotiations in accordance with good faith and fair dealing with a view to adapting or terminating the contract. Subject to [...], the court may award damages for the loss suffered

21 Chr. von Bar & E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Munich: Sellier 2009, Volume I, Art. III.-1:110, Comments, C.

22 Von Bar & Clive 2009, *ibid.*

23 E. McKendrick, in: S. Vogenauer & J. Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford: Oxford University Press 2009, Art. 6.2.3, sub 1, notes that there is no express obligation imposed, but adds that it must be borne in mind that the PICC contain a general principle of good faith (art. 1.7) and that the parties are subject to a duty to co-operate (art. 5.1.3). Cf. UNIDROIT *Principles of International Commercial Contracts*, Rome: UNIDROIT 2010, Art. 6.2.3, Comments, 5. See also *ibid.*, Comments, 2, mentioning the disadvantaged party’s ‘right to request renegotiations’.

24 Commission Expert Group on European Contract Law, *Feasibility Study for a future instrument in European Contract Law*, 3 May 2011, published on the Internet: http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf (Annex IV).

through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

However, the Expert Group is not sure of the suggested system. Article 92 is one of seven issues on which it seeks the advice of ‘all interested parties’:²⁵

‘Article 92 foresees an exceptional possibility to alter a contract due to change of circumstances. [...]. Do you think that the procedure which leads to the alteration of a contract is appropriate?’²⁶

9 REAL OBLIGATIONS TO NEGOTIATE?

In my opinion the creation of *obligations* to renegotiate is not necessary and may therefore, in the words of the DCFR commentary, be labelled ‘undesirably complicated and heavy’. What such obligations add to the more reserved model of *Obliegenheiten* is the possibility for the other party to demand performance (negotiations in good faith) or to claim damages because of non-performance (frustration of negotiations). Neither of these options is really useful. We should bear in mind that the parties concluded a contract which is still on the table. The sanction that a party who refuses to negotiate ‘only’ forfeits the opportunity to refuse performance (debtor) respectively forfeits its right to demand performance (creditor), has the fundamental advantage that it focuses on the heart of the matter: the contract itself. Renegotiation issues have a derived character, which is reflected accurately and attractively by the technique of *Obliegenheiten*.

The creation of obligations is not necessary to protect the parties from damage caused by unwillingness. This again follows from the fact that the heart of the matter is the contract itself. If a party frustrates desirable renegotiations, the court will be inclined to alter the contract not *ex nunc* but from an earlier date, namely the date on which reasonable parties would presumably have concluded their negotiations. The Dutch Code mentions explicitly that the modification or setting aside may be given retroactive effect (article 6:258 (1) DCC).²⁷ Such an automatic compensation *in natura* makes more sense than an isolated financial compensation of the damage resulting

²⁵ *Feasibility Study*, Introductory remarks, sub V (3).

²⁶ After the completion of this essay, the Feasibility Study was succeeded by the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) d.d. 11 October 2011, COM(2011) 635 final. The proposed art. 89 (1) CESL reads: ‘[...] Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract’. This article does not mention damages because of noncompliance.

²⁷ Moreover, the court may pronounce a contract modification subject to conditions (e.g. compensation); art. 6:260 (1) DCC.

from not renegotiating in good faith. The possibility that the court thus 'overtakes' a reluctant party creates a welcome pressure: it may be wiser to take part in the negotiations, and thereby retain influence, than to withdraw and leave the matter to the insight of the court.

10 CONCLUSION

All in all the Dutch regime regarding the modification of a contract with respect to unforeseen circumstances amounts to an interplay of the parties and the court.

The Code seems to equip the judiciary with great powers: the court may modify the contract or may set it aside, in whole or in part. In essence the court's power is limited. The requirements for an intervention are rarely fulfilled; moreover, the court is only entitled to intervene upon a party demand, which fundamentally restricts its options. The parties themselves will be wise to declare and effectuate their willingness to renegotiate. A debtor who is not prepared to negotiate will forfeit a possible intervention by the court; a creditor who is not prepared to negotiate will forfeit his right to claim performance. This mechanism of mutual *Obliegenheiten* is proper and generally sufficient; there is no need to upgrade to structural obligations for the parties to renegotiate.

