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## **Foreseen and unforeseen circumstances**

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*Foreseen and unforeseen circumstances*



# Foreseen and unforeseen circumstances

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## Introduction

In times of war and recession the law used to be strict, as some would wish it to be nowadays.

In December 1915 and November 1916 the Haarlem-based Cotton Company sold a large quantity of 'sarongs' to Stork, to be delivered in Rangoon (Myanmar). Due to the Great War, shipping was hampered. For a long time it was impossible to deliver on time. Obviously, this resulted in force majeure on the part of the Cotton Company during the war period. After the war, it was disputed that the Cotton Company was still obliged to deliver under the same conditions agreed upon before the war, even though production costs had risen some 70%. The Dutch Supreme Court chose a very firm stance. The effects of agreements had to be in accordance with good faith, but good faith cannot bring about the extinction of obligations.<sup>1</sup>

In the same era, the Dutch company Holland purchased weaving looms from Globe. Under the agreement, Globe was required to buy the looms from the British company Butterworth & Dickinson Ltd. However, deliverance by Butterworth & Dickinson Ltd. was forbidden by the British government due to the fact that Holland was involved with German companies. When the British government lifted the ban, Holland demanded delivery at the original purchase price. Again, the Supreme Court rejected a change in the contractual terms.<sup>2</sup>

What if the economy collapses and the Deutsch Mark becomes worthless? Could this be a circumstance under which a court may modify the agreement? Müller & Co. borrowed a large sum of Marks from Ms. Marken Heerdt in 1911, when one Mark was worth 0.60 Guilders. In 1924 Müller & Co still had to pay 125,000 Mark. In the meantime a new Mark had been introduced, at a rate of one billion old ones for one new Mark. Again, the Supreme Court decided in line with its previous decisions, with the effect that the value of the remaining debt was practically nil.<sup>3</sup>

The Leiden professor in private law Eduard Maurits Meijers, commenting on the last Mark-is-Mark case, exclaimed bitterly:

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1 HR 8 January 1926, *NJ* 1926, 203 (Sarong).

2 HR 19 March 1926, *NJ* 1926, 441 (Weefgetouw).

3 HR 2 January 1931, *NJ* 1931, 274 (Mark=Mark).



‘This decision hurts our sense of justice and can only serve to make our justice unpopular.’

This infamous line in the jurisprudence, as well as Meijers’ bitterness, ultimately led to the codification of a regime of unforeseen circumstances. Article 6:258 paragraph 1 of the Dutch Civil Code reads as follows:

‘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.’<sup>4</sup>

Facing the economic and financial crises of our time, this article might be useful to modern sellers of sarongs and businessmen yearning for the return of the Mark and Florin. Is it the solution to their problems? This question merits a strongly negative response. In the doctrine of unforeseen circumstances a balance is sought between two major principles. On the one hand, the principle that agreements are binding or, as put by art. 1374 paragraph 1 of the former DCC; to parties, agreements are like law. On the other hand, the law has to be equally just in its consequences. The decisions of the twenties and thirties show that we should be able to deviate from the principle that contracts are binding, but not too soon and not too much. Where and how should the line be drawn? The 27<sup>th</sup> Leiden Yearbook of Private Law (BWKJ) is dedicated to this question.

#### *Part I – General aspects*

The first part of this Yearbook covers some general aspects. *Bezemer* describes the early involvement of professor Meijers in the debate on ‘imprévision’. In 1918, Meijers already rejected a solution based on the presumed intention of the parties, favouring an objective approach instead – taking into account all the circumstances relating to a contract and its performance. *Bezemer* shows how Meijers used rhetoric and his well-known comparative method to try to convince his audience.

*Hijma* analyses the division of powers between the court and the parties, when faced with a change of circumstances. The court may modify or even set aside a contract, in whole or in part. But is this power really that intervening? *Hijma* argues that the court is still obliged to choose one of the solutions the parties put forward: it may not draft the outcome itself, nor may it reject any demand which does not entirely suit the view of the court. Further-

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4 Translation by H. Warendorf, R. Thomas and I. Curry-Sumner, *The Civil Code of the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2009.

more, the ‘general’ article on reasonableness and fairness (6:248 DCC) still plays a complementary role, according to Hijma. He argues that parties may expect that the party needing adaptation will first undertake a proper initiative to negotiate. This would probably have satisfied Meijers, since not the presumed intention, but the *current* intention of the parties then becomes most relevant.

*Snijders* delves into another discussion: is it possible to modify or set aside a valid contract that (1) has been enforced or (2) has expired because the agreed period has expired. Meijers’ legislative drafting of 6:258 DCC allows for such an application. Enforcement and expiry do not exclude modification *per se*. However, they are still relevant as arguments to determine whether and to what extent unmodified maintenance of the contract would be *unacceptable*, in light of the requirements of reasonableness and fairness. Finally, *Snijders* deals with a question that precedes this substantial and marginal scrutiny by the court: at what time should the right to make such a demand be evoked by either party?

What exactly are unforeseen circumstances? To answer this question it is necessary to determine what parties actually have foreseen and should have foreseen. This will eventually be a matter of interpretation: what have parties agreed upon? *Wissink* describes tendencies in the case law of the Dutch Supreme Court on the interpretation of contracts: from the Haviltex criterion (how can parties reasonably be expected to interpret the contract and what can they have been expected to have agreed upon?) to the recent emphasis on textual interpretation when dealing with commercial parties. The influence of reasonableness and fairness thus fluctuates, depending on the nature of the contract and of the contracting parties. Even though parties cannot exclude 6:248 DCC, they may agree that certain changes in circumstances cannot be considered to be ‘unforeseen’. Still, the ambit of such a clause will need to be determined through interpretation.

## *Part II – Application*

In the second part several authors focus on a specific application of the ‘*imprévision*’ rule. The contribution of *Mellema-Kranenburg* deals with family property law. To what extent may one of the spouses ask the court for a revision of the marriage settlement because of a change of circumstances, when no preamble or revision clause is included in the agreement? While case law does not provide many leads and so far courts seem to have been reluctant, she argues for a generous application of the general *imprévision* rule with regard to marriage settlements. Life and marriage in particular may turn out differently than had been foreseen or was foreseeable, even if parties were excellently informed and advised at the time the marriage was concluded.

Unforeseen circumstances play a role in different areas of private law, besides the interpretation of contracts and the application of article 6:258 DCC. In the context of the law of sale *Breedveld-de Voogd* concentrates on foreseeable

and unforeseeable defects after immovable property has been transferred to a new owner. Although each of the parties performed its part of the contract, the legal relationship, which is governed by good faith and which commenced when the parties started negotiating, has not ended. In this post-contractual phase, the buyer's perspective of the property is decisive: what was he entitled to expect?

Visser and Van der Kooij write about unforeseen circumstances in intellectual property law. Is it possible for employees to get additional equitable remuneration when their invention becomes a success? Could authors or actors make a rightful claim for additional remuneration on top of what was contractually agreed upon? Visser and Van der Kooij show that this is fairly improbable under current Dutch law. They critically assess a Dutch legislative proposal to grant the right to an equitable remuneration for authors and even enable them to request a court to change their agreement if the remuneration is disproportionate in relation to the benefits of their work ("bestseller"-clause). Based on experiences in Germany, Visser and Van der Kooij doubt whether these changes will be of benefit to actors and authors.

Could a crisis be foreseen in the contract – for example when a buyer wants to ensure that he is relieved of his obligations when the target company suddenly gets into difficulties? In his contribution *Engel* considers the so-called Material Adverse Change (MAC) clauses from a Dutch perspective. These clauses are still considered to be important tools in international business, though they have gradually become more and more negotiated, specific and complex. Nevertheless, *Engel* advocates the use of such clauses as a way to prevent litigation and accommodate a more precise assessment and allocation of risk between the parties – besides the more general system of 6:258 DCC.

### *Part III – Comparative perspectives*

In the third and last part of the compendium, authors discuss some comparative law perspectives on unforeseen circumstances. *Hondius* sets out the main findings of the Trento European private law group on the issue of unexpected circumstances in European contract law. Binding force of contract and requirements of equity seem to lead to uncertain outcomes in many jurisdictions. Many cases in which relief is discussed are quite eccentric. This makes research on a European level difficult, since precedents are rare and not easy to compare. According to *Hondius*, further harmonization may enlarge the basis of precedents. However, he is in favour of a more advanced legal discourse, to which he hopes the Trento report will contribute.

*Momberg* gives a comparative overview of Latin American law on this subject, and discusses the Argentinian law in detail. Most of the Latin American jurisdictions have followed the Italian *Codice Civile*, which has a more structured approach. The affected party is granted an exclusive right to claim termination of the contract. The other party can avoid such a claim by offering

modifications. Thus, the affected party is not entitled to request a court to adapt or modify the contract, and no duty to renegotiate exists. Momberg believes that a duty to negotiate, as provided in the PICC and PECL, would better protect the interests of both parties.

Finally, *Philippe* analyses the practice in France and Belgium, where the doctrine of ‘*imprévision*’ is currently the most important concept in dealing with the effects of unexpected circumstances. Only recently in Belgium, a situation similar to the old decisions by the Dutch Supreme Court on sarongs and weaving looms urged the Belgian Supreme Court to consider the adaptation of a contract possible, in this case under the influence of international usage as expressed by the UNIDROIT principles.

#### *On the editors*

The 27<sup>th</sup> edition of the Leiden Yearbook of Private Law is the last yearbook to be edited by Kasper Jansen and Pauline Memelink. They left our faculty to put their knowledge into practice, Kasper in The Hague and Pauline in Amsterdam. We will miss them dearly. Luckily, this was not unforeseen. We are happy to welcome Clementine Breedveld-de Voogd, Teun van der Linden and Hetty ten Oever as our new editors.

Alex Geert Castermans  
Marte Knigge  
Hans Nieuwenhuis



# 1 Meijers on *imprévision* in 1918, in 1937, in 1950, and today

Kees Bezemer <sup>■</sup>

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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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).<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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<sup>12</sup> Meijers 1937, p. 286.

<sup>13</sup> 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).

<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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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<sup>15</sup> Meijers 1937, pp. 287-289.

<sup>16</sup> 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.

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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),<sup>22</sup> in 1958 spoke of a magisterial speech.<sup>23</sup> 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.<sup>24</sup>

It was briefer than the 1918 and 1937 speeches, and more practical.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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 2<sup>nd</sup> 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.<sup>32</sup> 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

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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):<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup> 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:<sup>36</sup>

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.

<sup>33</sup> For this translation I owe much to the translation mentioned in note 36.

<sup>34</sup> 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).

<sup>35</sup> 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.

<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.

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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*.<sup>41</sup> 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.<sup>42</sup> 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

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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*.

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

Jaap Hijma <sup>■</sup>

### 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*).<sup>1</sup> 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,<sup>2</sup> 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,<sup>3</sup> in connection with that of the parties, when a change of circumstances occurs that undermines an existing contract.<sup>4</sup>

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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.<sup>5</sup>

*Article 6:248 DCC*<sup>6</sup>

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.<sup>7</sup>

*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.

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

<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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

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

<sup>9</sup> *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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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-

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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.<sup>13</sup>

## 6 'UPON THE DEMAND OF ONE OF THE PARTIES'

The Bijenkorf case arose when the former Dutch Civil Code, enacted in 1838,<sup>14</sup> 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).<sup>15</sup> 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.

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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.<sup>16</sup> 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

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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)<sup>17</sup> 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 court<sup>18</sup> 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.<sup>19</sup> 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.

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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.<sup>20</sup>

## 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.

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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.<sup>21</sup>

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’.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

*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

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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](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’:<sup>25</sup>

‘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?’<sup>26</sup>

## 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).<sup>27</sup> Such an automatic compensation *in natura* makes more sense than an isolated financial compensation of the damage resulting

<sup>25</sup> *Feasibility Study*, Introductory remarks, sub V (3).

<sup>26</sup> 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.

<sup>27</sup> 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.



### 3 | Unforeseen circumstances after enforcement or expiry of the contract, prescription and forfeiture of rights

*Henk Snijders* <sup>■</sup>

#### 1 A CASE

A and B agree to a joint venture for the common exploitation of A's coal plant during the years 2001-2010. The agreement provides among others that B will every year pay half of the depreciation for the plant estimated at € 90 million a year. At the moment when the parties agreed on that amount, they assumed that the coal plant would have an operating time of 15 years, because the government had decided to stop all coal plant exploitations from 2016. After the expiry of the contract the government changes its decision: meanwhile it is of the opinion that the exploitation of nuclear power plants must be stopped and that coal plants can serve as an alternative for some decades yet. The operating time of the coal plant is now estimated to be 30 instead of 15 years. Consequently, B claims modification of the contract, arguing that the huge extension of the operating time is an unforeseen circumstance and that therefore the contract has to be modified. A argues that the contract has already been enforced and expired, and that judicial modification of the contract is therefore not acceptable anymore.

What to think of A's position, assuming that the huge extension of the operating time is, as B argues, an unforeseen circumstance?

#### 2 THE QUESTIONS

Article 6:258 DCC (Dutch Civil Code) states, among others, that the court may modify (the effects of) a contract or 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

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to be maintained in unmodified form'<sup>1</sup> (in Dutch: 'ongewijzigde instandhouding van de overeenkomst niet mag verwachten').

The word 'maintained' suggests at least that the contract still exists at the moment when modification or setting aside is claimed, and that the contract is still valid then. Indeed it can be held that a contract which is non-existent or null cannot be modified on the basis of art. 6:258 DCC: there is nothing to be changed anymore. The same applies to a contract which has been annulled, at least if the annulment has been given retroactive effect to the time the contract was agreed for, as usually occurs on the basis of art. 3:53 DCC. An interesting question remains whether a valid and unannulled contract for a definite period can be changed or set aside on the basis of unforeseen circumstances, if it has been enforced or has expired because that period is past. And that is the central issue in this article. At the end the same question will be considered shortly for some contracts which have expired in another specific way: a) valid contracts for an indefinite period after termination of the contract, b) contracts which have been subjected to annulment without retroactive effect to the time the contract was agreed and c) contracts which have been set aside on account of breach of contract. Furthermore, some attention will be given then to the prescription of a claim for the setting aside or modification of such a contract on the basis of unforeseen circumstances and to the possibility of forfeiture of rights.

### 3 TEXT AND HISTORY OF ART. 6:258, FOREIGN AND TRANSNATIONAL LAW

The text of art. 6:258 does not explicitly give an answer to the questions dealt with here. We will see that the text does give an interesting indication, but first some attention to parliamentary history may be useful.

The text of art. 6:258 DCC may not explicitly answer the questions dealt with, nor does it preclude application to a contract which has been enforced in part or even entirely, as the main author of the code, E.M. Meijers, explains the original draft of the article (which draft was not changed during the parliamentary discussion on it, as far as relevant now, for that matter).<sup>2</sup> Meijers adds (l.c.) that the application is especially important with regard to a contract which has been enforced only partly (i.e. the contract has not been enforced by all the parties or the obligations out of the contract have been enforced only

1 The quotation is from the translation by H. Warendorf et al., *The Civil Code of the Netherlands*, Kluwer Law International: Alphen aan de Rijn 2009. The translation by P.P.C. Haanappel and E. Mackaaij (*New Netherlands Civil Code/Nouveau Code Civil Néerlandais*, Kluwer Law and Taxation: Deventer/Boston 1990) differs only very slightly from that of Warendorf et al. Both translations correctly underline that the question, whether the contract has to be maintained in an unmodified form, is at stake (the verb to maintain means 'handhaven' or 'in stand houden' and corresponds to the substantive 'instandhouding').

2 Toelichting Meijers, *Parlementaire Geschiedenis Boek 6*, pp. 969-970.

partly). The modification or setting aside of an agreement which has been enforced entirely, will seldom be in accordance with reasonableness and fairness, Meijers holds.<sup>3</sup> The question what to think of this last observation will be considered later on. Now, it is relevant to stress that this is not a fundamental objection to the modification or setting aside of a contract which has already been entirely or partly enforced, on the basis of unforeseen circumstances. On the contrary, Meijers seems to adopt such modification and setting aside, in principle. What applies to a contract enforced entirely, must also be applicable to (other) contracts which have expired. There is no reason to assume that Meijers would have another view with regard to those contracts. Especially the wording of art. 6:258 that regards the question whether an existing contract has to be 'maintained', does not give a reason for that assumption. The expiry of a contract from a certain date does not make it disappear, it is still maintained. Then the question arises whether that contract still has to be maintained for the period up till the expiry date.

Furthermore, the second sentence of art. 6:258 par. 1, which has been added to the bill on Book 6 DCC while it was pending in parliament, indicates that the judicial modification of entirely or partly enforced contracts is possible. It permits retroactive effect of a judicial modification or setting aside to any moment before the date of such judicial modification or setting aside. That moment may be the date of a procedural document, such as a writ of summons or a statement of defence, in which the possibility of modification or setting aside because of unforeseen circumstances has been invoked in a concrete case. It may also be situated before the civil procedure. Retroactive effect even seems to be possible from the date of establishment of the contract itself. There is no indication that the legislator would have been willing to limit the retroactive effect to a certain period. Retroactive effect up to the date of the contract will seldom be in accordance with reasonableness and fairness, Meijers could hold, again, which will be also discussed later on. Important now is that retroactive effect is permitted for -among others- contracts which have only been enforced entirely or in part. Again, it may be held that what applies to a contract enforced entirely must also be applicable to (other) contracts which have expired. Therefore the second sentence of art. 6:258 par. 1 also suggests, albeit slightly, that the judicial modification and setting aside of a contract which has expired, is possible.

Summarizing, the legislator does not see any fundamental objections to the judicial modification and setting aside of contracts already enforced or expired. Meanwhile, he is of the view that the modification or setting aside of a contract which has been entirely enforced will seldom be in accordance

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3 Meijers refers to Karl Larenz, *Geschäftsgrundlage und Vertragserfüllung*, 1. Auflage, Beck: München-Berlin 1951, p. 91 ff. See further, inter alia John Cartwright, *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer*, Hart Publishing: Oxford and Portland, Oregon 2007, p. 235, is of the same opinion.

with reasonableness and fairness. Whether that last observation can be applied to expired contracts *per analogiam* is another question. Both observations will be considered in more detail under 4.

What about foreign laws? Provisions of foreign law do not explicitly deal with the judicial modification and setting aside of contracts already enforced or expired, as far as could be investigated. The same can be held for the UNIDROIT Principles of International Contracts (UNIDROIT) and the Principles of European Contract Law (PECL): neither the UNIDROIT Principles nor the PECL give a clear indication of the answer to our questions. See arts. 6.2.1-3 UNIDROIT and art. 6:111 PECL. The same applies to art. III – 1:110 of the Draft Common Frame of Reference (DCFR), which is similar to arts. 6.2.1-3 UNIDROIT. All these texts give no explicit indication for a positive answer to the question, but there is no opposition to the judicial modification or setting aside of enforced or expired contracts on the basis of unforeseen circumstances either. A general investigation of foreign case law and literature on domestic provisions, transnational principles and the DCFR did not really help to interpret these rules. Foreign and transnational law will be left aside further.

#### 4 MEANING OF REASONABLENESS AND FAIRNESS IN CASE OF CONTRACTS ENTIRELY OR PARTLY ENFORCED OR EXPIRED

As pointed out under 3 the modification and setting aside of an agreement which has been enforced entirely, will seldom be in accordance with reasonableness and fairness, in Meijers's view. It is not clear what exactly Meijers means in this respect. Maybe the underlying idea is that the severer the consequences of modification or setting aside (in the sense of the effect of a reversal of what has already been done), the greater the chance that such modification or setting aside will not be in accordance with reasonableness and fairness. However, the reason for modification or setting aside on the basis of unforeseen circumstance is precisely that the consequences of maintenance of the contract in unmodified form are so serious that the counter-party of the person who seeks the modification or setting aside may not expect maintenance in unmodified form and it is clear that a modification or setting aside on that basis will not only be effected in details but in a substantial way. It is clear nevertheless that the judge dealing with the claim for modification or setting aside will also consider the negative consequences of it for the other party and calculate the extent of that disadvantage for that party as a factor in weighing the interest of the parties with regard to the question whether the other party may expect the contract to be maintained without modification, and if not allowed to expect so, to what extent the modification must be accepted (the concept of 'claim' is intended as a quite general one here: the modification and setting aside can also be informally demanded by the defendant, as will be pointed out and discussed under 6). In other words, it can

be held that the application of the legislator's criteria of reasonableness and fairness to a claim for modification and setting aside of an agreement which has been entirely enforced or has expired requires a careful consideration of the advantages and disadvantages of such modification or setting aside for both parties to the contract. That can be held both with respect to the question whether the claim has to be granted and – in case of an affirmative answer to that question – to what extent the claim for modification or setting aside has to be granted. The latter question is also an important one. The modification or setting aside can be applied only to a part of the subject of the contract, for instance, or only without retroactive effect or with limited retroactive effect.

That test against the requirements of reasonableness and fairness is not an ordinary but a marginal one: the judge is only allowed to modify or set aside the contract if and insofar as it is *unacceptable* in the light of the requirements of reasonableness and fairness to keep a party to unmodified maintenance of the contract. After all, art. 6:258 DCC is a codification of a specific rule which was derived from art. 1374 par. 3 of the Old Civil Code, which, according to case law under the Old Civil Code, provided in general for the so-called contract-limiting effect of reasonableness and fairness, as art. 6:248 par. 2 DCC does now: 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.<sup>4</sup> Therefore, the judge has to apply the legislator's authorization to modify or set aside a contract on the basis of unforeseen circumstances with restraint and caution, i.e. only in exceptional situations.<sup>5</sup> In practice, it occurs very seldom indeed that the judge modifies or sets aside a contract on the basis of unforeseen circumstances.<sup>6</sup>

Altogether it may be concluded that the modification and setting aside of contracts on the basis of unforeseen circumstances are only appropriate in exceptional situations: it is only allowed if, and if so to the extent that, unmodified maintenance of the contract is absolutely unacceptable according to the requirements of reasonableness and fairness. There is no good reason in principle to make it still more difficult in case of a contract which has been enforced entirely or has expired.

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4 Cfr. Voorlopig Verslag II and Memorie van Antwoord II, Parlementaire geschiedenis Boek 6, p. 971 resp. pp. 973-975. See further, inter alia Asser/Hartkamp & Sieburgh 6-III\* (2010), nr. 439.

5 Memorie van Antwoord, Parl. gesch. Boek 6, PG. See further, inter alia Asser/Hartkamp & Sieburgh 6-III\* (2010), nr. 444, *Rechtshandeling en overeenkomst* (W.L. Valk), Kluwer: Deventer 2007, nr. 288 and Attorney-General Wuisman in his 'conclusie' (official advice to the court) in the case of Dutch Supreme Court 15 February 2008, *NJ* 2008, 110.

6 See for instance Dutch Supreme Court 19 November 1993, *NJ* 1994, 156, Dutch Supreme Court 20 February 1998, *NJ* 1998, 493 and Dutch Supreme Court 21 March 2003, *NJ* 2003, 591, with commentary from JBMV.

A fortiori, there is no good reason for making it more difficult in case the contract has been enforced in part.<sup>7</sup> On the contrary, modification or setting aside of a contract on the basis of unforeseen circumstances will just be claimed very often, maybe even in the large majority of the cases, with regard to contracts which have already been enforced in part. The legislator must certainly have been willing to provide for the modification and setting aside of such contracts.<sup>8</sup>

5      MODIFICATION OR SETTING ASIDE ON THE BASIS OF UNFORESEEN CIRCUMSTANCES AFTER TERMINATION OF THE CONTRACT, ANNULMENT WITHOUT RETROACTIVE EFFECT AND SETTING ASIDE ON THE BASIS OF BREACH OF CONTRACT

What to think of the modification or setting aside of a contract on the basis of unforeseen circumstances after termination of a contract for an indefinite period? In fact the termination of the contract, if valid of course, transforms the contract for an indefinite period to a contract for a definite one. There is no difference between both types, except that the former is definite from the beginning while the latter is made definite in the course of its duration. It may be held that the answers to the questions as given before also apply to indefinite contracts which have been terminated and therefore expired.

Now for the case of a contract which has been subjected to annulment without retroactive effect to the time the contract was agreed. A contract does not disappear as a result of an annulment. It is still maintained, albeit only for the period from the date of agreement up till the date of annulment or a date in between insofar as limited retroactive effect is given to the annulment. Therefore such an annulled contract must be susceptible to modification and setting aside on the basis of unforeseen circumstances arisen after the annulment, albeit it only for the remaining period of the contract.

Finally a look at contracts which have been set aside on account of breach of contract. Such setting aside does not have retroactive effect according to present Dutch law (art. 6:269 DCC). Still, the setting aside releases the parties from the obligations effected by it (art. 6:271, first sentence DCC). However, to the extent that these obligations have already been performed, the legal ground for this performance remains intact, albeit that the parties have the obligation to reverse the performance of the obligations already performed

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7 The Court of Appeal in 's-Hertogenbosch appeared to be of another view, without mentioning any argument therefor (Court of Appeal 's-Hertogenbosch 11 April 2006, *NJF* 2006, 500). On the other hand, the Court of Appeal of Arnhem seems to be in favour of the author's opinion, albeit that it does not give any reasons for that either (Court of Appeal Arnhem 14 July 2009, *LJN* BK6402).

8 See also P.S. Bakker and J.W. de Groot, *WPNR* 2009 (6797) under 5.

(art. 6:271, second sentence DCC) or at least to compensate therefor by paying damages in case the performance, given its nature, cannot be reversed (art. 6:272 DCC). Therefore, there is no interest for any party in the modification or setting aside of a contract on the basis of unforeseen circumstances after that contract has been set aside entirely on account of breach of contract. Only in case of a partial setting aside on account of breach of contract (as art. 6:265, par. 1 DCC in conjunction with art. 6:270 DCC permits respectively elaborates) can such an interest still be there and if so, there is no reason why modification or setting aside on the basis of unforeseen circumstances would not be allowed then.

## 6 PRESCRIPTION AND FORFEITURE OF RIGHTS

The interim conclusion may be that the modification and setting aside of a contract is possible on the basis of unforeseen circumstances arisen after the enforcement or expiry of the contract. However, it is possible, of course, that a claim for modification or setting aside in this matter is prescribed. Furthermore, it is possible that a claim in this matter will founder on forfeiture of the right of action. Some remarks on these possibilities have to be made now, but first some attention has to be paid to the concept of 'claim' in this matter.

As stated before, the concept of 'claim' is intended as a quite general one. The original draft provision on modification and setting aside on the basis of unforeseen circumstances allowed the interested party to institute court proceedings for the modification and setting aside of a contract on the basis of unforeseen circumstances by using the word 'vordering', i.e. a claim by the original claimant in the action or by the defendant bringing a counterclaim. In the final text of art. 6:258 DCC the word 'vordering' was changed by the more neutral word 'verlangen' (i.e. demand), in order to provide not only a possibility for a person to bring civil proceedings for the judicial modification or setting aside of a contract on the basis of unforeseen circumstances, but also by way of defence for the defendant or by way of an answer to a defence for a claimant in a civil action for another claim. However, this change of words was not necessary to achieve that the defendant or the claimant can, by way of an answer to a defence in a civil action for another claim, seek to gain a judicial modification or setting aside of a contract on the basis of unforeseen circumstances. This modification or setting aside can be achieved by a counterclaim of the defendant respectively an additional claim of the original claimant (these being claims in a narrow sense). Obviously the legislator still wants to allow the possibility of seeking the judicial modification or setting aside of a contract on the basis of unforeseen circumstances via another route, notably by way of an informal demand by the original claimant or the de-

fendant. What are we to think of this informal demand in connection with the question of prescription?<sup>9</sup>

The legislator probably did not realise that through his use of the concept of an informal demand, claimants and defendants could try to circumvent the prescription. On the basis of the legislator's wording, curious results in the field of prescription could occur. What to think of an informal demand of a claimant after prescription of his right of action (i.e. the *ius agendi*) for instance? Whereas a claim for the judicial modification or setting aside of a contract on the basis of unforeseen circumstances should be dismissed due to that prescription, an informal demand later on in the procedure should be admissible. Still, there is a strong need for prescription of a 'right of informal demand' after a long time as well. Legal certainty is involved here, as it is involved with regard to the prescription of claims in a narrow sense. Therefore, in the author's opinion, the informal demand has to be dealt with in the same way as a claim in a narrow sense. For both of these it must be held that the right to initiate the judicial modification or setting aside of a contract on the basis of unforeseen circumstances must be interpreted as the right of action in the sense of the Dutch law of prescription. Thus, the right of an informal demand to the judge in the sense of art. 6:258 DCC can be prescribed on the same conditions as a right of action in a narrow sense.

However, there is no specific provision on that right of action with regard to the judicial modification or setting aside of a contract on the basis of unforeseen circumstances in Dutch law. There is still a specific provision on the prescription of a right of action to set aside a contract (art. 3:311 DCC), but this provision only refers to setting aside for failure to perform. That is why the general provision on prescription of rights of action is applicable (art. 3:306) which states that unless otherwise provided for by law, a right of action is prescribed on the expiry of twenty years. From what moment does this term start? From the moment the unforeseen circumstances occur or the moment when the interested party is aware of these circumstances? Keeping in mind the length of the period, the former option seems to be the most appropriate one, but there is no indication for it in the text or in the history of the law. However, even in that former sense, the 20-year period is an extremely long one in the author's opinion. The right of action to set aside a contract for nonperformance is prescribed on the expiry of five years from the moment when the creditor becomes aware of the failure and only in other situations on the expiry of twenty years after the failure occurred (art. 3:311 DCC). There is no reason why a right of action to the judicial modification or setting aside of a contract on the basis of unforeseen circumstances should not be dealt with in the same way, *mutatis mutandis*. The prescription would be better fixed on five years from the moment when the interested party becomes aware of the

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<sup>9</sup> See more in general for instance H.J. Snijders et al., *Nederlands burgerlijk procesrecht*, Kluwer: Deventer 2011, no. 126.

originally unforeseen circumstances and in any case not more than twenty years after the originally unforeseen circumstances occurred. It looks as if the legislator simply forgot to make a specific prescription provision on rights of action with regard to unforeseen circumstances, possibly due to the fact that the old Code did not provide for a right of action as laid down in the present art. 6:258 DCC. Anyway, the *ius constitutum* does not provide for such a limited prescription period. Perhaps our Dutch Supreme Court is willing to interpret art. 3:311 *per analogiam* in the sense argued just now, but it is not sure whether it will do so.

However, as far as prescription is not at stake, the right of action can be forfeited. This will be the case if in the given circumstances, according to standards of – again – reasonableness and fairness, it cannot be accepted anymore that a right of action is used. In that case the right of action expires as well, as in case of prescription. This forfeiture of rights has not been laid down in Dutch legislation, but was adopted by the Dutch Supreme Court under the old Civil Code and is still accepted by the Dutch Supreme Court under the present one.

There is no occasion for an elaborate analysis of Dutch legal criteria for forfeiture of rights now. Some remarks may suffice. According to case law, neither the simple expiry of a certain period after a certain event nor simply sitting around doing nothing is enough for the reception of forfeiture. Forfeiture of rights is only accepted in two situations. It is accepted if under the specific circumstances of a case the debtor suffers an unreasonable disadvantage if the creditor would, after a certain period, still invoke his right of action. It is also accepted if the debtor correctly trusted that the creditor would not invoke his right of action anymore.<sup>10</sup> Application of this general rule to the right of action to the judicial modification or setting aside of a contract on the basis of unforeseen circumstances means that this right of action can be forfeited a) if the debtor suffered an unreasonable disadvantage in case the creditor, after a certain period, still invoked his right of action to modification or setting aside and b) if the debtor was allowed to trust that the creditor would not invoke his right of action anymore. In general, it is clear that the longer a prescription period is, the sooner the judge will dismiss a claim because of forfeiture of rights. An example of the latter may be found in the situation in which a debtor, from the moment he is conscious of a certain, hitherto unforeseen circumstance, still, without any objection, continues to enforce the agreement, for instance through the continuous annual payment, without any objection, of the agreed amount for depreciation costs as could occur in the case of section 1 *supra*.

The question of the forfeiture of rights precedes the substantive treatment of a claim for the judicial modification or setting aside of a contract on the

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10 See further for instance *Verbintenissenrecht* (W.L. Valk), loose-leaf and e-edition, Kluwer: Deventer, art. 2, notes 1 ff.



basis of unforeseen circumstances, because in case of forfeiture the claim will not be admissible. The substantive treatment of that claim is not at stake anymore in that case. However, the arguments in favour of forfeiture in a certain case can be, entirely or partly, the same as the arguments in favour of rejection of the claim for the judicial modification or setting aside of a contract on the basis of unforeseen circumstances. This phenomenon is not that strange. Both legal concepts – judicial modification or setting aside of a contract on the basis of unforeseen circumstances and forfeiture of rights of action – have a common assessment framework: the tandem of reasonableness and fairness in its correcting function as laid down in art. 6:2 par. 2 DCC and art. 6:248 par. 2 DCC.

## 7 SUMMARY AND FINAL REMARKS

It is clear now, how the case of section 1 should be decided. The single fact that the contract has already been (entirely or partly) enforced or has already expired does not prevent a judicial modification or setting aside of the contract. A's argument that the contract has already been enforced and expired, and that judicial modification of the contract is therefore not acceptable, fails.

However, the enforcement and expiry arguments are still relevant. A's claim for the modification or setting aside of a contract on the basis of unforeseen circumstance can be granted and can be granted only if the consequences of maintenance of the contract in unmodified form are so serious that the counter-party of the person who wants the modification or setting aside may not expect maintenance in unmodified form. The judge, dealing with such a claim for modification or setting aside, will also consider the negative consequences of it for the counter-party and calculate the extent of that disadvantage for that party as a factor in weighing the interest of the parties with regard to the question whether the counter-party may expect the contract maintained without modification, and if it is not allowed to expect so, to what extent the modification must be accepted. It can be held that the application of the legislator's criteria of reasonableness and fairness to a claim for the modification and setting aside of an agreement which has been entirely enforced or has expired, requires a careful consideration of the advantages and disadvantages of such modification or setting aside for both parties to the contract. It can be held both to the question whether the claim has to be granted and – in case of an affirmative answer to that question – to what extent the claim for modification or setting aside has to be granted.

That test against the requirements of reasonableness and fairness is not an ordinary but a marginal one: the judge is only allowed to modify or set aside the contract if and insofar as it is *unacceptable* in the light of the requirements of reasonableness and fairness to keep a party to unmodified maintenance of the contract. Modification and setting aside of contracts on the basis

of unforeseen circumstances are only appropriate in exceptional situations: it is only allowed if and insofar as unmodified maintenance of the contact is absolutely unacceptable according to the requirements of reasonableness and fairness.

Questions of prescription and forfeiture of rights precede the substantial question whether a claim for modification or setting aside of a contract on the basis of unforeseen circumstances has to be granted. Prescription is not often an issue in practice, due to the long prescription period (20 years). Forfeiture of rights is at stake more. The right of action to judicial modification or setting aside of a contract on the basis of unforeseen circumstances can be forfeited if the debtor was allowed to trust that the creditor would not invoke his right of action anymore or if this put the debtor at an unreasonable disadvantage.



## 4 | Legal certainty and the construction of contracts in Dutch law

Mark Wissink <sup>■</sup>

### 1 INTRODUCTION<sup>1</sup>

Dutch contract law relies heavily on the open standard of reasonableness and fairness. In the end, the interpretation of a contract is based on “*reasonableness and fairness*”, hereinafter also referred to as “good faith and fair dealing”. The same goes for the question whether an addition to the contract is required, because the parties have forgotten to include a provision.<sup>2</sup> Moreover, the exercise of contractual rights is not only corrected when there is abuse of rights, but also if reliance on those rights were unacceptable in the circumstances according to standards of reasonableness and fairness.<sup>3</sup> Finally, a number of provisions are regarded as special elaborations of the principle that parties should behave in accordance with the requirements of reasonableness and fairness. A typical example is the provision about unforeseen circumstances.<sup>4</sup> According to this provision the court may, upon the demand of a party, modify or set aside the contract on the basis of unforeseen circumstances that are of such a nature that the other party may not, according to standards of reasonableness and fairness, expect the contract to be maintained in unmodified form.

This express acknowledgement of the role of reasonableness and fairness is not unique. There are more legal systems in which similar notions have roles to play. Thus, anyone who familiarises themselves with the Unidroit Principles for International Commercial Contracts (PICC) or the comparative comments on the Draft Common Frame of Reference (DCFR), can see that such notions are recognisable everywhere, for example in words to the effect that contract parties must observe “good faith and fair dealing”.<sup>5</sup> Although the differences

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1 This contribution is based on two earlier publications. See M.H. Wissink, ‘Vertrouwen op tekstuele uitleg’, in: Th.M. de Boer, J.W. Fokkens, P. Vlas, M.J. Vos & C.L. de Vries Lentsch-Kostense, *Strikwerda’s Conclusies (Essays in honour of Luc Strikwerda)*, Deventer: Kluwer 2011, pp. 585-601 and ‘Afspraak is afspraak?’, *Tijdschrift voor Agrarisch Recht* 2005, pp. 210-219.

2 Article 6:248 paragraph 1 DCC (Dutch Civil Code).

3 Article 6:248 paragraph 2 DCC.

4 Article 6:258 DCC.

5 C. Von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, DCFR, Full Edition*, München: Sellier 2009, p. 679 *et seq.*

between legal systems often concern the formal position of such notions (e.g. do they only pertain to the performance of the contract?), in the end they are concerned with their importance. Do such notions play a prominent role, indeed one which sometimes permeates contract law as a whole, as is the case in Germany and the Netherlands? Or is this a marginal role, whereby express recognition is granted merely in certain cases, as in English law?<sup>6</sup>

The above may give the impression that reasonableness and fairness will in Dutch contract law usually play a dominant role when solutions for concrete cases are sought. Nevertheless, theory may differ from practice in this respect. In theory, reasonableness and fairness always come into play. And it stands to reason that nobody (wherever this may be) will defend the position that the court must attain a result which is obviously unreasonable. That is the long and the short of it for most cases, though. What really matters, is to determine the true meaning of reasonableness and fairness in concrete cases where the issue is the interpretation of or addition to a contract or interference in the exercise of contractual rights. For example, the court cannot simply interpret the contract in a way which it deems reasonable and fair. It must interpret the contract on the basis of rules of law that are geared to the intention of the parties or to the meaning that third parties attribute to the text used by the parties. Reasonable expectations will be instrumental here, such as the question how certain words will normally be understood. Still, the importance attached to this may be greater, but it may also be less.

Indeed, when a court has to assess a contract there is always an area of tension between “certainty” and “flexibility”. This may be translated roughly into the question whether the court should interpret the contract primarily literally, should sparingly add terms, and should only in highly exceptional circumstances – i.e. practically speaking: should not – interfere in the exercise of contractual powers. Naturally these questions also turn up in a system such as Dutch contract law. While Dutch law encompasses the possibility of “flexibility”, it is not compulsory. The system provides an equal opportunity to give priority to “certainty”. The court may postulate a flexible approach to a written contract, for example when it has been drafted by parties lacking expertise, in great haste and with the intention to represent no more than the outlines of their agreement in words understandable for them at that moment. The court may postulate the (relative) certainty of the text, for instance when there have been final negotiations about the contract by professional parties assisted by expert legal advisers who have made sure that the text of the contract adequately and fully represents the consensus of the parties.

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6 On the question how English law should deal with the duty to act in good faith accepted elsewhere, see for example Gerard McMeel, *The Construction of Contracts. Interpretation, Implication and Rectification*, Oxford University Press 2011, pp. 104 and 297 *et seq.*; Neil Andrews, *Contract Law*, Cambridge University Press, pp. 375, 659 *et seq.*

In the former case a flexible approach represents what in that particular case is in keeping with reasonableness and fairness, since that approach takes into account the circumstances of the case and the interests of the parties. In that sense it is sufficient for the parties to make an inadequate representation of their agreements in the contract, for they will not be punished with a textual interpretation that does not do justice to their intentions. Of course they will pay the price for this, i.e. they will have to incur costs *ex post* in order by means of proceedings to obtain clarity on the contents of their contract and in so doing will run the risk of the court ruling against them. In the latter case a strict approach, aiming at legal certainty, will represent what in that case is in agreement with reasonableness and fairness, because that approach takes the circumstances of the case and the interests of the parties into account. They have invested *ex ante* in a contract representing their consensus as adequately and fully as possible and may therefore assume that the text of the contract will take priority in its interpretation.

These examples indicate that giving a central role to reasonableness and fairness in contract law admittedly opens up the possibility of a flexible approach to a contract, but does not compel anyone to do so, and that the circumstances may also justify a stricter approach. While this broad range of options may be agreeable for a court, enabling it thereby to attune its resolution of a conflict to the particularities of a case, it may simultaneously lead to a measure of uncertainty for the parties about the way in which the court will view their contract, if they are forced to seek a court judgment in case of a conflict. It is against this background that this contribution concentrates on the question to what extent the parties can exert influence on the way in which the court will approach their contract. Thereby the interpretation of the contract will be first and foremost. In this respect Dutch law shows a distinct development, emphasising the importance of “certainty” in specific cases. Following on that, some attention will be devoted also to the influence of the parties on the addition to the contract and on the possibility of rectifying the exercise of contractual powers.

## 2 CERTAINTY AND INTERPRETATION OF THE CONTRACT

The discussion whether Dutch law in its interpretation of certain contracts succeeds in striking the right balance between legal certainty and flexibility has been going on for a while. Some authors are of the opinion that the manner in which contracts are interpreted according to Dutch law leads to uncertainty

which specific types of parties would wish to avoid.<sup>7</sup> A remedy could be found in an approach to the contract that would be textual in principle. Thereby the interpretation of the contract would be influenced less by ‘the circumstances of the concrete case, assessed according to standards of reasonableness and fairness’.<sup>8</sup> The result would be that it is clearer beforehand how the contract should and will be interpreted. It appears that this criticism is voiced (in any case: also) against the background of the international commercial legal practice.<sup>9</sup> Just think of professional parties in an international context, under the influence of the Anglo-American legal sphere, concluding commercial contracts about the text of which they have had final negotiations assisted by specialised legal advisers, whether based on internationally current models or not. If these parties need the contract to be interpreted textually, there is reason to consider to what extent Dutch law can fulfil that need.

In order to prevent misunderstandings it is useful to describe what is meant by the phrase ‘textual interpretation’ in this contribution. While this may differ from case to case, an attempt will be made to give a general interpretation of this for the benefit of the discussion. Textual interpretation obviously means

7 See for this opinion, with different nuances, inter alia F.W. Grosheide, ‘Lees maar, er staat wat er staat’, *Contracteren* 2000/4, p. 100 *et seq.*; the same, ‘Ad fontes’, *Contracteren* 2005/2, p. 30; R.P.J.L. Tjittes, ‘Enige opmerkingen over de beperkte rol van de redelijkheid en billijkheid in het ondernemingsrecht’, *Contracteren* 2001/2, p. 31; the same, *Uitleg van schriftelijke contracten*, Nijmegen: Ars Aequi Libri 2009, p. 24; C. Drion, ‘Evenwicht en proportionaliteit in het (commerciële) contractenrecht’, in: J.J. Brinkhof *et al.* (ed.), *Contracteren internationaal* (Grosheide-bundel), Den Haag: Bju 2006, p. 190; R.H.J. van Bijnen, *Aanvullend contractenrecht* (doctoral thesis Tilburg), Den Haag: Bju 2005, p. 319; R. de Vrey, ‘Het waterdicht maken van een Nederlands contract op Angelsaksische wijze’, in *Contracteren internationaal* 2006, p. 87 *et seq.*; R. Hofstede and W. Oostwouder, ‘To cultivate command of language. Over het gebruik en de uitleg van Engelse termen in Nederlandse (overname-)contracten’, in *Contracteren internationaal* 2006, p. 30; H.N. Schelhaas, ‘Pacta sunt servanda bij commerciële contracten’, *NTBR* 2008/4, p. 150 *et seq.*; J. Meier Timmerman Thijssen, ‘De ontvankelijkheid van het Nederlandse privaatrecht voor invloeden vanuit de Anglo-Amerikaanse financieringspraktijk’, *Contracteren* 2009/4, p. 123. Further compare M. Wolters, ‘Uitleg van schriftelijke overeenkomsten. Over de onzalige trend naar een primair taalkundige uitleg van contracten’, *Contracteren* 2009/1, p. 14; M.M. van Rossum, *De redelijkheid en billijkheid bij commerciële contracten* (oration OU), Deventer: Kluwer 2010; C.E. Drion, ‘Anglo-Amerikaanse contracten, een zegen of een ramp?’, *NJB* 2011/24, p. 1523; P.S. Bakker, ‘Uitleg van commerciële contracten (I)’, *WPNR* (2011) 6891, p. 477.

8 Dutch Supreme Court 20 February 2004, *LJN* AO1427, *NJ* 2005/493 with commentary from C.E. du Perron (*Pensioenfonds DSM-Chemie/Fox*).

9 Thus, there are many references to English law. See on interpretation Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912. See for example R.P.J.L. Tjittes, *Uitleg van schriftelijke contracten*, Nijmegen: Ars Aequi Libri 2009, p. 77. This has brought English law closer to Dutch law among others, but how much closer is a matter of appreciation. See for instance Lord Hoffmann in *Chartbrook Limited v. Persimmon Homes Limited and others* [2009] UKHL 38 esp. nos. 37-39 and 47; J.M. van Dunné, ‘Normatieve uitleg à l’anglaise. Investors Compensation Scheme (1998) als de Engelse Haviltex-zaak’, in: E.H. Hondius *et al.* (ed.), *Contracteren internationaal* (Grosheide-bundel), Den Haag: Bju 2006, p. 104.

an interpretation based on the text as a whole, i.e. including arguments that may be derived from its methodology. That will not suffice, though, as it is inevitable to consider factors outside the text in order to attach significance to it. Factors such as the type of transaction and its business background do tend to cast light on the meaning of the text. In addition, the context may prove that the contract does not use certain terms in their customary linguistic meaning, but in a technical meaning connected with the nature of the transaction. Although the above may be extended with more examples,<sup>10</sup> the aim here is to clarify that textual interpretation encompasses more than a merely linguistic interpretation of the contract and cannot go without the context. Consequently, textual interpretation is not at odds with a contextual interpretation, it is more a matter of gradation. Textual interpretation presupposes a certain attitude to the text of the contract. To put it briefly, the point is that in determining what the parties have agreed, the third party called in to do so (court, arbitrator) should focus attention on the text. The text is central and contextual factors, if any, play a role in that light. First the text, then the rest, if necessary. In this way, one avoids elaborations unknown beforehand (i.e. at the time of conclusion of the contract) of what requirements of reasonableness and fairness would entail in the circumstances of the case, unless this is impossible.

What does Dutch law now have to offer to the professional parties referred to in 7? According to the casebook judgment *Pensioenfond DSM-Chemie/Fox*, in the interpretation of a written contract all circumstances of the concrete case are always decisive, assessed according to what the standards of reasonableness and fairness entail.<sup>11</sup> At first glance this is a far cry from the textual interpretation described above. On closer consideration, though, that is not always so. After all, in practice interpretation does not take place on the basis of this principle, but on the basis of a criterion of interpretation grafted onto it.<sup>12</sup> Briefly put, interpretation is generally conducted on the basis of either the 'Haviltex' criterion, named after the 1981 judgment in the case *Ermes/Haviltex*.<sup>13</sup> Upon application of the (subjective-objective) Haviltex criterion the question at issue is what the parties thought and could think they agreed to; in that context all circumstances of the case are relevant. However, in some case, notably when interpreting collective bargaining agreements, an (objective) criterion is applied. According to this so called CAO criterion (these three letters refer to the Dutch abbreviation for collective bargaining agreement) the question is what third parties think the document means; in that context not only

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10 Think of interpretive tools such as those expressed in articles 4.4-4.7 of the Unidroit PICC.

11 Dutch Supreme Court 20 February 2004, *LJN AO1427*, *NJ 2005/493* with commentary from C.E. du Perron (*Pensioenfond DSM Chemie/Fox*).

12 Dutch Supreme Court 1 October 2004, *LJN AR2974*, *NJ 2005/499* (*Taxicentrale Middelburg*), refers only to the principle, for that matter.

13 Dutch Supreme Court 13 March 1981, *NJ 1981/635* with a commentary from C.J.H. Brunner.



textual arguments are relevant, but other arguments also, provided they are objectively apparent.<sup>14</sup> The casebook judgment referred to holds that there is a smooth transition between the two criteria of interpretation. On the one hand, because there is sometimes a reason for a more objective interpretation in the application of the Haviltex criterion in connection with the position of third parties. On the other hand, because the collective bargaining agreement criterion takes into account more circumstances than just textual ones. The contracts discussed in this contribution must in principle be interpreted according to the Haviltex criterion, which, as stated, already leaves room for an objective application. In all cases the text of the contract is, of course, an important factor. In the *Pensioenfonds DSM-Chemie/Fox* judgment it is also observed that the idea underlying both the collective bargaining agreement criterion and the Haviltex criterion is that the interpretation of a written contract should not be made only on the basis of the linguistic meaning of the words in which it has been put. However, as the Dutch Supreme Court continues, in practice the linguistic meaning usually attributed to these words, when read in the context of that document as a whole, according to generally accepted standards (in the relevant circle of society), are often of great relevance in the interpretation of that document. This observation is made against the background that (even) according to the Haviltex criterion the text of the contract is not sanctifying. As the Haviltex criterion is context-sensitive, it is equally possible in its application in a concrete case that much or little weight should be accorded to the text of the contract. This is right and proper according to Dutch (and other)<sup>15</sup> views, because the parties are bound to what they envisaged. If the text expresses the parties' intention inaccurately or incompletely, then this will be taken into account. For the Dutch Supreme Court it appears to be relevant to retain an equilibrium between factors providing "certainty" and factors providing "flexibility" in the interpretation of contracts. A judgment balancing between different approaches may well be unavoidable, not only because Dutch law is familiar with both approaches (and variants), but also because the Dutch Supreme Court here speaks at a high aggregation

14 See for example Dutch Supreme Court 20 February 2004, *LJN AO1427*, *NJ* 2005/493 with commentary from C.E. du Perron (*Pensioenfonds DSM Chemie/Fox*); Dutch Supreme Court 8 October 2010, *LJN BM9621*, *NJ* 2010/456.

15 See C-W Canaris and H.C. Grigoleit, 'Interpretation of Contracts', in: A. Hartkamp *et al.* (ed.), *Towards a European Civil Code*, Nijmegen: Ars Aequi Libri and Kluwer Law International, 2011, pp. 606-607; article II:801(1) DCFR and the pertinent Notes 8 and 9 (C. Von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, DCFR, Full Edition*, München: Sellier 2009, p. 558. This approach is taken in article 56 of the Feasibility study for a future instrument in European Contract Law dd. 3 May 2011 of the Commission Expert Group on European Contract Law ([http://ec.europa.eu/justice/policies/consumer/docs/explanatory\\_note\\_results\\_feasibility\\_study\\_05\\_2011\\_en.pdf](http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf)) and in article 58 of Annex I to the Proposal for a Regulation on a Common European Sales Law (COM(2011) 635 final) of 11 October 2011.

level, namely about the interpretation of all contracts in all possible sorts of cases, which may thus be vastly different from each other.

At the same time reference may be made to a tendency in the case law of the Dutch Supreme Court in the interpretation based on the Haviltex criterion to attribute much weight to textual arguments when the dispute concerns commercial contracts concluded between professional parties for which the final negotiations have been conducted with the assistance of legal experts.<sup>16</sup> Thereby, then, it aims for the objective application variant of the Haviltex criterion. In a number of cases, (too) briefly put, a (more) textual interpretation of the relevant contracts is approved by the Dutch Supreme Court. That textual arguments in these cases carry a lot of weight, does not appear to be the result of a merely case-bound judgment of the weight of the arguments put forward by the parties for or against a certain interpretation. It turns out that there is a normative component at play as well: textual arguments must weigh heavily here. This tendency forms part of a broader development in Dutch law, whereby different cases are mentioned in which an objective interpretation occupies a special place.<sup>17</sup> At the same time the standard application of the Haviltex criterion is maintained, which also gives the court more scope to tackle the interpretation of the contract in the manner it deems best in the given case,<sup>18</sup> even if this should mean that the contract is not interpreted literally. Thereby the court deciding questions of fact has a great

16 Dutch Supreme Court 19 January 2007, *LJN AZ3178*, *NJ 2007/575* (*Meyer Europe/PontMeyer*); Dutch Supreme Court 29 June 2007, *LJN BA4909*, *NJ 2007/576* with commentary from M.H. Wissink (*Derksen/Homburg*); Dutch Supreme Court 9 April 2010, *LJN BK1610*, *NJ 2010/411* (*UPC/Aandeelhouders Signal*); Dutch Supreme Court 4 June 2010, *LJN BL9546*, *NJ 2010/312* (*Euroland/Gilde Buy-Out Fund*).

17 Dutch Supreme Court 20 February 2004, *LJN AO1427*, *NJ 2005/493* with commentary from C.E. du Perron (*Pensioenfond DSM Chemie/Fox*) mentions the collective bargaining agreement criterion and considers that there may be reasons for a more objective interpretation under Haviltex in connection with the interests of third parties. See further: Dutch Supreme Court 8 December 2000, *LJN AA8901*, *NJ 2001/350* (*Eelder Woningbouw/Van Kammen*), Dutch Supreme Court 13 June 2003, *LJN AH9168*, *NJ 2004/251* (*Teijssen/Marcus*) and Dutch Supreme Court 22 October 2010, *LJN BM8933*, *NJ 2011/111* with commentary from F.M.J. Verstijlen (*Kamsteeg/Lisser*), all about the interpretation of a notarial deed of transfer of or creation of a right to a registered property regarding the question what has been transferred or created; Dutch Supreme Court 23 December 2005, *LJN AU2414*, *NJ 2010/62* (*De Rooij/Van Olphen*) about the interpretation of a provision about 'normal use' in a standard deed such as the NVM deed; Dutch Supreme Court 2 February 2007, *LJN AZ4410*, *NJ 2008/104* (*NBA Management/Meerhuysen*) about the interpretation of a perpetual clause in auction conditions. Sometimes it is sufficient to indicate that there is a reason for interpreting a contract especially on the basis of objective factors; see Dutch Supreme Court 16 May 2008, *LJN BC2793*, *NJ 2008/284* (*Chubb/Dagenstead*) concerning the description of cover in a contract of insurance; Dutch Supreme Court 22 October 2010, *LJN BN5665*, *NJ 2010/570* (*Euronext/ASF Brokers*) concerning the AEX Listing and Trading Rules; Dutch Supreme Court 18 June 2010, *LJN BL8514*, *NJ 2010/354* (*Erasmus Beleggingen*) concerning a perpetual clause and a stipulation attached to a certain capacity.

18 Dutch Supreme Court 23 April 2010, *LJN BL5262*, *RvdW 2010/579* (*Halliburton/X*).

arsenal of strategies at its disposal for the interpretation of a contract. Although it is clear in some cases that a certain mode of interpretation must be selected, the choice of the approach to be adopted is mostly left to the understanding of the court (of the fact-finding instance).

In view of this case law there is a good chance that according to Dutch law, textual arguments will play a big role, or will even be decisive, in the interpretation of commercial contracts concluded between professional parties for which the final negotiations have been conducted with the assistance of legal advisers. However, it is not a foregone conclusion that the court *must* in such contracts *always* select this mode of application of the Haviltex criterion. Perhaps that would be asking too much, notably for a practical reason. Even though this group of contracts may be described in the abstract on the basis of a number of factors (such as professional parties, commercial contract, negotiations assisted by advisers), that description is not so accurate that one can always say that textual arguments should carry a lot of weight in the interpretation. It does make a difference how professional the parties involved really are: is it a small shopkeeper, working locally, or an internationally operating company? It also makes a difference how intensive the negotiations have been and to what extent the pertinent expert assistance influenced the phrasing of the contract. Prescribing a certain manner of interpretation exclusively on the basis of the factors mentioned could give rise to discussions about the proper delineation of the relevant category, when the discussion should focus on the proper interpretation of the contract. Conversely, an inductive approach, like the one adopted so far by the courts, allows the court to assess on the basis of the concrete case whether the case is one in which a (more) textual interpretation of the contract is called for.

Does this case law sufficiently meet the need of certain parties for their contract to be interpreted textually? For the parties that would like to have clarity beforehand about the question whether their contract will be interpreted textually, the message has not been unambiguously confirmed according to the current state of the art in case law. The existence of the possibility or even likelihood of a textual interpretation of the contract may not be enough to meet the need for textual interpretation when that question implies that the parties (and their advisers) may firmly depend on it. Can this certainty be provided under Dutch law?

Although courts, on the basis of their extensive experience in deciding all kinds of matters about different types of contracts, may have reasons to question the correctness of a textual interpretation, there may be grounds in certain cases to focus on that in particular. Not in every case does the contract prove to be the reliable compass which the parties had beforehand thought they could go by safely. Experience has shown that a textual interpretation only gives certainty to the extent that the text closes discussions. Whether the text will indeed prove to do so, is something that the parties can never be sure of in

advance.<sup>19</sup> Nor are they sure in advance whether their own party interest will in a future dispute be served best by a textual interpretation. Still, it is conceivable that the parties are aware of this and yet display a preference for textual interpretation. This may be explained as follows. In a certain sense the desire for a contract to be interpreted textually implies a lack of confidence in the ability of a third party (court or arbitrator) – still unknown at the time of conclusion of the contract – who will judge a possible dispute, to judge on the basis of what the parties really envisaged when concluding the contract.<sup>20</sup> This is not intended to disqualify any such third party, for that matter. The lack of confidence in this third party may be seen as a derivative of a lack of confidence in the other party. Will the latter, in case of a dispute about the contract arising after its conclusion, not be tempted to give its own interpretation ('twist') to the contract, only because that is advantageous for it and will its scope to do so not increase as contextual factors are more decisive for the interpretation? Maybe it does not end with the fear that such perceived opportunism of the other party will succeed with the court or the arbitrator. The lack of confidence may also be related to the contracting party itself. There are always different people from the organisations of the parties and from their advisers involved in (highly) complex transactions, while the degree of involvement and responsibility of each of them will vary. In such transactions there is a risk that a joint memory regarding the meaning of some of the agreements made at the time is absent, or cannot be (re)constructed afterwards with sufficient certainty.<sup>21</sup> Thus, the preference for a textual interpretation eventually rests on an effort to reduce uncertainty. For the parties – particularly the other party – the margin must be reduced to plead (apparently) with the force of arguments certain views not supported by the text of the contract. For the court or the arbitrator the margin must be reduced to take a certain decision not supported by the text of the contract. Parties who think along

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19 Compare for instance Dutch Supreme Court 19 January 2007, *LJN* AZ3178, *NJ* 2007, 575 (*Meyer Europe/PontMeyer*) *LJN* BL9546, and Dutch Supreme Court 4 June 2010, *LJN* BL9546, *NJ* 2010/312 (*Euroland/Gilde Buy-Out Fund*).

20 Compare R.H.J. van Bijnen, *Aanvullend contractenrecht* (doctoral thesis Tilburg), Den Haag: Bju 2005, p. 200.

21 A similar thing applies when standard contracts or boilerplate provisions are used without the parties devoting sufficient attention to their contents. Compare C.E. Drion, 'Anglo-Amerikaanse contracten, een zegen of een ramp?', *NJB* 2011/24, p. 1523. The problem may be obviated partly by working with a customary or standard meaning of such provisions. However, it is not the starting point of Dutch law that certain formulations have a standard or customary meaning. The familiar example refers to terms such as 'vouch for' or 'guarantee'; see Dutch Supreme Court 22 December 1995, *LJN* ZC1930, *NJ* 1996/300 (*Hoog Catharijne*); Dutch Supreme Court 4 February 2000, *LJN* AA4728, *NJ* 2000/562 with commentary from JBMV (*Mol/Meijer Beheer II*). When such a meaning is actually established, the Haviltex criterion subsequently takes it into account. See Dutch Supreme Court 4 May 2007, *LJN* BA1564, *NJ* 2007/187.

these lines, choose to rely on the text of their agreements, knowing that this entails risks as well.

In view of the principle of party autonomy the court has reason to respect that choice. As argued, however, it is difficult to formulate a general sub-rule by way of a distinction of the general Haviltex criterion. Indeed, under Dutch law the circumstances under which the arguments in favour of a textual interpretation apply are circumstances that will not always be valid. Therefore it is for the court to decide whether the case is one in which the conditions for a textual interpretation are present. An expedient may be for the parties in their contract to make a distinct choice for a textual interpretation. This is not necessary for the court to arrive at a decision that in the circumstances of the case the interpretation should accord a lot of weight to textual arguments; this decision is made even now, without such a clause. It is possible for the court to derive from a contractual choice for textual interpretation that the parties insist on this form of interpretation, provided that choice was made deliberately. If it then concerns a case that qualifies for this, the court can rest assured that this manner of interpretation, with all the pros and cons it entails, is the desirable form of interpretation for the parties concerned. That provides the basis for taking things a step further and stating that under these circumstances the parties' choice for textual interpretation must be respected. Once that is assumed, the parties can be certain beforehand that their contract will be interpreted textually.

### 3 CERTAINTY OF AND ADDITION TO THE CONTRACT

This will not suffice, because the legal consequences of contracts are not determined only by (interpretation of) the agreements made, but also by the other sources of law referred to in article 6:248 DCC (Dutch Civil Code): law, usage and reasonableness and fairness. The effect of reasonableness and fairness warrants particular attention in this context,<sup>22</sup> for its impact on the contract is the most difficult to gauge beforehand. It is known that interpretation and addition are legally related instruments. According to the (prevailing) view, which is also expressed in the case law of the Dutch Supreme Court,<sup>23</sup> these are two separate tenets. Indeed, only after it has been established by means of interpretation what rights and duties arise directly from the con-

22 Compare C.E. Drion, 'Uitleg van uitleg', *NJB* 2010, p. 279 and 'De status van de redelijkheid en billijkheid', *NJB* 2007, p. 433, which speaks of the 'knotty tenet' of interpretation and the 'panacea' of reasonableness and fairness.

23 See for example Dutch Supreme Court 19 October 2007, *LJN* BA7024, *NJ* 2007/565, *JOR* 2008/23 with commentary from Tjittes (*Vodafone/ETC*), legal grounds 3.4-3.5 (cf. about this judgment also the discussion between Grosheide and Drion in *Contracteren* 2008, pp. 30-32); Dutch Supreme Court 19 November 2010, *LJN* BN7886, *NJ* 2010/623 (*Skare/Flexmen*); Parl. Gesch. Boek 6, pp. 67 and 69; Asser/Hartkamp&Sieburgh 6-III\* 2010, nr. 366.

tractual agreements, can it be ascertained which obligations and other legal consequences are additionally attached to these agreements by the law, usage and reasonableness and fairness. It is at once acknowledged that in practice the interpretation of the contract as a whole and the role of the additional effect of reasonableness and fairness are occasionally difficult to separate, seeing that reasonableness and fairness also play a role in the interpretation. As a result, one cannot always indicate clearly where 'interpretation' stops and 'addition' begins. For that matter, the prevailing doctrine in the Netherlands is in line with that of other (European) systems, which also make the distinction between interpretation and addition, along with their own nuances.<sup>24</sup>

Whereas the blurred boundary line between interpretation and additional effect of reasonableness and fairness is not problematic in general, it may give rise to problems in contracts referred to here whereby the parties' wish is that the text should be central in their interpretation. That is precisely where the follow-up question may crop up: is it not likely that a contract interpreted so strictly should have shortfalls rather than a contract that allows for a broad and reasonable interpretation based on the circumstances of the case? And if so, does this not imply that this leaves more room for the additional effect of the principle of reasonableness and fairness? Or, conversely, should the strict approach governing the interpretation of such a contract be carried through also to the additional effect of reasonableness and fairness? The latter approach is preferable when it may be assumed that the parties have deliberately decided on a strict interpretation in a case qualifying therefor. This approach seems feasible.

The impact of the additional effect of reasonableness and fairness may fluctuate, depending on the nature of the contract. This *may* mean that there is little room left for the additional effect of reasonableness and fairness, because it concerns a contract that must be interpreted strictly. In case law this is expressed, for example, in the idea that a strict application of the conditions of an independent bank guarantee cannot be circumvented by attaining a result deviating from that strict application on the basis of the additional effect of reasonableness and fairness.<sup>25</sup> Following on this, it may also be argued that a strict application of the additional effect of reasonableness and fairness ties in with the nature of the contract in the sense that the result of the strict interpretation of the contract cannot be prejudiced by means of the

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24 See M.W. Hesselink, *De redelijkheid en billijkheid in het Europees privaatrecht* (doctoral thesis Utrecht) 1999, p. 138; N. Kornet, *Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives* (doctoral thesis Maastricht), 2006, p. 4, 266.

25 Dutch Supreme Court 26 March 2004, NJ 2004/309 (*Anthea Yachting Company/ABN-AMRO*). This does not exclude, by the way, that the bank may be obliged to point out to a party that the party's reliance on the guarantee does not satisfy the requirements. See Dutch Supreme Court 9 June 1995, LJN ZC1749, NJ 1995/639 (*Gesnoteg/Mees Pierson*) with commentary from PvS, in which the Dutch Supreme Court recognises the principle of strict conformity in accordance with the conclusion of advocate general Strikwerda.

addition.<sup>26</sup> This is not to say that no scope would be left for the additional effect of reasonableness and fairness. Here too, though, restraint will need to be exercised. The wish to do so could also be expressed by the parties in their contract, for instance by indicating that they think that the contract should only be added to on the ground of reasonableness and fairness when this is necessary to make the contract work in accordance with the parties' intentions.<sup>27</sup> In this context reference can be made to the provision of article II-9:101 paragraph 4 DCFR. It says that no 'implied term' can be assumed by the court 'if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing'. The comment clarifies that this provision is intended for the event 'where the parties have foreseen a contingency and have deliberately left it unprovided for, accepting the risks and consequences of so doing.' The provision is not intended for the event 'where the parties foresee a situation but either think it will not materialise or "forget" to regulate it without intending to accept the risks.'<sup>28</sup> A similar provision has been included in article 66 par. 3 of the Feasibility Study, though formulated slightly differently: 'if the parties have deliberately left a matter unprovided for, accepting that one or other party would bear the risk.' Article 68 par. 3 of the proposal for a Common European Sales Law also uses this formulation.<sup>29</sup> This formulation expresses even better that there is a distribution of risks. One could say that with regard to these deliberately 'unregulated' situations there is no 'gap' in the agreements, as it has been agreed that the party confronted with this situation must bear the consequences thereof itself.<sup>30</sup> It concerns situations of which the parties know that they could occur and which they knowingly leave 'unregulated' in the sense referred to just now.

#### 4 CERTAINTY AND UNFORESEEN CIRCUMSTANCES

According to art. 6:258 DCC a contract may be modified or set aside '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 provision concerns the occurrence

26 See also a case such as Dutch Supreme Court 16 May 2008, *LJN BC2793, NJ 2008/284 (Chubb/Dagenstead)*. It is difficult to conceive that the additional effect of reasonableness and fairness could lead to yet another result than the objective interpretation of the description of cover.

27 Compare Tjittes, *Uitleg van schriftelijke contracten*, Nijmegen: Ars Aequi Libri 2009, p. 88, about the correction by means of addition of a meaningless interpretation result.

28 C. Von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, DCFR, Full Edition*, München: Sellier 2009, p. 580.

29 On the understanding that one speaks of 'a matter unregulated' instead of 'a matter unprovided for'.

30 That is why in Dutch Supreme Court 19-11-2010, *LJN BN7886, NJ 2010, 623 (Skare/Flexmen)* it could be judged that the contractual provision about the allocation of taxes was not of such a far-reaching tenor as appeared to be the case at first sight.

of circumstances after the conclusion of a contract which are unforeseen, i.e. which have not been taken into account in the contract because the parties have not made any (tacit) arrangement about them. In addition, it must be a change of circumstances that is not for the risk of the party which suffers a loss as a result. According to settled case law the provision should be applied restrictively, since reasonableness and fairness require allegiance to the given word first and foremost.<sup>31</sup>

In the application of a provision such as article 6:258 DCC uncertainties are bound to present themselves, for the very reason that it concerns such special cases.<sup>32</sup> This may be clarified by some examples. Fluctuations in the market and hence of prices are a general fact. In principle, then, these cannot lead to the application of article 6:258 DCC. The same goes for price changes caused by amendments to legislation and regulations. In extreme cases the application of article 6:258 DCC is not excluded. A clear criterion is lacking, however. Sometimes a change in value of 50% or more is mentioned.<sup>33</sup> This is not meant to indicate that at such a percentage the contract should be modified; at most it gives an indication that article 6:258 DCC could apply (leaving aside whether, upon an affirmative answer, a price correction by the same percentage should take place). A very sharp fall in prices (by 170%) of waste paper has been deemed sufficient in case law, though.<sup>34</sup> One should consider that a contract of a (partly) speculative nature is incompatible with modification for that very reason, as it has allowed for the risk of price changes. In that sense the court ruled on a disappointing development in the price of building land when an appeal was made to a building company to fulfil its repurchase obligation after having transferred land to the municipality within the framework of the development of a zoning plan.<sup>35</sup>

The parties may have an interest in agreeing on a contractual arrangement about unforeseen circumstances. In this respect it should be noted that article 6:258 DCC is mandatory and cannot be contractually excluded.<sup>36</sup> The parties can try to put the flesh on the bones of this provision. They can make arrangements from which it follows that allowance has been made for certain changes in the contract. It may be agreed that certain changes are at the risk of one of the parties. Such a clause may also indicate how such changes should be

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31 Dutch Supreme Court 20 February 1998, LfN ZC2587, NJ 1998/493 (*Briljant Schreuders/ABP*); Asser/Hartkamp & Sieburgh 6-III\* 2010, nr. 444.

32 For an extensive survey of possible applications see P. Abas, *Rebus sic stantibus*, Deventer: Kluwer 1989, pp. 215-216. See also R. Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts-Comparative Perspectives* (doctoral thesis Utrecht), Antwerp: Intersentia 2011.

33 In the comment on art. 6.2.2 Unidroit Principles for International Commercial Contracts. See also Abas, WPNR 6307.

34 District Court of Roermond (summary proceedings) 1 July 1993, KG 1993, 317.

35 Court of Appeal of 's-Hertogenbosch 17 November 1983, BR 1984, p. 152.

36 Article 6:250 DCC.



dealt with. Thus, a price clause may indicate that the price is indexed according to a certain formula. Clauses like this clarify that the said change of circumstances cannot be considered to be ‘unforeseen’ in the sense of art. 6:258 DCC. However: no absolute certainty can be obtained thereby. The extent of the clause will need to be determined through interpretation (such as: does a price indexation also regard excessive price increases or only those that are normally foreseeable?). Here a contractual arrangement about the interpretation, such as discussed in section 2, may be useful.

## 5 CONCLUSION

All things considered, what role is left for reasonableness and fairness? Although that role is not played out, practically speaking it has been driven away towards the edges of the playing field. Rendered briefly, the following applies. In the approach described above, too, the starting point is maintained as described in the judgment *Pensioenfondsen DSM-Chemie/Fox*, that for the interpretation of a written contract decisive importance will always be attributed to all circumstances of the concrete case, assessed according to standards of reasonableness and fairness. In the administration of justice this principle is made operational in an interpretation criterion which under certain circumstances may be objective (*Haviltex* criterion) or is objective by definition (the CAO or collective bargaining agreement criterion). It has been argued that an application of the *Haviltex* criterion may result in an objective interpretation whereby textual factors are dominant, that the parties may have good reasons for deciding on these in their contract and that the court can and must respect that choice in the cases referred to. Further, it has been argued that the additional effect of reasonableness and fairness should reflect this strict manner of interpretation of the contract. This means that the additional effect must not detract from the result of the interpretation when it concerns subjects which the parties have deliberately not provided for. The above implies that the parties can to a great extent exert influence on what reasonableness and fairness entail in the interpretation of and addition to their contract.<sup>37</sup> That also applies to parties’ agreements about the application of article 6:258 DCC. Focusing attention on the text when determining the contents of the contract is, in these cases, not at odds with what reasonableness and fairness imply

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<sup>37</sup> This is not the same as the question whether the parties could contractually declare the additional effect of reasonableness and fairness to be inapplicable. See for that view R.H.J. van Bijnen, *Aanvullend contractenrecht* (doctoral thesis Tilburg), Den Haag: Bju 2005, p. 284; C.E. Drion, *NJB* 2007, p. 433; H.N. Schelhaas, *NTBR* 2008, p. 153. Against that H.C.F. Schoordijk, ‘Het betwiste onderscheid tussen uitleg en derogeren te goeder trouw breekt op’, *NJB* 2007, p. 1233; Asser/Hartkamp&Sieburgh 6-III\* 2010, nr. 380; P.S. Bakker, ‘Uitleg van commerciële contracten (I), *WPNR* 6890 (2011), pp. 481-482 and (II, end)’, *WPNR* (2011) 6891, pp. 505-508.

in the relationship between these parties. However, in extreme cases, reasonableness and fairness will intervene. That follows from the presence of corrective mechanisms, such as articles 3:13, 6:248 par. 2 and 6:258 DCC. Thus, certain undesirable forms of party behaviour can be corrected (such as acting in bad faith and conduct resulting in forfeiture of rights), and in exceptional cases of circumstances really not foreseen by the parties the contract may be modified.



## 5 | How flexible must a marriage settlement be?

*Tea Mellema-Kranenburg* ■

### 1 THE MODERNIZATION OF THE MARRIAGE SETTLEMENT

Although since the 1970s community property law has been modified several times on more or less important or subordinate points, our community property law remains an important focus of interest. I should like to draw attention to the question already posed by Schoordijk in 1996 whether a marriage settlement also applies in the event of changed circumstances.<sup>1</sup> When a marriage settlement is made, attention is focused on entering into a marriage on the one hand, and on the other hand on dissolution of the marriage, especially in the event of divorce. In the intervening period everything is relatively peaceful and there appears to be little need for a legal arrangement.

When discussing a marriage settlement we may distinguish between different phases.

### 2 ENTERING INTO THE MARRIAGE

Quite recently it was discussed in de ‘Tweede Kamer’ (the Lower House) whether it was desirable to make it mandatory for intending spouses to make a marriage settlement or to go to a notary to discuss whether a marriage settlement with some substance should be entered into. For the time being it has not materialized, but I believe that it is not desirable either.

In my opinion the community of property is the ideal system for community property for the majority of young couples. It is the pinnacle of solidarity: sharing the sweet and the bitter, not only the gains but also the burdens.

Naturally this may be unpleasant in certain circumstances, for instance if one of the spouses is an entrepreneur without personnel and has bitten off

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1 H.C.F. Schoordijk, ‘De betekenis van de rechtswetenschap voor het notariaat’, *WPNR* 1996 (6207), pp. 11-17 even suggests the hypothesis that science has neglected this question. Schoordijk wrote his article, by the way, mainly on the basis of the subordinated position of women. ‘A smart girl prepares for her future’. After fifteen years that is perhaps an obsolete slogan, in view of both the absolute and the relative power of women in the lecture halls. The principle of desirability of flexible marriage settlements is not changed by that.

more than he can chew, i.e. taken too great a risk, as a result of which not only he but also his spouse runs into bankruptcy problems. If only they had known! And that exactly seems to be what probably motivated the Kamer: not the necessity of making a marriage settlement but familiarity with the legal aspects of the matter. In my opinion that need not be done by making a marriage settlement or even by going to a notary, but by simply having the Registrar of Births, Deaths and Marriages and Registered Partnerships provide information about the proprietary consequences of the marriage or the registered partnership when notice is given of the marriage or the registered partnership: even if it is only a leaflet.

### 3 MAKING A MARRIAGE SETTLEMENT

When it later appears that a marriage settlement is desirable after all, the question is in what way this should be realized. The law on family property and therefore also the contents of a marriage settlement change as circumstances in society change.

That also applies to the perception of the continuing performance contract that a marriage settlement is.<sup>2</sup>

In principle a marriage settlement is made for a whole life or at any rate for a whole marriage. But what if the internal or external circumstances of the marriage change?

In my opinion there are two ways to deal with that: either the marriage settlement is so flexible that it already provides for the change in those circumstances, or an arrangement is included in the marriage settlement that the marriage settlement will be revised if the circumstances change.

Both cases will be discussed in more detail.

### 4 THE PREAMBLE

Several times<sup>3</sup> I have advocated the inclusion of a preamble in the marriage settlement. While the marriage settlement must naturally be clear, it may still be advisable to begin the marriage settlement with the considerations of the parties, stating why precisely they chose this settlement and how this settlement is to be interpreted.

What exactly is a preamble? My dictionary gives as the meaning for the Dutch word for preamble: 'a motive, an introductory paragraph of a law, a judgment, giving the considerations on which they are based'. A Latin diction-

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2 See T.J. Mellema-Kranenburg, 'De houdbaarheidsdatum van huwelijksvoorwaarden', *Tijdschrift Relatierecht en Praktijk* 2010, p. 175.

3 See also Mellema-Kranenburg loc. cit.

ary gives as the meaning for the same word: 'reflect on, take into consideration, be aware of'. In my view all these cases may be grouped under the concept of an explanation of another item. The preamble is not a component of the marriage settlement, but rephrases what the parties on both sides<sup>4</sup> may expect of the contents of the marriage settlement.

Naturally good information by the notary is essential on that occasion.

Sending the clients a questionnaire beforehand to prepare for the discussion of the marriage settlement is indispensable in that context. This is not a plea for always including a preamble in every marriage settlement. The main rule remains that the wording of the marriage settlement should be clear and not capable of more than one interpretation. The exceptional thing about the marriage settlement contract is, however, that its significance often only becomes an issue many years later. As long as the marriage proceeds smoothly, the marriage settlement is kept in the bottom drawer, but only when the first cracks appear in the marriage, does the significance of the marriage settlement become relevant and may it be that the texts drawn up twenty years ago are suddenly not as clear anymore as they appeared to be at that time. In case law we see that an important role is played by the fact that the parties are aware of the consequences of a construction chosen when the marriage is entered into, see for instance the judgment of the Dutch Supreme Court of 15 February 2008, *NJ* 2008, 110.

This concerned the question whether the right of compensation due to the husband on the strength of moneys withdrawn from the community for the construction of the marital home – built on a plot acquired privately by the wife by virtue of a testamentary disposition – had to be set at a nominal amount.

The Dutch Supreme Court held:

'The right to compensation in principle refers to the same amount as the one withdrawn from the community in the past. On the grounds of reasonableness and fairness that govern the relationship between the co-owners an exception may be made for this in such a way that (part of) the increase in value realized by this amount must also be compensated to the community. According to standards of reasonableness and fairness it is unacceptable that the wife merely returns to the husband the amount received in the past without any increase in the value of the dwelling'.

Subsequently the Dutch Supreme Court lists the relevant circumstances, with several considerations attributing an important role to the circumstance that the parties had or had not intended a certain legal consequence or had been aware of it.

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4 Dutch Supreme Court 13 March 1981, *NJ* 1981, 635, with commentary from CJHB (*Haviltex*).

‘When a nominal obligation of compensation of the wife is taken as a starting-point, the husband cannot benefit from this contribution. In that way the husband would actually have relinquished a future increase in value of the first joint home to enable the wife to build the relevant dwelling as private property, so that only she benefits from the dwelling. It has neither appeared nor been stated that the parties *had been aware of this consequence*.

The acquisition of the land and the dwelling by the woman in private follows from the last will of her father and is *not based on a deliberate choice of the parties*; they were married in the statutory community of property, from which it follows that they share equally in the increase/decrease in value of the goods that are part of the community.’ [italics TJMK]

These considerations show that the Dutch Supreme Court attaches importance to the parties’ awareness of the legal consequences of their community property system for the applicability of statutory (in this case community of property with nominal rights of compensation) or contractual rules of community property law. Whether this awareness is present may be inferred from a properly formulated preamble in which, apart from certain rules from the marriage settlement, especially the legal consequences attaching to them are emphasized.

Furthermore it may be true that the spouses have meanwhile got into different circumstances, for instance have gone to live in another country, in which case the marriage settlement may have to be assessed by a foreign court. Then, too, the text in the preamble can play an important role in the interpretation of the marriage settlement. This will especially be the case in countries that are accustomed to provisions resembling the preamble, such as in Anglo-Saxon countries. But the preamble may play a significant role also in our country, where reasonableness and fairness are gradually beginning to play a role in existing marriage settlements.

The preamble may make the meaning of the marriage settlement clearer to the foreign court than the wording alone, leaving aside the translation link that must be made with the marriage settlement.

## 5 THE REVISION CLAUSE

It is also possible, however, to evaluate the marriage settlement after a few years by including a revision clause<sup>5</sup> in the marriage settlement. The preamble could include, for instance, that the parties intend to reconsider the marriage settlement five years after the start of the marriage and to adjust it to the circumstances in which the parties are then. The circumstances could for instance have changed in the sense that after the birth of children the wife

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5 See Mellema-Kranenburg, loc. cit. p. 176; See also L.H.M. Zonnenberg, *Het verrekenbeding* (thesis Open University of the Netherlands), Deventer: Kluwer 2009, p. 327.

(or the husband) has started to work considerably less, as a result of which he or she generates less income. That could, for instance, lead to making a change in the way that incomes are settled. But even less foreseeable circumstances, such as the loss of a job or occurrence of occupational disability, could make a reconsideration desirable. It is also conceivable that tangible circumstances are listed that must lead to reconsideration of the marriage settlement. The question is, however, how much such an intention is worth. Let us assume that the wife wants to reconsider, but the husband does not. In that case the intention is not enforceable. In principle the intention only has a moral value, a natural obligation that people impose on each other, but is not enforceable.

The intention could be strengthened by formulating it in the form of a condition in the marriage settlement (article 3:38 Dutch Civil Code, hereinafter DCC). Then the condition will have to be given substance, though, for instance that the contents of the marriage settlement must be reconsidered if one of the parties no longer receives income from employment. If subsequently one of the parties defaults, the parties now agree for that future event to reach a solution by means of a mediator. Such a condition could be formulated in the article about the costs of the household or the settlement of income.

As such the reconsideration is given much more weight, but if things should get this far between the spouses, the days of the marriage also appear to be numbered.

On the other hand: precisely with a view to an impending divorce it may be very important for (one of) the parties to put everything into perspective.

## 6 REVISION ON THE STRENGTH OF THE LAW

Should it be so that the intention uttered in the preamble is not enforceable on the strength of the marriage settlement or that no preamble or revision clause has been included in the marriage settlement at all, one may wonder whether an alteration of the marriage settlement is not possible on the strength of the law.

## 7 THE SUPPLEMENTARY AND LIMITING EFFECTS OF REASONABLENESS AND FAIRNESS

In the first place consideration may be given to the supplementary effect of reasonableness and fairness (article 6:248(1) DCC). Let us assume that the parties have concluded a marriage settlement in which the husband takes the costs of the household for his account. The husband becomes occupationally disabled. I believe that in that case the interests of each of the parties and the circumstances of the special case (occupational disability) may entail that the marriage settlement is supplemented with the obligation for the wife to con-



tribute to the costs of the household as well.<sup>6</sup> Precisely in the continuing performance contract of a marriage settlement the existence of reasonableness and fairness will play a role. In my opinion that role of reasonableness and fairness will decrease as more has been ‘spelled out’ in the marriage settlement (or even the preamble). For that matter I believe that with the supplementary effect of reasonableness and fairness the contractual provisions themselves will remain intact; they will therefore not be altered, as in article 6:258 DCC, to be discussed below.

Moreover, thought may be given to the limiting effect of reasonableness and fairness (article 6:248(2) DCC). In this connection it must first be determined what the contents of the marriage settlement are. If the contents are clear and no problems of interpretation occur, it may still be true that observance of the contents agreed may prove very bitter. An example of the applicability of the limiting effect of reasonableness and fairness is the judgment of the Dutch Supreme Court on 18 June 2004, *NJ* 2004, 399. The case was as follows: the husband and wife made a marriage settlement during the marriage exclusively to protect the joint property from possible future creditors of the husband. They continued to behave, however, as if they were married in community of property.

When it then came to a divorce, the Court of Appeal held that the marriage settlement was clear and not susceptible of different interpretations. But then the Dutch Supreme Court:

‘4.3 Insofar as the ground for appeal resists the consideration of the Court of Appeal that even the demands of reasonableness and fairness cannot detract from the marriage settlement agreed between the parties, it succeeds, because with this judgment the Court of Appeal has failed to recognize that a rule in force between the parties by virtue of a marriage settlement does not apply insofar as this is unacceptable in the given circumstances according to standards of reasonableness and fairness (cp. *inter alia* Dutch Supreme Court 25 November 1988, *NJ* 1989, 529 and Dutch Supreme Court 29 September 1995, *NJ* 1996, 88). In that connection it should be noted that when answering the question whether in the settlement of accounts between former spouses after dissolution of the marriage the marriage settlement must be deviated from on the strength of reasonableness and fairness, importance may definitely be attached to mutually corresponding behaviour during the marriage, even if that behaviour deviated from the marriage settlement.’

Naturally a marriage settlement constitutes a very special type of contract with its own statutory provisions of community property law. Nevertheless I should

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<sup>6</sup> For that matter it would also be possible here to rely on the limiting effect of reasonableness and fairness because it is contrary to reasonableness and fairness to discover that reliance is placed on the provision that the husband will take the costs of the households exclusively for his account.

not want to rule out the limiting effect of reasonableness and fairness under certain circumstances.<sup>7</sup>

Even if reliance on reasonableness and fairness should succeed, that will still not lead to an alteration of the marriage settlement, at most to not applying a provision included in the marriage contract.

#### 8 UNFORESEEN CIRCUMSTANCES (ARTICLE 6:258 DCC)

It is possible, however, to go one step further and assert that even if there is no preamble and revision clause included in a marriage settlement at all, the other spouse may ask the court for a revision of the agreement because of a change of circumstances (article 6:258 DCC). Reasonableness and fairness may then entail that a change of circumstances leads to an alteration of the marriage settlement.<sup>8</sup>

In this connection a role is played by the question to what extent the 'imprévision' rule of article 6:258 DCC may be applied to the special agreement of a marriage settlement.

Arguments pleading against change were already listed by Schoordijk in 1996:<sup>9</sup>

- a. the public-law elements that the marriage settlement comprises are not susceptible of change;
- b. legal certainty is endangered by an alteration of the marriage settlement;
- c. how heavily must changed circumstances weigh to justify an alteration of the marriage settlement?

With regard to the public-law elements (a) I fully agree with Schoordijk: first of all agreements with a public element are also susceptible of alteration, secondly it is highly debatable how public a marriage settlement is. In my view marriage itself contains elements of public law but the property law system is purely a matter of private law.

With regard to legal certainty (b): naturally there is always a certain tension between legal certainty and reasonableness and fairness but the legislator has

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7 See also J. van Duijvendijk-Brand, *Afrekenen bij (echt)scheiding* (thesis Leiden), Deventer: Kluwer 1990, pp. 120-121.

8 See Van Duijvendijk-Brand 1990, pp. 121-122; Asser/Hartkamp & Sieburgh 2010 (6-III\*), nr. 441; W.L. Valk, 'De door de rechter te betrachten terughoudendheid in geval van onvoorziene omstandigheden', *NTBR* 1994, pp. 258-260; M. Antolskaia, B. Breederveld, L. Hulst, W. Kolkman, F. Salomons & L. Verstappen, *Koude Uitsluiting* (Report by researchers of the VU and the RUG), Den Haag: Boom Juridische uitgevers 2011, pp. 37-44; see also Dutch Supreme Court 18 June 2004, *NJ* 2004, 399; Dutch Supreme Court 10 June 2010, *RvdW* 2010, 811; *LJN* BM4649; Dutch Supreme Court 29 September 1995, *NJ* 1996, 88 (*milk quota judgment*).

9 See Schoordijk 1996, p. 15.

an open mind if adherence to existing contracts leads to unacceptable consequences, as appears *inter alia* from article 6:258 DCC.

From this it follows logically that the changed circumstances must be reasonably drastic (c) and – especially – not anticipated. A next question is: should one rather exercise restraint with the application of the rule from the general law of obligations or is a more generous application appropriate here in view of the nature and the contents of the marriage settlement? For the time being case law practises restraint. Before the implementation of the new Civil Code the future appeared to hold the use of reasonableness and fairness, witness the *Kriek/Smit* judgment.<sup>10</sup> In summary this concerned a dwelling that had been registered in the husband's name with the wife's money. The parties had been married with the exclusion of any form of community property. After the divorce the house was sold with a substantial profit. In principle the wife was only entitled to repayment of the same amount as she had made available to the husband for the financing of the dwelling. The surplus value would then have benefited the husband entirely. The Dutch Supreme Court, however, considered a correction appropriate owing to the unforeseen circumstances at the time of the purchase and stated:

'In that connection it will depend on the question whether the relevant unforeseen circumstances are of such a nature that the spouse in whose name the house is registered may not expect in accordance with standards of reasonableness and fairness that it will be enough for him to merely return the amount made available in the past without any settlement of the increase in value of the dwelling.'

However, after this there have not been many feats to report in the field of unforeseen circumstances in community property law. In case law a few attempts were made on the subject, such as for instance in the '*Hilversum catering*' judgment,<sup>11</sup> but there the Dutch Supreme Court stayed with the exclusion of every community agreed between the parties. Much is written about this subject, however, especially in relation to the concept of '*koude uitsluiting*' (i.e. exclusion under a matrimonial contract precluding any claim by one spouse on assets accruing to the other spouse during the marriage, hereinafter '*cold exclusion*').

A difficult point when relying on unforeseen circumstances is to determine when it is a matter of circumstances that were unforeseen when the agreement, i.e. the marriage settlement, was entered into. In that connection the issue is what supposition the parties took as a basis: did they or did they not want to provide for the possibility of the occurrence of the unforeseen circumstances

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10 Dutch Supreme Court 12 June 1987, *NJ* 1988, 150, with commentary from E.A.A.L. (*Kriek/Smit*).

11 Dutch Supreme Court 25 November 1988, *NJ* 1989, 529.

or, at any rate, did they tacitly take that possibility into account.<sup>12</sup> As the relevant circumstances are less remote from the imaginative powers or actual conceptions of the parties, the belief will sooner be created that they were taken into account (article 3:35 DCC).<sup>13</sup> When we apply this to a marriage settlement, it must therefore be true that the circumstances that cause inequities did not already exist when the marriage settlement was concluded and that in the agreement the parties did not reckon with the occurrence of the circumstances either.

The expectations that the spouses had when entering into the marriage settlement therefore play an important role.<sup>14</sup>

In view of my earlier suggestions concerning the preamble, the answer to that question should be easy in the presence of a preamble.

In the Koude Uitsluiting (Cold Exclusion) report<sup>15</sup> it is concluded that in legal practice material problems occur in the event of 'cold exclusion' and a number of solutions are presented.

There the specific fairness correction is also mentioned in the event that owing to changed circumstances the provisions of the marriage settlement had become unacceptably unfavourable for the former spouse who has or has not undertaken (part of) the care for the children. There is also mention of a more general fairness correction, consisting of the possibility of setting aside or adjusting a marriage settlement comprising a 'cold exclusion', if it is unreasonable in view of all the circumstances of the case.

I count myself among the persons who believe that for such a fairness correction a change of law is not necessary, but that application of article 6:258 DCC leads to the desired result. That does not only apply to the marriage settlements that entail 'cold exclusion' but also to marriage settlements whose shelf life has expired for other reasons.<sup>16</sup>

In the above I asked the question whether with regard to marriage settlements the general *imprévision* rule of article 6:258 DCC should perhaps be applied with restraint. I think the opposite is the case. A marriage settlement constitutes a continuing performance agreement, concluded for a long period whose course is hard to survey. Moreover, this concerns parties who have an affectionate relationship with each other. Naturally the rule 'contract is

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12 See TM, Parl. Gesch. Boek 6, p. 98 and p. 973; Valk 2009 (T&C BW), art. 6:258 DCC, note 2.

13 See Asser/Hartkamp & Sieburgh 2009 6 III\*, no. 441.

14 See the Koude Uitsluiting report, p. 37.

15 A report about the bottlenecks in Cold Exclusion (and unmarried cohabitation) issued by order of the Ministry of Justice by lawyers of the University of Groningen and the Free University.

16 See also Van Duijvendijk-Brand 1990, pp. 121-122; M.J.A. van Mourik, 'Huwelijkse voorwaarden en de eisen van redelijkheid en billijkheid', *WPNR* 1987 (5811), pp. 1-5; H.C.F. Schoorndijk, 'Amerikaanse huwelijkse voorwaarden en koude uitsluiting', *WPNR* 1989 (5914), pp. 251-255. See furthermore the Koude Uitsluiting report, p. 308 and the literature mentioned in it in note 2.

contract' also applies there. Legal certainty demands it. Still, if there is a case of unforeseen circumstances anywhere, it is here.<sup>17</sup> Even if there is superb information, with questionnaires, which I applaud, as said, and even if, as suggested in the report on Cold Exclusion, every party has its own adviser, nevertheless life and therefore also a marriage may turn out differently than had been foreseen or was foreseeable. Hence my request to legal practitioners but especially to the judiciary: please apply article 6:258 DCC generously here!

#### 9 ALTERATION OF THE MARRIAGE SETTLEMENT ON THE GROUND OF A NATURAL OBLIGATION

If the marriage settlement does not imply an enforceable alteration of the marriage settlement and there is no legal ground for alteration either, there may be a natural obligation to alter the marriage settlement on the ground of a compelling moral duty (article 6:3(2)(b) DCC). Whether it is a question of a natural obligation depends on social views and must be assessed in accordance with objective criteria. Subjective standards play no role in this.<sup>18</sup> In that connection the court must decide what the substance is of the views generally held in society. Where duties of care are relevant, a role will be reserved in particular for the existence of a natural obligation. See on the subject the judgment of the Dutch Supreme Court of 9 November 1990, *NJ* 1992, 212 (*Nahar/Cornes*) and Dutch Supreme Court 15 September 1995, *NJ* 1996, 616.

On the ground of these duties of care one spouse may for instance have the duty to ensure that the other spouse may continue to live in the matrimonial home even if the house is registered in the name of the other spouse and the spouses are married with the exclusion of any form of community property.<sup>19</sup>

The problem at work here is that the natural obligation is not enforceable (article 6:3(1) DCC). This means that co-operation of both spouses is required to 'convert' the natural obligation into an obligation that is legally enforceable.

If such co-operation is not possible, it may be possible, after having established that it is a question of a natural obligation, to ask the court for an alteration of the marriage settlement. That, in turn, naturally raises the problem that the circumstances must be unforeseen, which is not always the case with the existence of a natural obligation. If we cannot rely on article 6:258 DCC in this case, we might consider article 6:248 DCC.

If it is a question of a natural obligation between the parties, reasonableness and fairness entail, taking account of the interests of both parties and the

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<sup>17</sup> Schoordijk, loc. cit. speaks in this connection about the vicissitudes of life.

<sup>18</sup> See also the Koude Uitsluiting report p. 54.

<sup>19</sup> See Dutch Supreme Court 17 October 1997, *NJ* 1998, 692.

circumstances of the specific case, that the marriage settlement is supplemented or limited to what is reasonable and fair between the parties.

## 10 CONCLUSION

Society is changing constantly. Persons change. The community property system often needs maintenance. This may be done by the spouses revising their marriage settlement or even their system of property. Often they will need a little help for that purpose. This may be done by including a provision in the marriage settlement that in the event of a change of circumstances they will revise their marriage settlement.

If such a provision has not been included and/or spouses are not prepared to co-operate in a revision of the marriage settlement, it is possible to rely on reasonableness and fairness in certain circumstances. In that connection it is possible to consider reliance on the supplementary or limiting effect of article 6:248 DCC, as a result of which the marriage settlement is supplemented or some specific provision from the marriage settlement may not be relied on. Even more drastic is reliance on article 6:258 DCC, on the strength of which the court may alter the marriage settlement (possibly strengthened by the existence of a natural obligation). So far, however, the courts have been very reluctant in the application of article 6:258 DCC. I hope I have shown that under certain circumstances they may definitely apply article 6:258 DCC.



## 6 | Foreseeable and unforeseeable defects after the transfer of immovable property

*Clementine Breedveld-de Voogd* <sup>■</sup>

The taps started dripping, the pipes started leaking, the roof tiles started breaking, and green mould started appearing on the walls.<sup>1</sup>

### 1 THE CONFORMITY REQUIREMENT AND THE MANIFESTATION OF HIDDEN DEFECTS

Anyone who has ever bought a house knows one thing for sure: sooner or later, they will be faced with repairs and major and minor defects, and have to make more or less necessary alterations to bring the house into line with modern life.<sup>2</sup> The battle against the elements, including fire and water, is in the buyer's hands from the time of delivery (article 7:10(1) of the Dutch Civil Code, hereinafter 'DCC'),<sup>3</sup> and that is why the date of delivery is the point at which it is necessary to decide whether the seller has sold the buyer a property which conforms to the contract.<sup>4</sup> The seller is liable for defects which existed before the delivery and which the buyer did not need to expect at that point. It is generally accepted, on the basis of case law established in the lower

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1 Isabel Allende, *The House of the Spirits* (English translation by Magda Bogin, original title: *La casa de los espíritus*), Jonathan Cape, 1982.

2 The conformity requirement of article 7:17 DCC, the provisions regarding the time of the transfer of risk (article 7:10 DCC) and the obligation to notify of article 7:23 DCC apply to the sale of both movable property and immovable property. This article was written from the perspective of the sale of immovable property and does not deal with the rules for consumer sales, in view of the fact that the sale of immovable property is by definition not deemed to be a 'consumer sale' (article 7:5(1) DCC), even if the property was sold to a consumer by a professional seller.

3 The time of delivery is the point at which the buyer is given possession of the property (article 7:9(2) DCC). Opinions differ on the question when this is the case for immovable property. According to Huijgen, this is prior to the transfer, viz. when the keys are handed over, which is usually done when the deed of transfer of title is signed (W.G. Huijgen, *Koop en verkoop van onroerende zaken* (Studiepockets Privaatrecht, no. 58), 3<sup>rd</sup> edition, Deventer: Kluwer 2008, no. 21), but according to Reehuis this point usually coincides with the registration of the deed of transfer of title in the public registers (Pitlo/Reehuis Heisterkamp, *Goederenrecht*, Deventer: Kluwer 2006, no. 205).

4 Asser-Hijma 5-I, *Koop en Ruil*, 2007, no. 332.



courts,<sup>5</sup> that when buying an existing property, not every imperfection means that the house fails to conform to the contract. Thus, to a certain extent, a buyer will have to take account of some maintenance or arrears that will need to be performed immediately, even if the need for them was not immediately visible when the contract of sale was signed.<sup>6</sup> A buyer who fails to perform such maintenance and who lets minor repairs become major arrears cannot hold the seller responsible for this. This does not, however, alter the fact that after the sale, it may be possible to stumble on defects which could not really be considered the kind of problems a buyer could be expected to accept and which therefore fall outside the scope of the conformity requirements of article 7:17 DCC. If such defects manifest themselves, the buyer can exercise against the seller the rights and powers the law confers on him in the event that an obligation under the contract has not been performed (article 7:22(4) DCC): he may, for example, demand repair (article 7:21(1)(b) DCC), set aside the contract of sale in whole or in part (article 6:265 DCC) or claim compensation (article 6:74 DCC). Confirmation that such a defect exists could also, for example, lead to the conclusion that the buyer has been led astray upon the formation of the contract of sale (error), and this offers him the possibility to annul the contract (article 6:257 DCC).

By definition, a 'conformity defect' is one which the buyer should not have been required to *expect* at the time of the delivery. However, does this also mean that the buyer is justified in *waiting* to see whether such a defect manifests itself following delivery? And is it then not too late to go back to the seller with a claim on account of that defect? Article 7:23(1) DCC (which can be classified as a *lex specialis* of article 6:89 DCC) makes it clear that, in legal terms as well, a buyer cannot remain passive following delivery and must give the seller notification of a defect 'within a reasonable period after having discovered or having reasonably been able to discover' that defect. A buyer who fails to comply with this obligation to notify the seller, loses all rights under the claim that the purchased thing does not conform to the contract. According to case law of the Dutch Supreme Court, this sanction not only applies to claims concerning defects in purchased things based on nonconformity to the contract, but also to claims for annulment of the contract on the grounds of error and to claims arising from an unlawful act.<sup>7</sup> The period

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5 District Court of Arnhem 4 December 1997, *Njkort* 1998, 22 and District Court of Utrecht 17 December 1997, *Njkort* 1998, 26.

6 W.G. Huijgen, *Koop en verkoop van onroerende zaken* (Studiepockets Privaatrecht, no. 58), 3<sup>rd</sup> edition, Deventer: Kluwer 2008, no. 22a; Castermans & Krans 2009 (Text and Commentary on the Dutch Civil Code), article 7:17 DCC, note 2; Asser-Hijma 5-I, *Koop en Ruil*, 2007, no. 346d.

7 Dutch Supreme Court 29 June 2007, *NJ* 2008, 606, with commentary from Jac. Hijma and Dutch Supreme Court 21 April 2006, *NJ* 2006, 272 (*Inno v Sluis*). For criticism of the application of article 7:23 DCC in case of error, see Jac. Hijma, 'Koop en ruil', *WPNR* 5982 (1990), pp. 738-739.

within which the buyer was permitted to give notification of any defect in purchased things is deemed an expiry period.<sup>8</sup> This is then followed by a period of limitation, which can be described as fairly brief compared with the general periods of limitation provided for in Book 3 of the Dutch Civil Code. Claims and grounds for defence which are based on nonconformity of the purchased thing expire two years after the buyer gave the seller notification in compliance with the obligation to do so (article 7:17(2) DCC).

The expiry period of article 7:23 DCC was designed to protect a seller against late notifications which are then difficult to dispute.<sup>9</sup> The principal criticism of this *ratio legis* in legal literature is that article 7:23 DCC offers insufficient justification for the far-reaching sanction which it imposes on the buyer, viz. the expiry of all his rights on the grounds of nonconformity.<sup>10</sup> Tamboer therefore argues in favour of making finer distinctions as to the consequences of overdue notifications. In view of the fact that articles 6:89 and 7:23 DCC are elaborations of the doctrine of the forfeiture of rights and are therefore based on the restrictive effect of the key principle of reasonableness and fairness under Dutch law (*redelijkheid en billijkheid*), Tamboer believes that article 7:23 DCC should also be elaborated in that light. She argues, for example, that, although forfeiture of the right to claim the setting aside of an entire contract is not unfair, it should remain possible to claim partial repayment of the purchase price. She also believes that finer distinctions should be possible as regards which party should be responsible for providing evidence of the allegations and which party has the burden of proof.<sup>11</sup>

The applicability of the principles of reasonableness and fairness at the end of the route, i.e. to claims that can be filed in the event of a breach of contract, is an opportunity to avoid the unfair outcome of the obligation to notify. The Dutch Supreme Court, however, seems to have opted for a different approach: it has placed the question whether the buyer has notified the seller in time in the 'key context' of contractual good faith and has allocated an important role to the seller's obligation to provide the buyer with information and the buyer's obligation to investigate, as is customary in the formation of a contract.

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8 Asser-Hijma 5-I, *Koop en ruil*, 2007, no. 543; regarding the question of whether this is an expiry period under the rules of public order, see R.P.J.L. Tjittes, 'De klacht- en onderzoeksplicht bij ondeugdelijke prestaties', *RMThemis* 2007, p. 16.

9 TM, Parliamentary history, *Parl. Gesch. InvW. Boek 7*, p. 146.

10 J.G.H. Meijerink, 'De klachtplicht in Europees perspectief', *NTBR* 2010, para. 3; S. Tamboer, 'De klachtplicht van de koper in het Nederlandse kooprecht', *Tijdschrift voor Consumentenrecht* 2008, p. 225 and p. 227; T. Hartlief, 'De klachtplicht van de teleurgestelde koper', *Ars Aequi* 2008-5, pp. 363, 364 and 368.

11 S. Tamboer, 'De klachtplicht van de koper in het Nederlandse kooprecht', *Tijdschrift voor Consumentenrecht* 2008, pp. 227 and 228.

## 2 INVESTIGATION PERIOD AND NOTIFICATION PERIOD

The ‘reasonable period’ within which a buyer is required to notify a seller of a defect commences at any rate at the point at which a buyer becomes aware of the nonconformity. Hijma points out that this is not the point at which the buyer has his first doubts, but the point at which he concludes that the purchased thing does not conform to the contract.<sup>12</sup> An example of a situation in which the buyer’s suspicions hardened into certainty within a few months can be found in the *Fabels v Meenderink* judgment.<sup>13</sup> The buyer, Meenderink, had applied for subsidy from the Nibag, the agency charged with implementing the Soundproofing Facilities Scheme (*Regeling geluidwerende voorzieningen*), for soundproofing his newly-purchased home. The Nibag, however, ruled that Meenderink did not qualify for subsidy because some of the renovations previously made by the seller, Fabels, did not comply with the soundproofing standards applicable at the time. Meenderink then turned to the Soundproofing Facilities Foundation (*Stichting Geluidwerende Voorzieningen*) to verify whether the Nibag’s refusal to let the house qualify for government subsidy was correct. The Foundation concurred with the Nibag, after which Meenderink turned to Fabels. According to Fabels, the period for notifying him commenced at the point at which Meenderink was informed of the Nibag’s refusal. According to the Dutch Supreme Court, however, the applicable criterion was the point at which Meenderink could or should be assumed to have had sufficient certainty that the house did not conform to the contract. The Dutch Supreme Court agreed with the Court of Appeal’s decision that the Nibag’s letter did not offer sufficient certainty and that the reasonable period did not commence until the point at which Meenderink received the decision from the Soundproofing Facilities Foundation.

Taking into consideration the seller’s interests, it is not unreasonable to require a buyer to notify a seller that the purchased thing does not conform to the contract within a reasonable period once the buyer has sufficient certainty of the nonconformity. Aside from this is the issue of how a ‘reasonable period’ should be interpreted in the case of the purchase of immovable property.<sup>14</sup> When applying article 7:23(1) DCC, the buyer’s problem is that the seller might argue that the ‘reasonable period’ commenced before the actual discovery of the nonconformity, i.e. at the point at which the buyer ought *reasonably* to have discovered the defect. This implies that, after having acquired the property, the buyer is not only required to inform the seller of any defect he discovers, but also to inspect the property.<sup>15</sup>

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12 Asser-Hijma 5-I, *Koop en ruil*, 2007, no. 544.

13 Dutch Supreme Court 25 February 2005, *JOR* 2005, 168 with commentary from J.J. Damingh (*Fabels/Meenderink*).

14 See legal ground [3.3.4] of the *Pouw v Visser* judgment, referred to below.

15 Asser-Hijma 5-I, *Koop en ruil*, 2007, no. 544a.

The *Pouw v Visser* judgment demonstrates how the period of time available to the buyer to investigate the property (investigation period) can be determined. It also provides clarity on the length of the period within which the buyer should notify the seller (notification period).<sup>16</sup> Pouw purchased a house from Visser in Onderdijk on 26 May 2000 which house was built in 1987. This property was transferred on 1 December 2000. Pouw moved in shortly afterwards. In late June 2001 (more than six months after the transfer), Pouw discovered that the paint on the wooden top rail on the window on the western side of the house was starting to bubble. The painter called in by Pouw scraped away the paint and discovered mould and wood rot in the entire rail and window frame. Pouw then called in a building consultant to ascertain whether the house had any other defects. The consultant's report, which summed up various other defects, was not made available until 26 September 2001. In a letter dated 27 September 2001, Pouw notified Visser of those defects and claimed compensation for damage on account of the property's nonconformity to the contract. Visser successfully contested this claim before the District Court and based his defence on article 7:23 DCC. The Court of Appeal upheld this defence, finding that Pouw had discovered or ought to have discovered the defects in late June 2001. According to the Court of Appeal, the notification, which was served twelve weeks later, could not be deemed to have been served within a reasonable period. The Dutch Supreme Court subsequently discussed in great detail the length of the investigation period (a) and the notification period (b) (legal ground 3.3.3):

'The length of the period referred to at (a) depends on the circumstances of the case. In view of the seller's interests protected by article 7:23(1) DCC, the buyer must institute and carry out the investigation referred to at (a) with the expeditiousness which could reasonably be expected of him in view of the circumstances of the case. In that respect, the nature and visibility of the defect, the way in which it becomes apparent and the buyer's expertise are some of the relevant factors.'

The Dutch Supreme Court added that if an expert opinion is necessary, the buyer is in principle entitled to wait for the outcome of that investigation. The Dutch Supreme Court (legal ground 3.3.4) also found as follows in connection with the notification period:

'The third sentence of article 7:23(1) provides that notification made within a period of two months of discovery is sufficiently prompt in terms of the length of the period referred to under (b) in case of a consumer sale.

In case of a non-consumer sale, the question whether notification has been given within a reasonable period must be answered by weighing up all the interests concerned, with due consideration of all the relevant circumstances, including whether

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16 Dutch Supreme Court 29 June 2007, *NJ* 2008, 606 with commentary from Jac. Hijma (*Pouw v Visser*).

the seller is prejudiced by the length of the notification period. It is not possible to give a fixed period for this, even as a point of departure.'

The lower courts sometimes adhere to a notification period of, in principle, two months for the purchase of immovable property (the same as for consumer sales), but it is clear from the above that the Dutch Supreme Court is not in favour of such standardisation.<sup>17</sup>

The buyer must inspect the property after the transfer and must conduct this inspection reasonably expeditiously. Exactly how expeditiously this should be done depends on the circumstances of the case, such as the nature and visibility of the defect, the manner in which it becomes apparent and the buyer's expertise. The possible influence of acts or omissions by the seller is not yet included in this enumeration of relevant circumstances. These elements are articulated in another judgment: *Ploum v Smeets & Geelen II*, and the facts of this case which gave rise to this judgment give every reason for their inclusion.

This judgment followed on from a judgment delivered by the Dutch Supreme Court on 23 November 2007 on the liability of the seller of a petrol station built on a lot which turned out to be contaminated.<sup>18</sup> These two judgments were the result of the following dispute: Ploum sold a lot in Kerkrade containing a petrol station to Smeets and Geelen Tankstations (hereinafter '*Smeets*'). Shortly after the transfer, Smeets discovered that the soil was seriously contaminated and held Ploum liable for the damage it sustained, arguing that Ploum had breached their contract and committed an unlawful act vis-à-vis Smeets. Ploum rejected this claim contending, *inter alia*, that Smeets had not notified Ploum of the property's nonconformity (articles 6:89 and 7:23 DCC) in due time. In its first judgment, the Dutch Supreme Court reiterated its previous ruling in the *Inno v Sluis* judgment of 21 April 2006, namely that articles 7:23 and 6:89 DCC apply to any legal claim by a buyer which is in fact based on the purchased thing's nonconformity to the contract, even if the buyer bases his claim on an unlawful act.<sup>19</sup> The Dutch Supreme Court also held that articles 6:89 and 7:23(1) DCC aimed to protect a debtor in the sense that the latter should be able to rely on the fact that a creditor who believes that a performance does not conform to the contract should inform the debtor of that fact expeditiously. A debtor/seller who becomes aware of a defect in any other way therefore continues to have an interest in the creditor actually performing its obligation to notify. In legal proceedings, the buyer is required

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17 Asser-Hijma 5-I, *Koop en ruil*, 2007, no. 545a.

18 Court judgment, 23 November 2007, NJ 2008, 552 with commentary from H.J. Snijders to Dutch Supreme Court NJ 2008, 553 (*Ploum v Smeets & Geelen I*) and Dutch Supreme Court 25 March 2011, LJN BP8991 (*Ploum v Smeets & Geelen II*).

19 Dutch Supreme Court 21 April 2006, NJ 2006, 272 (*Inno v Sluis*).

to submit and provide evidence that he notified the seller of the defect in due time, describing the manner in which he did so.

The Dutch Supreme Court referred the case back to the Court of Appeal in Arnhem, which was charged with deciding whether Smeets had notified Ploum in due time. A few months after the transfer it came to Smeets' attention that the lot was included in the provincial decontamination programme, it wrote to BP, the petrol station's tenant, asking why the property had been included in that programme. After a number of reminders to BP, Smeets finally received an answer a year later, the essence of which was that the soil under the petrol station was seriously contaminated. Smeets immediately notified Ploum in writing. This particular investigation had therefore taken one year.

The Arnhem Court of Appeal ruled that once it had become aware of the decontamination programme, Smeets merely needed to conduct a brief investigation by writing to BP enquiring into the reason for inclusion in the programme. This was sufficient because, partly on the basis of the statements made by Ploum, Smeets was entitled to presume that the soil was not contaminated. The fact is that the deed of transfer referred to a previous soil survey and guaranteed that no government agency or public utility had required the seller to make any obligatory amendments to the property at that point.

Ploum lodged a second Supreme Court appeal against this judgment. In the *Ploum v Smeets & Geelen II* judgment, the Dutch Supreme Court rejected the grounds for appeal lodged against the Court of Appeal judgment on the following ground (legal ground 3.3.2):

'(...) The more a buyer is entitled to be confident that a purchased thing conforms to the contract on the basis of the contents of the contract of sale and the other circumstances of the case, the less he can be expected to proceed with an (expeditious) investigation, because, in general, a buyer may rely on the accuracy of the statements made by a seller in this connection, certainly if these statements may be interpreted as reassuring statements regarding the presence or absence of certain characteristics of the purchased thing.'

The Dutch Supreme Court then went on to comment on the requisite degree of expeditiousness of the buyer's obligation to investigate: if it was a simple matter for the buyer to establish whether a suspected defect actually existed, that investigation could be brief. If, however, such certainty could only be obtained after a lengthy or expensive investigation, the buyer would have to be allowed sufficient time to conduct it. In this regard, the Dutch Supreme Court held that in determining the requisite degree of expeditiousness, any third-party assistance required, would also have to be taken into account. The absence of (prompt) assistance from third parties is not always automatically the buyer's responsibility. Finally, the Dutch Supreme Court listed the circumstances to be taken into account in protecting the seller's interests, for which 7:23 DCC was intended:

‘In this connection (...) the extent to which the seller’s interests have or have not been prejudiced is the guiding principle. If those interests have not been prejudiced, there is not likely to be sufficient reason to accuse the buyer of a lack of expeditiousness. The seriousness of the failures could be such that an omission by the buyer cannot be used against him.’

In his commentary on the *Pouw v Visser* judgment, Hartlief carps at the absence of a firm guideline regarding the various factors which could affect the length of the investigation period. This is underlined by the fact that articles 6:89 and 7:23 DCC are placed in the key of the principle of legal certainty.<sup>20</sup> At first sight, it would seem that in the *Ploum v Smeets & Geelen II* judgment, the Dutch Supreme Court only exacerbated this vagueness by introducing yet another element into the debate, i.e. ‘all the circumstances’, but on closer consideration it is clear that this does not involve an open and unstructured weighing-up of the parties’ interests in which more and more new factors can be added to the catalogue of circumstances. The debate about the buyer’s obligation to notify the seller of a defect is a contractual debate on the purchased thing’s conformity to the contract. As is the case in the formation of a contract of sale, the buyer’s legitimate expectations and the legal relationship between the parties, which is subject to good faith, play a key role following the delivery of the purchased thing as well.

### 3 THE OBLIGATION TO PROVIDE INFORMATION AND THE OBLIGATION TO INVESTIGATE UPON THE FORMATION OF A CONTRACT OF SALE

A purchased thing conforms to the contract of sale if it has the characteristics which the buyer is entitled to expect upon its delivery. These expectations regarding the purchased thing are largely formed by what the buyer knows about it. If he has any doubts about the presence of certain characteristics, he must investigate them. To quote the first sentence of article 7:17(5) DCC, ‘The buyer may not invoke nonconformity of the thing to the contract if he was, or reasonably ought to have been, aware of it at the time the contract was concluded.’ When forming these expectations, the buyer may rely on the statements made by the seller about the purchased thing (first sentence, article 7:17(2) DCC). But there is more. In forming his expectations, the buyer is also entitled to expect that the seller will inform him of any defects of which he, the seller, is aware. This implies that the seller is charged with a certain obligation to provide information.

Much has been and will continue to be written about the relationship between the seller’s obligation to provide information and the buyer’s obliga-

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20 T. Hartlief, ‘De klachtplicht van de teleurgestelde koper’, *Ars Aequi* 2008-5, p. 367.

tion to investigate.<sup>21</sup> Current case law would seem to be clear: the seller's obligation to provide information prevails over the buyer's obligation to investigate. This rule became a standard criterion when the Dutch Supreme Court addressed the buyer's right to invoke error. Subsequently, in the *Van Dalfsen v Kampen* judgment, the Dutch Supreme Court ruled that this principle can also be used as point of departure in the test against the conformity requirement of article 7:17 DCC. This judgment, however, emphasised that this principle is subject to exceptions in certain special circumstances. In its role as seller of an old building, the municipality of Kampen had breached its obligation to provide information to the buyer, by failing to give the buyer, Van Dalfsen, a calculation of the load-bearing capacity, which was still in the archives of the council's buildings inspection department. Van Dalfsen, who wished to convert the old building into a restaurant with a functions room on the first floor, had however been warned by others that the load-bearing capacity on the first floor was going to be a problem. Given his plans, he had also called in an architect with whom he had viewed the building on a number of occasions. It was furthermore clearly visible that the timber beams on the first floor were sagging. This fact and the nature and age of the building could have been reason to conclude that the load-bearing capacity of this floor would be inadequate. For this reason, the Dutch Supreme Court upheld the decision by the Court of Appeal that, despite the fact that the municipality had breached its obligation to provide information, it could nevertheless invoke the buyer's own obligation to investigate.

Valk has rightly criticised the Dutch Supreme Court's formulation of this judgment, which created the impression it was an exception to the main rule – an exception in which the buyer's obligation to investigate should suddenly prevail on account of the special circumstances. He points out that in the doctrine of nonconformity, as well as in other doctrines of contract law, the obligation to provide information goes hand in hand with the principle that parties to a contract should be protected in their legitimate expectations.<sup>22</sup> Within the scope of article 7:17 DCC, the position of the seller's obligation to provide information vis-à-vis the buyer's own obligation to investigate must

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21 See *inter alia* A.G. Castermans, *De mededelingsplicht in de onderhandelingsfase*, PhD thesis Leiden, Deventer: Kluwer 1992; J.H. Nieuwenhuis, 'Wat mogen koper en verkoper van elkaar verwachten? Digitale en analoge werking van redelijkheid en billijkheid', *WPNR* 6304 (1998); P. Klik, 'De verhouding tussen spreek- en onderzoeksplicht', *NTBR* 1998, pp. 295-300, no. 8; J. Dammingh, 'De mededelingsplicht van de verkoper en de onderzoeksplicht van de koper', *WPNR* 6327 (1998); W.L. Valk, 'De rol van de mededelingsplicht in gevallen van non-conformiteit', *NTBR* 2009-18, pp. 137-144; T.H.M. van Wechem, 'Gelijkschakeling van mededelingsplichten en onderzoeksplichten bij vraagstukken van non-conformiteit en dwaling?', *WPNR* 6790 (2009), p. 222-226; Kasper Jansen, 'De gulden middenweg', in: A.G. Castermans, Jac. Hijma, K.J.O. Jansen, P. Memelink, H.J. Snijders & C.J.J.M. Stolker (eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, pp. 337-351.

22 W.L. Valk, 'De rol van de mededelingsplicht in gevallen van non-conformiteit', *NTBR* 2009-18, no. 9.



always be determined on the basis of the following criterion (of which the obligation to provide information is ‘merely a corollary’): did the purchased thing conform to what the buyer was entitled to expect? If the buyer was aware of a possible defect, as in the *Van Dalfsen v Kampen* judgment, he cannot insist that he was entitled to expect the purchased thing not to have this defect. In such a case the court would not even consider the issue of the seller’s obligation to provide information. In these circumstances, I doubt even whether the municipality could have been assumed to have been required to provide the information in question at all.

#### 4 THE OBLIGATION TO PROVIDE INFORMATION AND THE OBLIGATION TO INVESTIGATE; FROM A PRE-CONTRACTUAL TO A POST-CONTRACTUAL PERSPECTIVE

To what extent can the various theories on the obligation to provide information and the obligation to investigate during the formation of a contract play a part in answering the question whether, after a purchased thing is delivered, a buyer can be required to inspect a property and, if so, with what degree of expeditiousness he must conduct this investigation. The point of departure must be the purchased thing’s nonconformity to the contract, because otherwise the notification obligation and the obligation to investigate would not require any consideration. A purchased thing does not conform to a contract if it does not have the characteristics which the buyer is entitled to expect on the basis of that contract. Logically, this means that, from the time of delivery, the buyer is entitled to expect that the purchased thing has the agreed characteristics. It seems illogical that as of the point at which the buyer is entitled to have these expectations, he is charged with an obligation to investigate the existence of any defects. A distinction ought to be made here. The buyer’s legitimate expectations determine the substance of the contract and therefore the seller’s contractual obligations. This does not imply that the buyer should close his eyes to the possibility that the purchased thing does not conform to the contract and that the seller has defaulted in complying with the contract. If he wishes to exercise his contractual rights vis-à-vis the seller, the buyer must, from the outset, take account of the possibility that compliance (or proper compliance) with contracts is not always a given. The inspection of a newly-acquired thing has since time immemorial been the concern of a new buyer:<sup>23</sup>

‘But one by one they started making excuses. The first said, “I have just bought a field which I need to inspect; I regret I cannot accept the invitation.”. And another

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23 Luke 14:18 and 19 (The Holy Bible, revised standard version, Wm. Collins Sons & Co. Ltd, 1971).

said: "I have bought five yoke of oxen and I go to examine them; I regret I cannot accept the invitation."

In the first instance, a buyer will look at and inspect a property out of a sense of self-interest, but, when safeguarding his own contractual rights, he will also have to take into account the other party's interests. Even when exercising these rights, the buyer and seller remain locked in a legal relationship which is governed by good faith and which entails that their behaviour must, in part, be governed by the other party's legitimate interests.<sup>24</sup> Hijma believes that this rule forms the basis for the obligation to notify the seller in the case of nonconformity: the seller has an interest in the fact being established that the purchased and delivered thing indeed does conform to the contract within a reasonable period following delivery.<sup>25</sup> And that is the more understandable in case of the sale of immovable property. The passage of time can mean that minor defects, which would not have amounted to nonconformity upon transfer, might become major defects which could impede the property's normal use in the course of time. The *Ploum v Smeets & Geelen II* judgment demonstrates that the seller's interests play a key role when determining the investigation period, as in this judgment the Dutch Supreme Court finds that the question whether the seller's interests have been prejudiced is a decisive factor.

What is the relationship between the obligation to provide information and the obligation to investigate in the post-contractual period – the period in which the buyer is obliged to notify the seller of any defects? Are these obligations also an elaboration of the buyer's legitimate expectations? The *Pouw v Visser* judgment makes it clear that it is reasonable to expect a buyer to conduct the investigation with the expeditiousness which could reasonably be expected of him in the light of the circumstances of the case. The following factors are relevant: the nature and visibility of the defect, the manner in which it became apparent and the buyer's expertise. In the *Ploum v Smeets & Geelen II* judgment, the Dutch Supreme Court posed the question whether and how the buyer should conduct an investigation within the framework of his expectations that the purchased thing complies with the contract (see the legal ground cited in para. 2). This is a matter of greater or lesser expectations: the more the buyer is entitled to rely on the property's conformity, the less quickly he

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24 Dutch Supreme Court 15 November 1957, *NJ* 1958, 67 with commentary from L.E.H.R. (*Baris Riezenkamp*).

25 Asser Hijma 5-I, *Koop en Ruil*, 2007, no. 541; see also Castermans & Krans 2009 (Text and Commentary on the Dutch Civil Code), article 7:23 DCC, note 2, in which reference is made to the 'pre-contractual' *Baris/Riezenkamp* and *Booy/Wisman* judgements (Dutch Supreme Court 21 January 1966, *NJ* 1966, 183) also in connection with post-contractual obligations to notify the seller of defects in order to determine the relationship between the buyer's own obligation to investigate on the one hand and incorrect information provided by the seller or the breach of the seller's obligation to provide information on the other.

can be expected to conduct an (expeditious) investigation'. This does not mean, however, that the outcome of this weighing-up cannot yield a 'digital' result.<sup>26</sup> Once it has been decided what investigation period is reasonable in the given case, the outcome of a breach of that period will be all or nothing: the loss of rights and powers based on the property's nonconformity. As in the pre-contractual period, the statements made by the seller determine to a large extent the degree to which expectations are legitimate. As to these statements, the Dutch Supreme Court finds that the buyer is in general entitled to rely on their accuracy. As far as the obligation to notify the seller of defects is concerned, this presents nothing new. After all, article 7:23(1), second sentence DCC states:

'Where, however, it is established that the thing lacks a characteristic which according to the seller it possessed, or where the variance pertains to facts of which the seller was or ought to have been aware but has not communicated, the notification must take place promptly after the discovery.'

There is, however, a notable difference between the Dutch Supreme Court's legal ground and the second sentence of article 7:23(1) DCC: according to the statutory provision, the seller is not under any obligation to investigate the existence of defects, and therefore no investigation period applies, if the seller has informed the buyer that the property had a certain characteristic. In that case, the notification period does not commence until the buyer discovers that such characteristic is in fact lacking. The Dutch Supreme Court's ground thus offers more scope for applying certain qualifications, and that is, in my view, rightly so. Suppose that when the contract of sale was concluded the seller informed the buyer that there was no damp in the cellar, but that, three years after the transfer, when clearing out his tools, the buyer discovers that there is half a centimetre of water under the linoleum. This explains the rust on his hammers, saws and drills. A subsequent investigation shows that the damp was caused because, after the formation of the contract of sale, but two months before the transfer, the drainage authority had decided to permanently raise the ground water level. Was the buyer exempt from the obligation to investigate the property after the transfer, on account of the seller's statement before the formation of the contract? This question about the buyer's own obligation to investigate is even more pressing in view of the fact that in article 7:23 DCC not only the seller's factual statements seem to rule out the buyer's own obligation to investigate, but also any failure to report characteristics of which the seller was aware (or even unaware), but of which he *ought to* have been

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26 Regarding 'digital' and 'analogue' patterns in questions on nonconformity, see Kasper Jansen, 'De gulden middenweg', in: A.G. Castermans, Jac. Hijma, K.J.O. Jansen, P. Memelink, H.J. Snijders & C.J.J.M. Stolker (eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, pp. 339-341.

aware. In my opinion, the information which the buyer should have about the property increases with the passage of time and, at a certain point, he can no longer claim that the seller ought to have been aware of a defect while believing that he should not have been required to discover it himself.

The criticism of the second sentence of article 7:23 DCC is essentially the same as the criticism of the *Van Dalfsen v Kampen* judgment: the rule that the obligation to provide information prevails over the obligation to investigate is not a main rule to which exceptions are permitted, but merely a rule of thumb which must be applied within a certain context. But it is important not to lose sight of the main principle: to what extent was the buyer entitled to expect that the immovable property had certain characteristics? In the post-contractual phase, these expectations are in the first place established on the basis of the substance of the contract (see also the first sentence of legal ground 3.3.2 of the *Ploum v Smeets & Geelen II* judgment), but, as time passes, these expectations will be increasingly influenced by the facts of which the buyer becomes aware in the course of time.<sup>27</sup> Not only the statements made by the seller, but also the factors which the Dutch Supreme Court previously summed up in the *Pouw v Visser* judgment (the nature and visibility of the defect, the manner in which it becomes apparent and the buyer's expertise) can be placed within the contractual framework sketched in the *Ploum v Smeets & Geelen II* judgment: what was the buyer entitled to expect?

## 5 CONCLUSION

A contract of sale is not a continuing performance contract. This applies to the sale of immovable property as well. Upon transfer the buyer has paid the purchase price and the seller has transferred the property. They go their separate ways, each having performed his part of the contract. However, the post-contractual period will prove whether the seller has indeed transferred a property which conforms to the contract, and this applies in particular to any hidden physical defects which manifest themselves after the transfer. The legal relationship, which is governed by good faith and which commenced when the parties started negotiating, has not ended. More than that, that relationship will truly be put to the test in this post-contractual phase if the property does not entirely satisfy the buyer's expectations. It is clear from the *Ploum v Smeets & Geelen II* judgment that, with regard to the post-contractual requirements which may be imposed on a buyer, the buyer's perspective of the property is decisive. As with the formation of the contract, everything eventually turns on the question what the buyer was entitled to expect. In this post-contractual period, these expectations are readjusted by the manifestation

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<sup>27</sup> Castermans & Krans 2009 (Text and Commentary on the Dutch Civil Code), article 7:23, note 2.

of major and minor defects, which require further investigation. There is no other party that can be charged with this responsibility: at this point the buyer is, after all, the owner of the property. The relationship between the seller's obligation to provide information and the buyer's post-contractual obligation to investigate, can only be understood in terms of the buyer's expectations. Both in the pre-contractual and in the post-contractual phase, the rule that the obligation to provide information prevails over the obligation to investigate must be used as a rule of thumb only: a rule which can be a useful aid when establishing the buyer's legitimate expectations. Presumably, even more so than in the pre-contractual phase, the buyer will have to attach greater importance to his own findings and observations.

## 7 | Success and new technologies as unforeseen circumstances in intellectual property law

*Dirk Visser & Paul van der Kooij* <sup>■</sup>

### 1 INTRODUCTION

Unforeseen circumstances do not play a role in a large part of intellectual property law. Important aspects of intellectual property (hereinafter called: IP) law, such as the object of protection (invention, trademark, design, work, plant variety, trade name, etc.), the procedural and substantial conditions for protection, the contents of protection and the limitation, duration and termination of rights, have been defined by (inter)national laws and treaties, and are interpreted in case law in a rather clear and predictable way.

However, agreements between interested parties have always been an important issue in this part of law too, e.g. in licensing contracts, contracts commissioning an order to an artist (to make a portrait, to write a book, etc.), employment contracts containing certain IP elements such as provisions with regard to secrecy, employee inventions and copyright, as well as contracts dealing with the transfer of IP rights.

In this article we would like to focus on current regulations and case law with regard to two important contracts containing IP elements, in particular employment contracts in which provisions concerning employee inventions have been laid down (para. 2), and copyright contracts dealing with the rights and obligations of authors vis-à-vis their works of literature, science or art (para. 3).

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## 2 EMPLOYEE INVENTIONS

### 2.1 The Netherlands

In the year 2011, by far most inventions are performed by individual employees, working single-handedly or in a team, but specifically engaged in order to search for new products or processes or for improvements (on improvements on improvements) on existing products and processes. Despite the fact that these inventors totally outnumber the self-employed, independent inventors, the Dutch Patent Act of 1910 (as well as its successor, the Patent Act of 1995) contains only one provision dealing with inventions by employees.<sup>1</sup> According to the text of this provision (formerly article 10(1), nowadays article 12(1) of the Patent Act 1995), in short, if an employee is the inventor of a new product or process, he is entitled to the patent, unless this person has particularly been engaged to work ‘as an inventor’ (e.g. in a laboratory or on a research department of the company in question). In the latter case (in fact: in 99 per cent of all cases) the fruits of his R & D endeavours will be enjoyed by the employer, who, as a result, will be entitled to the patent.

Article 12(2) and (3) contain similar provisions regarding inventions realized during an internship and inventions at university locations or in other research institutions. Paragraphs 1, 2 and 3 of article 12 are of a facultative nature: the parties involved are entitled to make other arrangements (see article 12(5)).

Through this provision, the legislator has tried to reconcile two different points of view put forward by interested parties: on the one hand those who favour the inventor to be granted the exclusive right as a reward for his/her creative and inventive work; on the other hand those who hold the opinion that only the company should be entitled to protection, because the company has in fact hired the employee against a certain salary which – in most cases – already takes into consideration the *possibility* that the employee will achieve patentable inventions during the term of his employment. Moreover, it is argued that to a certain extent the company’s continuing existence may be dependent on the contents of its patent portfolio.

Be that as it may, article 12 of the Patent Act 1995 also takes into consideration the possibility that – maybe just once in a lifetime – an employee invents something which turns out to be extremely profitable for the company’s

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<sup>1</sup> As far as European patents are at stake, see Article 60 of the European Patent Convention. Paragraph 1 of this Article reads as follows: ‘The right to a European patent shall belong to the inventor or his successor in title. If the inventor is an employee, the right to a European patent shall be determined in accordance with the law of the State in which the employee is mainly employed; if the State in which the employee is mainly employed cannot be determined, the law to be applied shall be that of the State in which the employer has the place of business to which the employee is attached.’

revenues. For such cases, article 12(6) contains provisions which are obligatory (see article 12(7)): in short, they read as follows: if an employee has come up with an invention, and according to this article the employer is entitled to the patent, the former is entitled to an equitable remuneration (on top of his normal salary), if otherwise (without the extra remuneration) he would not receive sufficient compensation for the loss of the patent. This additional allowance shall take into account the financial value of the invention and all other circumstances of the case, especially the circumstances which accompanied the development of the invention as such. The employee must file his claim on equitable remuneration within a period of three years after the date of the granting of the patent to the employer.

There are a number of rather indefinite elements in this provision. They will be discussed below.<sup>2</sup> First, where the legislator refers to the financial interest of the invention, it is unclear whether the interest for the employer is meant or for the employee (if the latter would have been entitled to the patent). There is, of course, a big difference between these two options. For the employee in most cases the interest would be considerably lower, because he would have to invest a lot of money in order to finish the invention himself into a product ready to be marketed. This seems to be the correct interpretation, taking into account the text of the provision, which refers to a period of three years after the granting of the right, during which the employee must file his claim: to calculate the interest for the employer would often take a much longer period of time. This interpretation has also been suggested in the literature.<sup>3</sup> However, the Dutch Supreme Court once held, that it was the intention of the legislator to provide the employee/inventor with a reasonable part of the benefits of the invention for the employer.<sup>4</sup>

Secondly, article 12(6) does not clarify whether the value of the invention must be fixed on the date of the granting of the patent, or on a later date. Following the *Perquin* decision mentioned above (footnote 4) it would be necessary to deal with this matter after many years, perhaps even at the end of the term of the patent. This would of course be very unsatisfactory for the employee, having to await the outcome of such a calculation. In other and more recent case law, however, it has been decided that the value of the invention must be established (retroactively) on the date on which the patent was granted.<sup>5</sup> Although this seems to be the better approach, it is not without

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2 See also E.A. van Nieuwenhoven Helbach/J.L.R.A. Huydecoper, C.J.J.C. van Nispen, *Industriële eigendom, deel 1, Bescherming van technische innovatie*, 2002, p. 289 *et seq.*

3 See e.g. B.M. Telders & C. Croon, *Nederlandsch Octrooirecht*, 1946, p. 100; C. Croon, *De rechtspositie van de ontwerper, de maker en de uitvinder in dienstbetrekking*, 1964, pp. 11-12. See also District Court of Den Haag 5 March 1971, NJ 1974, 326 (*Van Kleffens/Instituut voor Tuinbouw-techniek*).

4 Dutch Supreme Court 30 June 1950, NJ 1950, 52, BIE 1950, 77 (*Perquin/Perfra*).

5 District Court of Den Haag 5 March 1971, NJ 1974, 326 (*Van Kleffens/Instituut voor Tuinbouw-techniek*); Hof Den Bosch 4 June 1980, NJ 1982, 30 (*X/Lips*). See also C. Croon, *op. cit.*, p. 12.



disadvantages either, as it may be quite difficult to estimate the gain of a patent at such an early stage, and the result of such estimation could often be open to dispute.

Thirdly, article 12(6) is rather vague with regard to the circumstances that accompanied the development of the invention, and which must also be taken into consideration in order to establish the additional payment, once it has been accepted that the employee is entitled to such payment. This should of course always be decided on a case by case basis; consequently, the outcome will often be highly uncertain. In the *Lips* case referred to above (footnote 5), the Court of Appeal enumerated the following parameters: a) the nature of the activities of the employee, as well as his salary and other (e.g. financial) benefits he has enjoyed in connection with these activities; b) the question whether other employees have also been involved in the development of the invention, and if so, to what extent; c) the question whether the employer has provided the employee/inventor with special facilities and possibilities in order to simplify his research activities; d) the question to what extent the organization of the company enables the commercial exploitation of the invention; e) the question of how the value of invention can be estimated and to what extent additional technical difficulties can be overcome.

It may have become clear from the above that the legal status of employee/inventors in the Netherlands has always been quite obscure. This can also be illustrated by a court decision from 1994 which has become rather notorious, at least among employees. As of 9 October 1969 Mr. Hupkens was employed as a ‘development engineer’ by the company Schuurmans & Van Ginneken. The employment contract contained a provision which stated that the employer would be entitled to patent protection with regard to inventions realized by the employee, and furthermore, that if the employer would apply for protection, the employee would be entitled to an appropriate remuneration, pursuant to (at that time) article 10 of the Patent Act.

In general, with regard to contracts like the one referred to, two further uncertainties may arise: a) first, the question whether the employee must be considered to be an employee/inventor as defined in article 10(1); in this case there was no discussion on this point, as the contract itself referred to the remuneration mentioned in article 10(2) (nowadays article 12(6)); in other court proceedings, a number of criteria have been developed to answer this question;<sup>6</sup> b) even if there is no doubt about article 10/12 being applicable, the decision whether or not to apply for patent protection lies in the hands of the employer only, see also the employment contract in the *Hupkens* case cited above. In other words: so long as the employer (for whatever reason) does

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6 See e.g. District Court of Arnhem 2 March 1933, *BIE* 1933, p. 60 (*Van Dartelen/Algemeene Kunstzijde Unie*); OR AvB (Board of Appeal of the Dutch Patent Office) 3 December 1949, *BIE* 1950, 4. See also B.M. Telders & C. Croon, *op. cit.*, pp. 106-107.

not apply for protection, the right of the inventor to receive an extra remuneration does not yet become operational.

Be that as it may, what happened in this case was that Mr. Hupkens came up with an invention (already in October 1969!) which, in short, turned out to be very profitable for the company. In 1982 the company was granted a patent for this invention. In the meantime, Mr. Hupkens had already left the company in 1973. After the grant of the patent he applied for the remuneration referred to in article 10 Patent Act (and mentioned in his former employment contract). Employer and employee were not able to reach an amicable settlement of their dispute, and therefore they went to court. The Cantonal Court appointed three experts to provide advice on the height of the remuneration. One of these experts advised paying Mr. Hupkens fl. 50,000.- (approximately € 22,500.-), but the other two experts came to the conclusion that he should receive fl. 585,000.- (approximately € 265,000.-) plus an additional amount of money, on an annual royalty basis, for the period starting in 1989. The enormous gap between these two results was caused by the fact that the experts had used a different basis for their calculations (in short: the value of the invention for the employee and the value for the employer, respectively). The Cantonal Court accepted the advice given by the two experts. In the appeal proceedings, however, the District Court set that decision aside. According to the latter Court, article 10 Patent Act provides rules with regard to an additional remuneration, which will apply only rarely, because in most cases the salary of the employee/inventor will be sufficient as it will already take into account the fact that the employee was specifically hired to do inventive work. The advice given by the two experts was based on the wrong principle: it should not have followed the view that the value of the invention must be calculated on the basis of the assumption of a licence agreement concluded between employer and employee. The Dutch Supreme Court upheld the latter decision. It held that according to article 10(2) Patent Act the financial value of the invention is only one of several circumstances which must be taken into account. Moreover, according to the Dutch Supreme Court, equity does not dictate that the employee's loss of the patent should be geared to the advantages obtained by the company as a result of the use of the invention in a manner decided by that company.<sup>7</sup> Thus, Mr. Hupkens received a remuneration much smaller than the one referred to above; in fact that remuneration was not even enough to compensate for the costs of legal proceedings taking more than a decade.

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7 Dutch Supreme Court 27 May 1994, NJ 1995, 136 (*Hupkens/Van Ginneken*).

The *Hupkens* decision has both been welcomed<sup>8</sup> and criticized<sup>9</sup> in the doctrine. Since then, no important developments in this field of law can be reported. In a more recent decision the Dutch Supreme Court repeated its decision in the *Hupkens* case, and, in addition, held that in order to accept the right to an extra remuneration it is ‘neither sufficient nor necessary’ that no specific component of the salary can be attributed to the employee’s loss of the patent.<sup>10</sup>

With a view to the relatively scarce Dutch case law on this topic, the conclusion might be that, in general, employment contracts concluded in the Netherlands between employers and employees/inventors deal with the problem in a satisfactory manner. On the other hand, the absence of case law might also (at least in part) be caused by a certain fear to start litigation against an employer, as this may have a negative impact on the employment relationship in question. In fact, in the majority of published cases on employee inventions, this relationship had already been ended as a result of the conflict arisen between the two parties. Therefore, it could be interesting to investigate employee invention systems applicable abroad. In this context, the German approach differs considerably from the Dutch approach.

## 2.2 Germany

In 1957 the German Parliament enacted the *Arbeitnehmererfindungsgesetz* (Employee Inventions Act).<sup>11</sup> It has been operational ever since, and was only slightly amended in 2009 (see hereafter). The Act’s two main objectives are of an economic (to stimulate employees to come up with inventions) and of a social nature (to protect employees/inventors). As a result, the Act contains a considerable number of provisions, dealing with all kinds of conflicts which may arise in this context.

The central notion in this Act is the so-called *Diensterfindung* (service invention). To qualify as a ‘*Diensterfindung*’, pursuant to § 4(2) a service invention must have been achieved during the employment period, and either came into being from the employee’s incumbent activity or was largely based on experiences or activities of the enterprise. All other inventions are so-called *freie Erfindungen* (free inventions), which the employee may exploit himself, after the fulfillment of a number of obligations, laid down in § 18 and § 19.

8 See e.g. J.H. Spoor, comment with regard to the *Hupkens* case (footnote 7), *NJ* 1995, p. 527 *et seq.*; Van Nieuwenhoven Helbach *et al.*, *op. cit.*, pp. 293-294.

9 See e.g. A.A. Quaedvlieg, ‘De betrekkelijke waarde van een werknemer voor de vooruitgang’, *BIE* 1996, p. 121 *et seq.*; A. Rijlaarsdam, *Octrooi en dienstbetrekking*, 2005, p. 84 *et seq.*

10 Dutch Supreme Court 1 March 2002, *NJ* 2003, 210 (*TNO/Termeulen*).

11 See <<http://www.arbeitnehmererfindungsgesetz.de/>> (accessed June 2011).

An employee who has made a 'service invention' has a duty to immediately inform the employer about this invention through a specific form. The employer must confirm the date of receipt of the notification to the employee promptly in writing. In the notification the technical problem, the solution and the realization of the service invention must be described (§ 5(1) and (2)). Pursuant to § 6, the employer has the right to claim the service invention. As of 1 October 2009 (cf. § 43(3)), this claim shall be deemed to have been made if the employer does not release the invention within four months from the date of the notification referred to in § 4: this new provision reduces the administrative burden for the employer compared to the situation before the entering into force of the revised Act.

As a result of the claim, all rights related to the service invention shall pass to the employer (§ 7(1)). Once the employer has claimed the service invention, the employee is entitled to a reasonable remuneration. In assessing the compensation, in particular the economic usefulness of the invention, the role and position of the employee within the enterprise and the share of the company in the realization of the invention shall be taken into consideration. Elaborate guidelines have been drawn up to determine the amount of the remuneration (§ 11).<sup>12</sup>

With regard to service inventions, as a general rule the employer is obliged to file a patent application in Germany, and he is entitled to do so in other countries (§ 13(1) and § 14(1), respectively). The Act contains a number of provisions dealing with several difficulties (exceptions, differing opinions, etc.) which may result from the said obligation, see in particular § 13(2), (3) and (4), § 14(2) and (3), § 15-17.

Pursuant to § 28 all disputes between the employer and the employee arising from this Act shall be settled, free of charge (§ 36), by a special Arbitration Board, to be established at the Patent Office (see also § 37 *et seq.* with regard to further judicial proceedings).

In the past, the system laid down in the German Act was sometimes criticized, e.g. because of the administrative burden it places on the employer, or because the big differences between the German system and legal systems applicable in other countries might be an obstacle for international (*intra-company*) cooperation in the field of R & D.<sup>13</sup> However, on the whole, the German Act has been accepted by the interested parties and has been judged positively by several authors. The system is considered to contribute to a good working climate, as well as to the technical development and the competitive

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<sup>12</sup> See e.g. <<http://transpatent.com/gesetze/rlarberf.html>> (accessed June 2011).

<sup>13</sup> See e.g. K. Meier, 'Bewährtes deutsches Arbeitnehmererfinderrecht?', *GRUR* 1998, p. 779 *et seq.*; R. Kockläuner, 'Bewährtes deutsches Arbeitnehmererfinderrecht?', *GRUR* 1999, p. 664 *et seq.*; Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, 'Stellungnahme zu einer Revision des Gesetzes über Arbeitnehmererfindungen, *GRUR* 2000', p. 385 *et seq.*; H. Vieregge, 'Aktuelle Berichte – February 2005', *GRUR* 2005, p. 132.

power of the national industry. Finally, it has not given rise to many court proceedings, and to a certain extent it has also inspired the French and Swiss legislators.<sup>14</sup>

In conclusion, comparing the Dutch and the German approach to employee inventions, it seems rather difficult to deny the higher degree of legal certainty provided by the latter. This might induce the Dutch government also to consider the German Act as a source of inspiration for future legislative measures.

### 3 COPYRIGHT CONTRACTS

Most authors and many publishers and producers believe, or at least hope, that the publication or other exploitation of their works will be a success. Therefore, the success of a work protected by copyright can, as such, hardly ever be considered a really unforeseen circumstance. Copyright law as it stands has come into existence in response to new technologies, starting with the invention of the printing press, followed by many other (audio/video, analogue/digital) recording, reproduction and distribution technologies. Therefore, new (recording, reproduction and distribution) technologies can as such never be considered to be really unforeseen circumstances either.

Due to the fact that producers and publishers usually have a stronger position in negotiations on copyright contracts, there is the recurring idea that authors should be protected against one-sided contracts, such as too broad transfers of rights against one-off lump sum payments. To a certain extent this takes the shape of a general *iustum pretium* concept for authors: authors should always have the right to an equitable remuneration for the use of their work. More specifically it leads to the idea that in case of (unexpected) success or in case of exploitation through new technologies, authors should have a right to additional remuneration. The idea behind this is that it is unjust not to take this ‘unforeseen’ success of these technologies into account in determining *ex post* what is an equitable remuneration for the use of the author’s work.

Obviously, there is a lot of opposition from the side of producers and publishers against the *iustum pretium* idea and against the idea that unforeseen success and unforeseen new technologies should always give rise to additional payments. Success is rarely completely unforeseen. And even if it is unforeseen, it should not automatically give rise to additional payments, just as failures and losses do not give producers or publishers the right to get part of their payments back from the authors. Part of the deal is that producers take the operating risk, with all the advantages and disadvantages it entails.

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14 See e.g. A. Rijlaarsdam, *op. cit.*, p. 47 *et seq.*, with further references.

New technologies might be unforeseen in some cases, but more often they replace existing technologies and modes of exploitation, thereby cannibalizing the existing technologies and not giving rise to additional turnover or profits.

Nevertheless, there is a tendency to create rules of copyright contract law to strengthen the position of authors, especially where (unforeseen) success or (unforeseen) new technologies are concerned. In this part of this article we look into the situation in the Netherlands, the situation in Germany and the draft proposal for new copyright contract law in the Netherlands.

### 3.1 The Netherlands (current situation)

#### *Dutch Copyright Act*

Currently, the Dutch Copyright Act (DCA) contains only two general rules of copyright contract law in favour of the author, which are contained in article 2.2 DCA:

##### Article 2 DCA

1. Copyright passes by succession and is assignable wholly or in part.
2. The delivery required by whole or partial assignment shall be effected by means of a deed of assignment. The assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title.

Assignment can only be affected by a deed. Therefore, an oral or implicit agreement can not constitute a valid transfer of copyright. And any assignment of copyright must be interpreted narrowly in favour of the author as it only includes 'such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title'. The majority opinion is that this clause is not a 'purpose-of-transfer rule' and does not exclude the possibility of assigning rights to future technologies, but there is quite some debate on this issue.<sup>15</sup> The Dutch Supreme Court was never called upon to decide on this controversy about the purpose-of-transfer doctrine. Case law on article 2.2 DCA by the lower courts is also rare.<sup>16</sup>

Dutch copyright does not provide the author or performer with a general right to an equitable or proportional remuneration. An exception, however, is included in the film rights section of the Dutch Copyright Act. For authors of films, the Dutch Copyright Act contains a separate and specific provision on the right to remuneration.

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15 See: B.J. Lenselink, *De verlening van exploitatie-bevoegdheden in het auteursrecht*, Den Haag: Sdu 2005, pp. 441-523.

16 See: District Court Haarlem 3 December 2003, *AMI* 2004-3, p. 111 (*Knudde*): in accordance with Article 2 DCA the exploitation rights that were unknown at the time of the transfer, do not fall under the transfer of copyright.

## Article 45d DCA

Unless otherwise agreed upon in writing by the authors and the producer, the authors shall be deemed to have assigned to the producer [all exploitation rights] [...]. The producer is indebted an equitable remuneration to the authors or their successors in title for all forms of exploitation of the cinematographic work. The producer is also indebted an equitable remuneration to the authors or their successors in title if he effects exploitation in a form that did not exist or was not reasonably foreseeable at the time referred to in article 45c or if he gives the right to effect such exploitation to a third party. The remunerations referred to in this article shall be agreed upon in writing. The right to an equitable remuneration for rental cannot be waived by the author.

The much debated issue is whether article 45d DCA allows the payment of a single lump sum for all existing and future technologies, or whether it requires a specification in a contract of which amount of remuneration covers which existing form of exploitation, or whether a single lump sum for future forms of exploitation is possible at all. There is, however, no decisive case law on these issues.<sup>17</sup> The current article 45d DCA has very little influence on the contractual practice in the Netherlands. Most authors and actors get a single lump sum payment for the transfer of all rights. Only the entitlement to collectively administered levies is usually exempted from this transfer.

What case law on article 45d DCA and the equitable remuneration can be mentioned? One of the few cases about the equitable remuneration is *Poppenk v. NCF*.<sup>18</sup> *Film producer Nature Conservation Films (NCF)* had film material of the nature filmmaker Hugo van Lawick. Poppenk, a freelancer who had sometimes worked with NCF, was instructed to edit a film with this material. Poppenk carried out the instruction, but he also had the idea of making a film with the remaining material about all the animals in Serengeti National Park in Tanzania. He wanted to present this material on the basis of the letters of the alphabet. Then NCF produced the English film 'Serengeti A to Z' and two Dutch versions. In addition, the broadcasting rights were granted to EO and Canal+. Poppenk received a remuneration of NLG 60,000.- for editing activities. Poppenk, however, also wanted an equitable remuneration in accordance with article 45d DCA, because NCF started to apply different forms of exploitation. He was of the opinion that he was entitled to an equitable remuneration, because he delivered a contribution of a creative nature. NCF denied this. There were no agreements in writing. According to the Court of Appeal Poppenk delivered a creative contribution by developing the idea of the alphabet, inventing the titles and selecting the scenes and creative employees. Thus

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17 See: B.J. Lenselink, *De verlening van exploitatie-bevoegdheden in het auteursrecht*, Den Haag: Sdu 2005, pp. 441-523.

18 District Court Amsterdam 24 October 2001, AMI 2002, p. 17, Court of Appeal Amsterdam 18 September 2003, nr. 1293/01 (not published) and District Court Amsterdam 22 September 2004, nr. 212361/H01.0099 (not published) (*Poppenk/NCF*).

Poppenk was designated as a filmmaker and therefore he was entitled to claim an equitable remuneration. The Court of Appeal also ruled that Poppenk had a right to a percentage of the gross profits. And what was the result of three years of litigation? An amount of only € 881.89.

In another more recent case, someone (hereinafter: X) who recorded voice-over texts for the series of *Gewoon Jannes* by order of Noordkaap TV Producties, had more success.<sup>19</sup> These series were broadcast by RTV Oost. X received a remuneration for his work. However, Noordkaap also had the series broadcast by another local broadcaster, RTV Drenthe, and distributed the series on DVD. X wanted to receive an equitable remuneration of € 4,000.- for these uses of the voice-over texts, but Noordkaap relied on the oral agreement that the remuneration that was paid earlier also included the use for other purposes. It was established in the proceedings that X had transferred his rights to Noordkaap and that X had a right to an equitable remuneration for every form of exploitation. In accordance with article 45d DCA an oral agreement that excludes an equitable remuneration is not valid, because a restriction on this remuneration must be in writing. The defense by Noordkaap that they earned nothing was unsuccessful. A producer is obliged to pay remuneration even when he granted the exploitation right to a third party for free, because this producer had the power to demand a fee from that third party. Noordkaap did not dispute the level of the equitable remuneration, therefore the Court of Appeal awarded the full amount as claimed (€ 4,000.-).

In practice many problems arise around the question whether remuneration is equitable. In the case of *De Kleine Waarheid*<sup>20</sup> the court had to decide on the amount of an equitable remuneration for a performer. Distributor Bridge Rights distributed the well-known television series *De Kleine Waarheid* on DVD in 2005. The performers received a remuneration varying from € 150.- to € 500.- depending on the size of their part. Every performer accepted the remuneration, except Van Selst. He claimed a remuneration of € 7,000.-. Bridge refused to pay this remuneration. The court decided that article 45d DCA did not give clear guidance and that market value should determine the amount of the remuneration. Van Selst did not have concrete market data to prove the need for the higher remuneration, therefore the court had to rely on the market survey of Bridge. It was evident from this survey that it is usual to pay an all-in lump sum remuneration and no royalty for a supporting role. Furthermore, the remuneration is smaller when the number of participants is bigger. In this case the fact that there were 92 people who participated in *De Kleine Waarheid* and the fact that they all accepted the same remuneration, convinced the court to consider the remuneration of € 250.- as reasonable.

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19 Court of Appeal Arnhem 6 January 2009, LJN BG9938 (*X/Noordkaap TV Producties; Gewoon Jannes*).

20 District Court 's-Gravenhage 8 July 2009, IEF 8049 (*Acteur/Bridge Rigts; De Kleine Waarheid*).



In the *Bassie & Adriaan*-case<sup>21</sup> no additional remuneration was rewarded at all. A group of performers with small parts in the *Bassie & Adriaan* series claimed an equitable remuneration for exploitation of the series on DVD and for the repeats on television from the companies of the leading actors Bassie and Adriaan, which had taken over the production rights to the series. Not all performers had agreements in writing. Claims related to series dating from before 1 August 1985 were denied because article 45d DCA entered into force on that date and was not given retroactive effect. In some contracts it was explicitly agreed upon that the remuneration paid included the remuneration for repeats, video cassettes and sale of television rights. According to the court these performers only had a right to a one-off lump sum payment as equitable remuneration, which they already had received. Just one claim remained in this case. Bassie and Adriaan pleaded that the costs of the productions were much higher than the proceeds would ever be. The performer had not disputed the financial statements with any contrary evidence. According to the court these circumstances were relevant for the amount of the remuneration. Because of the additional circumstances, the contribution of the performer was minimal and the remuneration that the performer had received earlier had been considerable, the court decided to award no additional remuneration at all. Finally, the court also ordered this performer to pay the costs of the proceedings. Reliance on article 45d DCA in court has not brought much to actors and authors in the Netherlands.

### 3.2 General civil-law concept of *imprévision*

Article 258 of Book 6 of the Dutch Civil Code (DCC) contains the following provision:

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 this 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.

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21 District Court Rotterdam 5 August 2009, B9 8103 (*Stobbe c.s./Adrina Produkties en Bassie Produkties*).

This provision is mandatory pursuant to article 250<sup>22</sup> and elaborates on article 2<sup>23</sup> and article 248<sup>24</sup> of Book 6 of the Dutch Civil Code (reasonableness and fairness). Authors could possibly rely on this legal provision in case of special unforeseen circumstances, such as special unforeseen new technological forms of exploitation. However, there is as yet no case law indicating that such a claim could be made successfully. There also is no evidence that article 258 of Book 6 of the Dutch Civil Code has had any influence on the contracting practice in the Netherlands.

### 3.3 Germany

Between 1965 and 2002 the German Copyright Act contained a so-called 'Bestseller' provision in article 36 of the German Copyright Act (GCA):

'If an author has granted an exploitation right to another party on conditions which cause the agreed consideration to be grossly disproportionate to the returns and advantages from the use of the work, having regard to the whole of the relationship between the author and the other party, the latter shall be required, at the demand of the author, to assent to a change in the agreement such as will secure for the author some further equitable participation having regard to the circumstances'.

This clause was seldom applied because the condition of 'gross disproportionality' was taken to be very strict. Through case law of the German Supreme Court it was also decided that the 'Bestseller' provision could only apply if the 'gross disproportionality' was unforeseen.<sup>25</sup> This condition of 'unforeseeability' was criticized because it meant that only 'naïve' authors could profit from the bestseller provision. Where an informed author clearly foresaw the

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22 Article 6:250 DCC: 'A contract may derogate from the following articles of this Section, with the exception of articles 251, paragraph 3, 252, paragraph 2, to the extent that the requirement of a notarial deed is concerned, and paragraph 3, 253, paragraph 1, 257, 258, 259 and 260.'

23 Article 6:2 DCC: '1. An obligee and obligor must, as between themselves, act in accordance with the requirements of reasonableness and fairness.  
2. A rule of law, usage or a juridical act which would otherwise bind them shall not apply, insofar as, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness'.

24 Article 6:248 of the Dutch Civil Code: '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, result from 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'.

25 German Supreme Court 27 June 1991, *GRUR* 1991, 901 (*Horoscope-Calendar*) and German Supreme Court 22 January 1998, *GRUR* 1998, p. 680 (*Comic-translations*).

later success of a work, but was not strong enough to negotiate a corresponding remuneration, reference to the bestseller provision was useless.<sup>26</sup>

In 2002, together with the introduction of a general right to an equitable remuneration for authors, the 'Bestseller' provision was changed into a 'Fairness' provision in article 32a GCA:

'If an author has granted an exploitation right to another party on conditions which cause the agreed consideration to be conspicuously disproportionate to the returns and advantages from the use of the work, having regard to the whole of the relationship between the author and the other party, the latter shall be required, at the demand of the author, to assent to a change in the agreement such as will secure for the author some further equitable participation having regard to the circumstances. It is not relevant whether the contracting parties foresaw or could have foreseen the level of such returns or advantages'.

'Gross disproportionality' was replaced by 'conspicuous disproportionality' and an extra sentence was added stating that foreseeability was no longer relevant. This new provision must be viewed in relation to the preceding article 32 GCA, which was also new in 2002 and introduced a general right to an equitable remuneration:

'For the grant of exploitation rights and permission to use a work the author is entitled to the remuneration contractually agreed. If the rate of remuneration is not settled, the remuneration shall be at an equitable level. If the agreed remuneration is not equitable, the author may require from his contracting partner assent to alter the contract so that the author is assured an equitable remuneration'.

Article 32 GCA contains the right of the author to revise a copyright contract *ex ante* if the agreed remuneration is not equitable. Article 32a GCA contains the right of the author to revise a copyright contract *ex post* if the agreed remuneration turns out 'conspicuously disproportionate' (after the exploitation has taken place and the profits have been made), and probably therefore 'not equitable' either. 'Unforeseeability' is no longer relevant.

There is now some case law from the courts in Germany. So far the new provisions of copyright contract law in Germany seem to have had little effect, but have led to many questions and legal uncertainty.<sup>27</sup> Must the 'conspicuous disproportionality' be determined by comparing the remuneration of the author with the net profit made by the producer or with the gross income by the same? Can there only be 'conspicuous disproportionality' if the remuneration

26 A. Dietz, 'Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers', *IIC* 2002, p. 828.

27 See for example: N. Reber, 'Der 'Fairnessparagraf', § 32a UrhG', *GRUR Int.* 2010, p. 708 (709) and: C. Berger, 'Sieben Jahre §§ 32ff. UrhG – Eine Zwischenbilanz aus Sicht der Wissenschaft', *ZUM* 2010, p. 90.

of the author is below the level of 'equitable remuneration'? Does the level of 'equitable remuneration' depend on 'the returns and advantages from the use of the work' aggregated by the producer? Is there always 'conspicuous disproportionality' if the remuneration is not 'equitable'? Is every author or actor, including stand-ins, extras, make-up artists and all other people mentioned in the credits at the end of a film entitled to equitable remuneration or revision of a contract on the basis of 'conspicuous disproportionality'? The Court of Appeal of Munich recently ruled that the graphic designer of the introductory sequence of a police series on television cannot rely on the 'conspicuous disproportionality' clause.<sup>28</sup>

In another case, based on article 32 GCA, the German Supreme Court has ruled recently that translators of books have a right to an equitable remuneration on top of the agreed lump sum payment per page, consisting of a royalty of 0.8% of the net sales price of hardcover editions and 0.4% of the net sales price of pocket editions, after more than 5,000 copies have been sold.<sup>29</sup> The Court also ruled that translators always have a right to one fifth of the remuneration the original author receives. Does this mean the  $5 \times 0.4\% = 2\%$  is (always) an equitable remuneration for original authors for sales over 5,000 copies of a hardcover edition? What does this mean for lump sum payments or royalties for sales under 5,000 copies? Can those payments or royalties be set at will by the publisher, taking account of the royalties for more than 5,000 copies? It seems quite unpredictable what the consequence of these kind of decisions will be in the long run.

### 3.4 The Netherlands (proposed legislation)

On 1<sup>st</sup> of June 2010 the Dutch government released a preliminary draft for a new system of copyright contracts in the Netherlands.<sup>30</sup> This preliminary draft contained several proposals including the abolition of the transferability of ownership of copyright during the lifetime of the author and a maximum duration of five years for exclusive licence agreements. These two far-reaching proposals have been dropped by the spring of 2011, and will not be discussed here. The preliminary draft is based to a large extent on the German example described above.

This preliminary draft also contained a proposed article 25c.1 DCA containing a general right to an equitable remuneration:

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28 Court of Appeal Munich 10 February 2011, 29 U 2749/10 (*Bötttrich-Merdjanowa/Bayerische Rundfunk*). <<http://www.justiz.bayern.de/gericht/olg/m/presse/archiv/2011/02919/index.php>>.

29 German Supreme Court 20 January 2011, I ZR 19/09 (*Destructive Emotions*).

30 See <<http://www.internetconsultatie.nl/auteurscontractenrecht/document/146>> (accessed June 2011).

‘The author has a right to an equitable remuneration for the granting of an exclusive licence for the exploitation of his work, in whole or in part.’

This preliminary draft also contained a bestseller or fairness paragraph<sup>31</sup> (also known as a disproportionality rule):<sup>32</sup>

Article 25d

1. Upon request of the author a court can change an exclusive licence agreement in favour of the author, if the remuneration the author receives shows a serious disproportionality with the profits in the exploitation of the work, in view of the mutual performance of the parties. The court will also take into account the nature and the further contents of the agreement, the way in which the agreement came into existence, the mutual interests of the parties and all other circumstances of the case.
2. To the aforementioned change can be given retroactive effect.

In the explanatory memorandum for this draft law<sup>33</sup> it is mentioned that, for a successful appeal based upon this disproportionality rule, there must be a serious disproportionality with the profits in the exploitation of the work, in view of the mutual performance of the parties. This serious disproportionality must be established objectively. The subjective feeling of the author is not relevant.

This disproportionality rule has a broad scope, in the sense that it applies to situations in which the level of a lump sum payment has been too low, as well as to situations with an insufficient royalty rate. That being said, according to the draft explanatory memorandum, the rule will in practice be applied less frequently with royalty agreements because the remuneration of the author is then related to the number of copies sold. Not every disproportionality is immediately a ground for a change by the courts of an exclusive licence agreement. There must be a *serious* disproportionality. According to the draft explanatory memorandum this will ensure that the producer or publisher will have sufficient opportunity to recoup his investment. It also ensures, according to the memorandum, that a producer or publisher, who is prepared to take the entrepreneurial risk of exploiting the work, can make a profit. That is necessary in order to be able to offset losses on other investments.

This disproportionality rule does not require that the serious disproportionality was unforeseen at the time when the agreement was concluded. The rule therefore also applies to agreements which were seriously disproportionate

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31 Implementation of the bestseller paragraph has already been recommended in the past, cf. P.B. Hugenholtz, *Sleeping with the enemy*, inaugural lecture University of Amsterdam 1999.

32 The provision will also apply to (the Dutch Law of) related rights, see preliminary draft Article 2b.

33 See <<http://www.internetconsultatie.nl/auteurscontractenrecht/>> (accessed June 2011).

from the beginning. That is the added value of this rule compared to article 258 of Book 6 of the Dutch Civil Code. The *imprévision* rule in that article could be set aside easily by adopting a standard clause to cater for the possibility of a large commercial success, without any upside for the authors or performers.

The disproportionality rule only applies to authors as natural persons, not to legal entities which can be titleholders on the basis of the employer right or on the basis of article 8 DCA. The rules also apply to heirs who are natural persons.

Producers and publishers cannot invoke the disproportionality rule. If the exploitation of the work flops, they cannot ask the courts to change the agreement to make the author share in the losses. A flop is part of the entrepreneurial risk taken by the producer or publisher. According to the draft explanatory memorandum a producer or publisher can limit the risk of a successful appeal to the disproportionality rule by applying a royalty-based payment system.

Obviously, the big difficulty is to determine objectively whether the compensation for the author is disproportionate, just as it is very difficult to determine what an equitable remuneration is.<sup>34</sup> What is a balanced division between author and publisher or producers, is the fundamental question which SEO Economic Research, the Amsterdam-based centre for scientific economic research, rightly asks.<sup>35</sup> Partially, the revenues of a copyrighted work are determined by its market value, which is dependent on the talent of the author or the preference of the buying public or the audience. But revenues also follow from the investment made, usually by the producer or the publisher, in the production, distribution and marketing. However, these values cannot exist independently. The intrinsic value of a copyrighted work cannot be achieved without production, distribution and marketing. Investments in production, distribution and marketing lead nowhere if there is no valuable copyrighted work. A royalty-based model seems attractive, because both the author and the publisher or producer share in the profits. But royalties mean uncertainty and an author being generally the more risk-averse person might want to replace this uncertain income by a fixed fee to be paid by the less risk-averse publisher or producer. According to SEO, the disproportionality rule is mainly disproportionate for the publisher or producer. Producers want to be the exclusive residual claimants and do not want to cut into their managerial freedom. Artists usually have nothing but their human capital for a living and, like ordinary workers, do not want to bear market risks. The publisher or producer must recoup his investment and compensate for his losses in other

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34 See e.g. SEO Economic Research, *Prova d'Orchestra, Een economische analyse van het voorontwerp auteurscontractenrecht*, December 2010, p. 17, see: <[http://www.seo.nl/uploads/media/dp59\\_prova\\_d\\_orchestra.pdf](http://www.seo.nl/uploads/media/dp59_prova_d_orchestra.pdf)> (accessed June 2011).

35 SEO Economic Research, *Prova d'Orchestra, Een economische analyse van het voorontwerp auteurscontractenrecht*, December 2010, p. 17.

investments. The only way to do so is to invest in many works, to ensure that some of them are successful. The ‘equitability’ of the remuneration of bestseller X depends on the flops of Y and Z, according to SEO. The question is how to determine equitability. On the basis of the profitability of the publisher or producer? Over which year or years? How far back do you go in time to establish ‘equitability’? Do the flops in 1980 still count in 2010? Apparently, there is very little sound economic basis for the proposed copyright contract law.

It seems that the Dutch legislator wants to introduce copyright contract law which is almost entirely based on the example of Germany. It is highly questionable whether that is a wise decision, because it is clear that this model has led to much uncertainty and many as yet unanswered questions in Germany. The proposed legislation will create much legal uncertainty and will leave it entirely to the courts to decide what is to be understood by ‘equitable remuneration’ (for every mode of exploitation) and what is to be understood by a ‘serious disproportionality’ between the remuneration the author receives and the profits on the exploitation of the work, in view of the mutual performance of the parties, thereby taking into account the losses incurred by the producer in other projects.

The creation of rules which allow parties to ask the courts to revise the contract and ask for additional payment whenever the project involved turns out to be a success, based on vague concepts such as ‘equitable remuneration’ or ‘serious disproportionality’, creates legal uncertainty.

This legal uncertainty may lead to fewer producers or credit-facilitators in the Netherlands willing to invest in films and thereby to fewer films being produced. In such a scenario the proposed legislation might turn out to be counterproductive and lead to less work and less income for authors and actors in the Netherlands.

#### 4 CONCLUSION

In contract law the legislator must try to find the proper balance between socio-economic equity and legal certainty and between general and vague concepts and detailed legislation. As far as employee inventions are concerned Dutch case law shows that employees/inventors will very seldom get additional equitable remuneration. Authors and actors also very seldom get additional remuneration on top of what has contractually been agreed upon, despite the existence of a specific rule in article 45d DCA. The Dutch legislator seems to want to follow the German example in the field of copyright contract law. Because of the economic realities of the market place and the limited success of the German example there is some doubt whether there is going to be any benefit to actors and authors.

## 8 | The Material Adverse Change clause from a Dutch perspective: a solution for the uncertainty caused by unforeseen circumstances?

Vincent Engel <sup>■</sup>

### 1 INTRODUCTION

The recent economic and financial crises have set lawyers a difficult task: how to make contracts crisis-proof? The M&A practice has long sought refuge with the Material Adverse Change (MAC) clause; a boilerplate clause used to relieve a buyer (or seller) from his contractual obligations in case the target company suffers a MAC. Case law on the MAC clause is scarce,<sup>1</sup> even in Delaware, where most corporate cases in the United States are brought to court. The case law currently available shows that judges are reluctant to accept that a material adverse change has occurred and so the MAC clause has yet to prove its use in court. However, the Nixon Peabody survey shows that a stunning 90% of all M&A deals surveyed contain a MAC clause of some sort.<sup>2</sup> So in practice, the MAC clause is used extensively as a standard clause in M&A agreements. This can be explained by the assumption that the MAC clause is not so much used in court, as it is used as a bargaining tool for renegotiation.

The Dutch legal system codified the possibility for judges to ‘... modify the effects of a contract or (...) [to] 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...’.<sup>3</sup>

This creates uncertainty for both parties. Does, for example, the economic crisis constitute an unforeseen circumstance? Can a property developer walk away from his contractual obligations by calling upon the unforeseen circum-

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1 Examples are: Delaware Ch. Court, *IBP inc. v. Tyson Foods inc.*, (2001); Tennessee Ch. Court, *The Finish Line inc. v. Genesco inc* (2007); and District Court of New York, *Lasker v. UBS Securities LLC* (2008). A Dutch example is: Dutch Supreme Court 7 September 2007, *LJN BA2014* (*Phoenix Acquisition Company Sarl v. Koninklijke Philips Electronics N.V.*).

2 *9<sup>th</sup> Annual MAC Survey*, Nixon Peabody LLP, New York, 2010, (<[www.nixonpeabody.com/linked\\_media/publications/MAC\\_Survey\\_2010.pdf](http://www.nixonpeabody.com/linked_media/publications/MAC_Survey_2010.pdf)>).

3 Article 258 of Book 6 of the Dutch Civil Code.



stance exemption, when a sudden decrease in housing prices confronts him with a deal that is no longer profitable? An equitable solution will sometimes be hard to find as either the property developer or the seller will have to bear the risk of these developments. It is questionable whether the codification of the unforeseen circumstances exemption alone will be able to provide the solution to this uncertainty. Rather, one might look towards the MAC clause for an answer.

The MAC clause can be – and is being – used outside the M&A field.<sup>4</sup> It is a practical way to allocate risk between parties during the period between the signing and closing of an agreement and can possibly provide a solution for the uncertainty caused by relying solely on the unforeseen circumstances exemption. This paper will examine the (dis)advantages of using the MAC clause, its use as a tool to allocate risk between parties, as a means to give parties additional ways out of a deal and as a method for better risk assessment. I will then move on to the question whether it might prove to be a solution to the uncertainty problem. Before doing so, recent developments in the use of the MAC clause will be analysed. To illustrate the uncertainty that the unforeseen circumstances doctrine can bring, two recent Dutch cases will be discussed. Finally, I will argue that the MAC clause and the unforeseen circumstances doctrine should complement each other to provide a reasonable and fair outcome in the event of unforeseen circumstances.

## 2 HISTORY OF THE MAC CLAUSE<sup>5</sup>

The MAC clause is a standard clause used in almost every merger or acquisition agreement.<sup>6</sup> Although the specific wording and scope of the clause can differ greatly from one contract to another, the goal is always the same: relieving the buyer (or in some cases the seller) from a deal when a material adverse change has occurred. The period of time between signing and closing of an M&A deal may span three months or even a year. This is caused by e.g. waiting for permission from regulatory institutions and/or due diligence reports. In this period, many changes can occur to either the target company or the buyer. The target company can lose important clients, key personnel, or suffer unforeseen losses. On the side of the buyer financing problems could occur.<sup>7</sup> In the event that such a change materializes, the buyer will want to walk away from the deal, preferably without having to pay the usual walk-away fee. The MAC

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<sup>4</sup> For example in loan agreements.

<sup>5</sup> As the MAC clause is most commonly used in M&A agreements, for reasons of simplicity, this introduction will primarily use examples from the M&A practice.

<sup>6</sup> *9<sup>th</sup> Annual MAC Survey*, Nixon Peabody LLP, 2010.

<sup>7</sup> This became a more likely problem during the credit crunch. Think for example of the bankruptcy of investment bank Lehmann Brothers in the fall of 2008.

clause seeks to facilitate both parties in determining when a party is relieved from his contractual obligations, or when he is not.

The MAC clause was first used as a boilerplate clause in general wording meant to include most unforeseen circumstances. During the negotiation process the MAC clause did not get much attention. In recent years, however, it has moved from a catch-all standard to a highly negotiated and specifically designed clause with carve-outs and exceptions.<sup>8</sup> In other words, the MAC clause, originally designed to circumvent problems with unforeseen circumstances, has changed from an unforeseen circumstances clause to a clause that specifically mentions what does and what does not constitute an (unforeseen) material adverse change.<sup>9</sup> The paradox is obvious.

A governmental judicial organ has still to decide a case allowing a MAC.

In *Hexion Specialty Chemicals, Inc. et al. v. Huntsman Corp.*, C.A. No. 3841-VCL (Sept. 29, 2008) the Delaware Chancery court states that:<sup>10</sup>

‘Many commentators have noted that Delaware courts have never found a material adverse effect to have occurred in the context of a merger agreement. This is not a coincidence. The ubiquitous material adverse effect clause should be seen as providing a backstop protecting the acquirer from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner.’

This led the International Bar Association, at the Conference in October 2010, to conclude that it is ‘Game over for MAC clauses’.<sup>11</sup>

The ‘new’ MAC clause and the uncertainty as to what actually can be defined as a MAC, has perhaps taken away some of its core function: relieving a party from its contractual obligations in case of a material adverse change. To counter this problem, corporate lawyers now try to specify what, by its nature, cannot be specified: an *unforeseen* circumstance.

By distinguishing between the function of a material adverse change clause and the function of the unforeseen circumstance exemption, one might find a solution for the current uncertainty.

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8 R.J. Gilson & A. Schwartz, ‘Understanding MACs: Moral Hazard in Acquisitions’, *The Journal of Law, Economics, & Organization* 2005, Vol. 21, No. 2, pp. 330-331.

9 This paper will not go into the many changes the MAC clause has undergone in recent years, as it would exceed its scope. Comparing the yearly editions of the Nixon Peabody Survey will provide a rough idea of recent trends and developments. Also, see: A.C. Elken, ‘Rethinking the Material Adverse Change Clause in Merger and Acquisition Agreements: Should The United States Consider the British Model?’, *Southern California Law Review* 2008-2009, Vol. 82, pp. 291-339.

10 *Hexion Specialty Chemicals, Inc. et al. v. Huntsman Corp.*, C.A. No. 3841-VCL (Sept. 29, 2008) at II.B.

11 International Bar Association 2010 Conference, ‘Game over for MAC clauses’, *IBA Daily News*, 6 October 2010, p. 4.

### 3 UNFORESEEN CIRCUMSTANCES AND THE SALE OF PROPERTY

Property developers face a difficulty when buying property: will current housing prices increase or decrease? The 2007 crisis caused housing prices to drop dramatically. In some cases this meant that prospected benefits turned into losses. Although every property developer knows, or at least should know, that housing prices can drop, there are examples in Dutch case law where the buyer argued that he should be relieved from his contractual obligations as the economic crisis was to be considered an unforeseen circumstance. They called on Article 258 of Book 6 of the Dutch Civil Code and asked the court to dissolve the contract or at least be exempted from liability for damages. Two recent cases will be analysed here. The first case is between the municipality of Zutphen and the State of the Netherlands.<sup>12</sup> Combined with the second example, it will show that it is not always clear to parties when unforeseen circumstances can exempt the buyer from having to fulfil his contractual obligations. Also, I will argue that the use of the MAC clause could have taken away some of this uncertainty and might contribute to a more efficient deal.

#### 3.1 Municipality of Zutphen v. State of the Netherlands

In July 2006 the State of the Netherlands signed an agreement with (among others) the municipality of Zutphen, the local court, and the local office of the public prosecutor. In summary, the agreement held that the State would buy land and develop a new building to be occupied by the local office of the public prosecutor. In a letter dated May 31, 2010 the municipality was told that the new office would not be built, and that the office of the public prosecutor would be relocated outside the municipality.

The dispute focussed on the fact that the State refused to fulfil its contractual obligations. It stated that as unforeseen circumstances occurred, it could not reasonably be required to uphold the agreement. The office of the public prosecutor has to cut cost and as such needs to reorganize. The office in Zutphen will be merged with and relocated to a different municipality, which results in the new building becoming redundant. The municipality, on the other hand, points out that the State could have foreseen this change in policy. As the planning for the reorganization started before the signing of the agreement, the possibility of a change should be considered as already having been taken into account.

The court decided that the State of the Netherlands could not and did not have to take into account the possible changes that might occur after signing the agreement. As nothing has been negotiated on the subject, the change in policy and the changes that occurred due to the reorganization constitute

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12 District Court of Den Haag 21 February 2011, *LJN* BP5123.

unforeseen circumstances. The court then goes on to ask the question whether these unforeseen circumstances should lead to the conclusion that the agreement cannot reasonably remain unchanged. It considers that although the municipality has a great interest in fulfilment of the contract, the State has an even greater interest in not building the new office. The court concludes that the State does not have to fulfil its contractual obligations, especially since it offered to compensate the municipality for possible damages.

### 3.2 Plaintiffs v. Nieuwwaerde Projecten BV<sup>13</sup>

On March 14, 2009 the plaintiffs sold a property to Nieuwwaerde Projecten BV, a property developer. The property was to be delivered and paid for on July 1, 2009. A few days before the contract was to be concluded, the property developer notified the plaintiffs of the fact that he would not be able to fulfil his obligation to pay the purchase price. As renegotiations went nowhere, the case came before the District Court of Zutphen. The plaintiffs requested that the property developer should pay the fine as agreed upon in the sale agreement and, in addition, should be held liable for damages. The damages claim is based on the fact that due to the credit crunch, housing prices dropped and so the property lost its original value. It is the plaintiffs' view that the property developer should bear this risk and as such he should be held accountable for damages. The property developer should also bear the risk and responsibility for the fact that he could not get any financing for the deal, as this was not a condition for closing the deal.

The property developer pleaded that he had started a procedure considering the realization of twelve apartments. Due to the economic crisis the market for these apartments had collapsed. As a consequence the plans that had been made for the property were no longer feasible. The long period of time between signing and closing made it seem unnecessary, if not impossible, to agree on a financing arrangement clause as a condition for closing the deal. As the property developer was also held liable in person, he argued that at the time when he agreed to his personal liability the risks were smaller. The unforeseen circumstances have altered the implications of this agreement. Therefore he cannot be held liable in person, nor should the current agreement remain unchanged.

The court considers that the economy in general and the property market in particular are subject to changes.<sup>14</sup> Being a property developer, the defendant should have known this fact. As such, the economic situation in which

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<sup>13</sup> District Court of Zutphen 30 September 2009, *LJN* BK3761.

<sup>14</sup> *ibid.* § 4.4.

housing prices drop cannot constitute a truly exceptional, nor unforeseeable, circumstance.<sup>15</sup> As a result, Nieuwwaerde Projecten BV – and the property developer personally – are ordered to pay the fine and damages to the plaintiffs.

When comparing these cases there is one important observation to be made. The different outcomes in the cases do not look surprising and there appear to be sufficient differences to justify the different outcomes. However, the economic crisis plays an important role in both cases and the two courts both needed to answer the question whether the change of circumstances was unforeseeable. While the District Court of Zutphen argued that it is a well-known fact that changes in the economy occur, the District Court of The Hague considered the change in policy as a result of cutting costs to be unforeseeable. Nevertheless, it is unclear why one situation is foreseeable and the other is not. If the property developer cannot be exempted from liability for damages because the dramatic drop in housing prices was foreseeable, should the State then not know that a change in the economy could result in the need for cutting cost? And was the possibility of a reorganization of the office of the public prosecutor not foreseeable? If we were to assume that the economic crisis does not constitute an unforeseeable circumstance in *Plaintiffs v. Nieuwwaerde Projecten BV*, then the fact that the State offered compensation for damages can, in my opinion, not justify the fact that the contract was dissolved by calling upon Article 258 of Book 6 of the Dutch civil code.

The main focus point in these cases concerning unforeseeable circumstances seems to be the (un)foreseeability of the change of circumstances. The apparently inconsistent rulings from the District Court of The Hague and the District Court of Zutphen illustrate that there is much uncertainty regarding the scope of the unforeseen circumstances exemption.

#### 4 COULD THE MAC CLAUSE PROVIDE A SOLUTION?

Whether or not the State could have foreseen the change of circumstances, difficulties and litigation could have been prevented by making express provisions in the agreement. Also, Nieuwwaerde Projecten BV could have sought protection by negotiating these same express provisions. Borrowing from the M&A practice, the MAC clause is probably the most obvious example of such a provision.

The MAC clause has two functions that could benefit parties in situations such as those mentioned above. First, it gives parties the possibility to provide for other ways out of a contract than those offered by the general provisions

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<sup>15</sup> To a certain degree the same argument has been made in the United Kingdom by Mr Justice Coulson in *Gold Group Properties Ltd v. BDW Trading Ltd*, 2010, EWHC 323 (TCC).

of contract law.<sup>16</sup> Secondly, it is being used as a tool to allocate risk between parties.<sup>17</sup>

The first function is perhaps the most obvious one. As contract law provides only a general framework to facilitate contracting between parties, it cannot and should not regulate every possible contingency. This does mean, that in some cases the frustration, force majeure, or unforeseen circumstances<sup>18</sup> provisions provided by contract law – whether codified or not – do not provide contracting parties with the possibility to expressly agree on a change of circumstances they want to account for in their agreement. Thus, when parties rely solely on contract law to solve future differences when a change of circumstances occurs, they might be surprised by the outcome of their conflict.

This is where the MAC clause's first function becomes more apparent. By making use of the MAC clause, parties have the opportunity to expressly agree on certain circumstances that should be considered as unforeseen circumstances, or a material adverse change. By doing so, they take away at least some of the uncertainty that arises from a conflict in which parties rely solely on contract law.

The project developer could, for example, negotiate a MAC clause that protects him from a deterioration of the property market by agreeing on a certain level of profitability of the project. If this level of profitability cannot be reached, he would then have the right to walk away from the deal. Parties could also agree that any change in the economy does *not* constitute a material adverse change. Carve-outs or exceptions to this clause could further specify what does and what does not constitute an unforeseen circumstance or material adverse change. By making explicit what parties understand by unforeseen circumstances or a material adverse change, the MAC clause could prevent litigation over the (un)foreseeability of a change of circumstances.

This brings us to the second function of the MAC clause, which is, to a certain extent, a consequence of the first function. As parties actively negotiate the MAC clause they immediately assign the risks for the period between signing and closing. It does not matter who bears the risk in the end, for as long as parties know which risks they are taking, they can assess these risks more easily and thus take better-informed decisions. Also, if the property developer had fully assumed the possible risks of what could happen in the

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16 L. Alpren-Waterman, 'Frustration and Material Adverse Change – The Secret to Avoiding Contracts in Troubled Times?', *Barlow Lyde & Gilbert LLP* 2010, p. 3. (<<http://www.blg.co.uk/pdf/Gold%20Group.pdf>>)

17 A.J. Macias., *Risk Allocation and Flexibility in Acquisitions: The Economic Impact of Material-Adverse-Change (MACs) Clauses* (AFA 2009 San Francisco Meetings Paper), 17 April 2009, p. 31 (<[ssrn.com/abstract=1108792](http://ssrn.com/abstract=1108792)>).

18 Although subtle differences between these terms exist, it would exceed the scope of this paper to go into these differences. These are just some examples of more or less the same principle trying to adjust for a change of circumstances that was unforeseeable and makes a contractual obligation impossible or much more onerous to perform.

two years between signing and closing, he might have negotiated a different price. When risk is assigned to the buyer, he will be less likely to offer the full price for the property. If risk is assigned to the seller, he will want a higher price as the property becomes more valuable when risk is almost non-existent. The allocation of risk to either party will be reflected in the price.<sup>19</sup>

In short, the MAC clause offers explicitly stated possibilities for a way out of a contract other than those offered by contract law. It also allocates risk between parties and thus allows them to take these risks into account when negotiating a price.

The question that needs answering now is how the MAC clause can be incorporated into the Dutch legal system that codified the possibility for judges to

‘... modify the effects of a contract or (...) [to] 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...’.

Some might fear an overlap with Art. 258 of Book 6 of the Dutch Civil Code and argue that the MAC clause puts in a contractual form what corporate law already provided for. Despite a possible overlap, the MAC clause distinguishes itself by being more specific and allowing parties to evaluate their risk in advance. The codified unforeseen circumstances exemption and the MAC clause complement each other. Since the MAC clause moved from a general catch-all solution to a more specific and more negotiated clause it has gained in clarity what it has lost in protection. One cannot account for the unforeseeable and by specifying certain risks one is bound to exclude others. Instead of opting for the unforeseen circumstances doctrine or the MAC clause exclusively, we should combine the strengths of both. Contracting parties should find a balance between unforeseen circumstances provisions and the MAC clause.<sup>20</sup> By specifying and therewith allocating certain risks in a MAC clause, parties have less uncertainty and should be able to assess their risks more accurately. For those circumstances that cannot be accounted for – because they are simply unforeseeable – they can rely on the unforeseen circumstances provision and find a fair and reasonable solution for the new situation.

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19 See: Macias 2009, p. 17, who grounds this thesis for mergers and acquisitions on empirical research.

20 While keeping in mind that those circumstances described in the MAC clause can, by definition, not be regarded as unforeseen.

## 5 CONCLUSION

The MAC clause has undergone a make-over in recent years. It has moved away from a boilerplate solution to a heavily negotiated, specific and complex clause. These changes and the lack of affirmative case law has led scholars and lawyers to believe that perhaps the MAC clause can no longer achieve its goals and has become obsolete. The Nixon Peabody survey shows that the MAC clause is still an important contractual tool to allocate risk and provide a way to walk away from a deal.

The two cases mentioned above illustrate the paradoxical, if not contradictory, way the unforeseen circumstances doctrine, as codified in the Dutch Civil Code, can work. It is my belief that in both cases the use of a MAC clause could have prevented litigation, or at the least have accommodated a better assessment and allocation of risk. Bearing a risk one knows of is to be preferred to possibly bearing a risk one does not know of.

The combination of the unforeseen circumstances exemption and the MAC clause, not competing with, but complementing each other, could provide for more certainty in the period between signing and closing.





## 9 | Change of circumstances: the Trento project

Ewoud Hondius ▪

### 1 INTRODUCTION

The financial crisis has raised a number of legal questions, one of which is whether or not contracts may be modified or abrogated<sup>1</sup> in case of a change of circumstances.<sup>2</sup> The issue is not wholly novel. It has been the subject of debate ever since medieval times.<sup>3</sup> Do all contracts contain an implicit clause that they are only valid when the circumstances remain unchanged: the *clausula rebus sic stantibus*? European jurisdictions provide different solutions to this question. But do they in fact diverge where practical issues are concerned? That is the question which one of the Trento/Torino common core of European private law working groups has set out to answer. The group's report was published last year;<sup>4</sup> its main findings are set out below in nrs. 3-9. Before doing so, this paper purports to give some insight into the group's methodology in nr. 2.

### 2 THE COMMON CORE OF EUROPEAN PRIVATE LAW PROJECT

The *Common core of European private law* project is based on the combined ideas of 'the two Rudi's': Rodolfo Sacco and Rudi Schlesinger. Sacco (1923-) is the godfather of Italian comparative law<sup>5</sup> and the author who coined the idea of 'legal formants'.<sup>6</sup> Having held a chair in Trieste and Pavia, since 1971 he has been associated with the University of Torino. Schlesinger (1909-1996) was

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1 A similar question is whether parties may be obliged to renegotiate the contract. This question is taken up by Rodrigo Momberg in his contribution to this volume.

2 This paper will use the words 'change of circumstances' interchangeably with 'unexpected circumstances'.

3 Famous cases include the French *Canal de Craponne* case (DP 76.1.195, *Grand arrêts* nr. 94) and the English coronation cases *Krell v Henry*, [1903] 2 KB 740 and *Herne Bay Steam Boat v Hutton*, [1903] 2 KB 683.

4 Ewoud Hondius, Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law*, Cambridge: University Press, 2011, 692 p.

5 Witness his *Introduzione al diritto comparato* (1979) and his *I Grandi sistemi giuridici* (1996).

6 Rodolfo Sacco, 'Legal formants: a dynamic approach to comparative law', 39 *American Journal of Comparative Law* 1-34 and 343-401 (1991).

an American of German extraction who taught in Cornell, where he came up with the theory of the common core of legal systems. According to this theory jurisdictions may have widely diverging points of departure, but in fact the outcome of litigation is often the same. Thus, even if specific performance is the prevailing remedy in continental law, in fact courts will often award damages, just like in common-law jurisdictions. Schlesinger set out to test his ideas in a celebrated research project on formation of contract.<sup>7</sup> It was in Italy that the project was to be continued on a much larger scale. In 1993, two young (at the time) Professors at the University of Trento, Mauro Bussani and Ugo Mattei, founded the Common core of European private law project.<sup>8</sup> There were to be three groups, on Contract, Property and Tort. All three are taken in a very wide sense, including for instance *Environmental liability and ecological damage*<sup>9</sup> and *The enforcement of competition law in Europe*.<sup>10</sup> The three groups have annually come together, first in Trento, and then – when the two convenors continued their careers elsewhere – in Torino. Apart from the meetings of the three working groups there are also plenary sessions, where not only general issues are discussed but outsiders are also invited to critically evaluate the group's methodology.<sup>11</sup> There is open access to the three groups, which provides a rare chance for young graduates to mingle with old diehards of comparative law.

It was the Contract group chaired by James Gordley which in 2000 invited the author of this paper to chair a working group on Change of circumstances. The group was to elaborate on the work of an earlier working group on Good faith, which had included one question on change of circumstances.<sup>12</sup> Ten years later, the work came to fruition. How come the elaboration lasted so long? Several arguments may be advanced. First, the common core project has no standardised procedure how to arrive at a questionnaire. Usually it is the general reporter who submits a draft to e.g. the Contract group. In other cases, such as in the present project, the questionnaire was arrived at in meetings of the working group, the members of which therefore first had to be

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7 Rudi Schlesinger (ed.), *Formation of Contracts/A Study of the Common Core of Legal Systems*, Dobbs Ferry: Oceana, 1968, 2 vols., 1 727 p.

8 See among their various publications Mauro Bussani and Ugo Mattei (eds.), *Opening up European law*, Bern: Stämpfli, 2007, 283 p.

9 Monika Hinteregger (ed.), *Environmental liability and ecological damage*, Cambridge: University Press, 2008, 697 p.

10 Thomas Möllers and Andreas Heinemann (eds.), *The Enforcement of Competition Law in Europe*, Cambridge: University Press, 2008, 713 p.

11 See for instance Günter Frankenberg, How to do projects with comparative law – notes of an expedition to the common core, 6 *Global Jurist* 2006, issue 2 (this critical appraisal of the Trento group at the time highly annoyed some of the project's staunch supporters such as James Gordley).

12 Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law*, Cambridge: University Press, 2000, pp. 557-577.

appointed.<sup>13</sup> Also, a second general reporter, Hans Christoph Grigoleit, presently from the University of Munich, was proposed and accepted. All of this took time: democracy has its price. Second, the project itself provided no incentive to establish sharp deadlines; on the contrary, why finish a project which each year invites its participants to a conference in a wonderful Italian city, with a precious mix of old established comparative lawyers and fresh graduates, East and West, practitioners and academics. Third, within this working group policy-oriented issues – and more particularly the question whether they should be taken up at all – took up quite some discussion time. Should the group remain neutral vis-à-vis the aversion of some jurisdictions to at least providing for the opportunity to open up contracts? As opposed to most other projects, the Trento Common core of European private law team does not have any (outright) political programme, such as harmonisation of private law. Instead, it focuses on one central issue. This is the contention of Rudolf Schlesinger that much as the various jurisdictions may differ from one another when it comes to the starting point, the end results are often the same or at least very similar.

Fourth, as the readers of *Perlmanns Schweigen*<sup>14</sup> will know, the obligation to render a manuscript can become problematic. What to do when an author ignores the deadline set by the group? This depends on the Chapter. It may well be conceivable to have a comparative study without Denmark or Finland, without the Netherlands or Portugal. Such jurisdictions may be left out without causing major problems to the project as a whole. But a project without England and France? That is precisely what threatened in the case of the change of circumstances project. When the original English and French reporters had to resign, it had to be decided to look for stand-ins. We were fortunate to get the help of Denis Philippe, who not only contributed the missing chapter on his native Belgium, but also that on French law (which actually is very close to Belgian law). English law also happens to be close to a jurisdiction for which we fortunately did have a report, namely Ireland. Like their Belgian counterpart, the Irish reporters undertook to write the national report on English law, which was familiar to them because it provided the foundation of Irish contract law.

The last element which caused some delay was the production process. First, the publisher had to decide whether or not to publish the work at all. We were quite unaware that at Cambridge University Press this decision is a collective one taken by ‘the Syndicates of the Press’, all, we understand,

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13 In the end Odavia Bueno Diaz, Marta Cenini, Robert Clark, Júlio Gomes, Carsten Herresthal, Cliona Kelly, Bert Lehrberg, Barbara Luppi, Brigitta Lurger, Francesco Macario, Laura Macgregor, Luz Martínez Velencoso, Valentinas Mikelenas, Kim Oestergaard, Francesco Parisi, Denis Philippe, Antonio Pinto Monteiro, Andreas Thier, Raphael Thunhart, Luboš Tichý, Matjaž Tratnik, Anastassios Valtoudis and Willem Wiggers participated in the final text.

14 Pascal Mercier, *Perlmanns Schweigen*, München: Knaus, 1995.

academics affiliated with Cambridge University. Then, the manuscript had to be adapted to the publisher's guidelines. Finally the text was handed over to a copy editor, who – it must be said – did a splendid job, once again, however, at the cost of time.

Apart from the time element involved in team work, several other of the group's experiences could be analysed. The selection of cases for the questionnaire was of course of primary importance. The change of circumstances group, as opposed to some other groups, tried to be as concise as possible, which resulted in leaving out some specific contracts. This was also the reason why, unlike our original plans, we did not include chapters on American law, administrative law and (public) international law as some other volumes – we did, however, include chapters on legal history and law & economics. Other issues which had to be solved were to what extent the solutions to the cases should be preceded by general descriptions of the various national jurisdictions and the question which general notions, which may also provide relief, should be covered. Notions such as *abus de droit*, *force majeure*, good faith, impossibility, interpretation, mistake, unfair contract terms and unjust enrichment may indeed be of relevance.

### 3 'OPEN' VERSUS 'CLOSED' LEGAL SYSTEMS<sup>15</sup>

Now coming to the substance of the matter, during the research, the group drew a distinction between 'open' and 'closed' legal systems. The distinction is based on the criterion whether or not a jurisdiction recognizes a general rule under which the contract can be adjusted to unexpected circumstances by the courts. The distinction led to the following groups: as 'open' legal systems we qualified those of Austria, Germany, Greece, Italy, Lithuania, the Netherlands, Portugal and Sweden. We characterized as 'closed' jurisdictions those of Belgium, Denmark, England, France, Ireland, Scotland and Slovenia. To a certain extent this distinction goes along with the classic division into legal families. Not very surprisingly, the common law tradition and the French influence ('closed' jurisdictions) led to similarities in the doctrinal approach to cases on the one hand, as did the German tradition ('open' jurisdictions) on the other hand.<sup>16</sup>

However, the distinction between 'open' and 'closed' jurisdictions did not survive the test wholly unscathed as far as the outcome of our cases is concerned. Thus, the distinction between 'open' and 'closed' jurisdictions is a

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15 The following is to a large extent based on the book *Unexpected circumstances in European contract law*, referred to above.

16 Rodrigo Momberg in his PhD thesis *The Effect of a Change of Circumstances on the Binding Force of Contracts* (PhD thesis Utrecht 2011, Antwerpen: Intersentia, 2011) arrives at a similar distinction between 'receptive' and 'non-receptive' systems.

rough doctrinal approach rather than a clear indication of differences with regard to the result of a certain case. It is fair to say that the recognition of a general and flexible rule providing for relief in cases of unexpected circumstances may make it easier for the courts to set aside a contract. Yet, the strict requirements for relief and the variety of other legal concepts dilute the effects of any particular doctrine. In a jurisdiction such as the Netherlands, for example, where a provision in the Civil Code allows adjustment of the contract in case of a change of circumstances, this provision is used so rarely that one may occasionally ask whether this is not rather a 'closed' system. Likewise, Slovenia, which we qualified as a 'closed' jurisdiction, seems to be on the borderline with the 'open' systems. The distinction was drawn based on doctrinal aspects and the differences between the two groups remain on a doctrinal level.

This rather diffuse picture with regard to results in the 'open' and 'closed' legal systems can be explained by the complex interference of different legal concepts that are applied to cases involving unexpected circumstances. Even if a jurisdiction does not recognise an 'exceptional' doctrine allowing for an adjustment of the contract, 'conventional' doctrines may be applied with similar results. In addition, in many jurisdictions specific legislation exists that is directed at dealing with the consequences of certain exceptional events on the contractual exchange. This complex interference of concepts complicates conclusions on a general level and makes a clear distinction between the groups difficult as far as the results are concerned.

Yet, it seems fair to say that the recognition of a general and flexible rule providing for relief in cases of unexpected circumstances may make it easier for the courts to set aside a contract. Across all the cases, the 'open' jurisdictions actually seem to be more open towards equitable relief than the 'closed' ones, while the latter systems express a higher esteem for the principle of *pacta sunt servanda*. It is also interesting to see that this division corresponds remarkably with the distinction between fault liability ('open' jurisdictions) and strict liability ('closed' jurisdictions<sup>17</sup>).

#### 4 CONVERGENCE AS TO THE GENERAL ISSUE OF THE BINDING CHARACTER OF THE CONTRACT TERMS

Before I turn to a more systematic analysis of the doctrinal concepts, it is remarkable to observe that in most cases there is a clear tendency as far as the results are concerned, i.e. whether or not a certain unexpected event justifies suspending the binding character of the terms of contract and to limit the principle of *pacta sunt servanda*. It should be noted, however, that these

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17 See case 14 below.

tendencies only relate to the suspensory effect as such while the legal consequences (adjustment or termination) may vary in detail. I shall examine these tendencies in the four different groups that we have established for our cases:

a) *Equivalence of exchange is substantially affected*

1) With regard to the first group of cases in which the ‘equivalence of the exchange has been affected’ we can conclude that under the law of all jurisdictions long-term agreements can lose their binding effect if, in the course of time, the initially fixed price grows out of proportion to the value of the object.<sup>18</sup> In many jurisdictions, the right to terminate long-term contracts is an essential element of their contract law. Such a right is, in effect, based on the rationale that in the course of long-term agreements unexpected effects can occur that cannot be provided for by the parties in advance. This correspondence becomes evident under the German rules on unexpected circumstances which contain a separate section dealing with the effects of unexpected events on long-term contracts (§ 314 BGB) besides the general provision on *Störung der Geschäftsgrundlage* (§ 313 BGB).

2) There is generally much reservation as to the question whether extraordinary inflation can affect credit agreements. Only some of the ‘open’ jurisdictions mitigate the consequences for the burdened party while applying very strict standards.<sup>19</sup> This reservation can be referred to the nominal value principle under which the amount of a monetary debt is based on its nominal and not on its ‘real’ value. Inflation is a ubiquitous phenomenon of the economy and distinctions between regular and excessive conditions are hard to draw.

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18 Case 1 ‘Canal de Craponne’: *Long-term agreement – devaluation of the price agreement*.

Early in the 20<sup>th</sup> century, the farmers A and B entered into a contract under which A promised to build and maintain an irrigation channel; B was entitled to extract water at a fixed price. The contract was concluded for an unlimited period of time. Almost 100 years later, A’s successors ask for an increase in the price arguing that due to inflation and a rise in the cost of maintenance as well as labour the agreed price has become completely inadequate.

Is the claim by A’s successors justified? Are they, alternatively, entitled to terminate the contract?

19 Case 2 Extraordinary inflation: *Hardship due to extraordinary inflation; hardship resulting from a foreign currency agreement (Extraordinary inflation)*.

A receives a loan from the B-Bank. Under the agreement, the interest rate is fixed at 10 percent for five years. In the last 20 years before the agreement, the rate of inflation had been relatively stable within a range of one to six percent. In the third year after the conclusion of the agreement, the economic situation begins to destabilize and inflation rises quickly to 50 percent.

Unsurprisingly, due to its speculative nature, the jurisdictions are even more reluctant to grant relief in the case of a foreign currency agreement.<sup>20</sup>

3) We can observe a tendency towards relief in cases, in which government intervention has strongly affected the contractual equilibrium, even though the 'closed' jurisdictions are more reluctant to grant relief. This trend can be attributed to the consideration that government action is often elementary to the parties' interests and evidently beyond their control.

4) Under a majority of jurisdictions, unexpected benefits do not trigger any form of relief, even if the benefits are out of proportion with the consideration.<sup>21</sup> It appears that one-sided windfall profits arising from the contract do not elicit the same inclination for equitable compensation as excessive losses.

*b) Recipient's use of goods or services is substantially affected*

1) In the cases from group B where the 'recipient's use of goods or services is substantially affected', government intervention seems to be, again, a clear example for judicial intervention: relief is predominantly granted if the lease of a petrol station becomes worthless to the lessee as petrol is no more available due to confiscation in wartime.<sup>22</sup> However, in the majority of the jurisdictions an export ban that is already present at the time of contracting does not justify relief for the burdened party even if both parties expected that the

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20 Case 2B: *B-Bank asks for an adjustment or for a termination of the contract (Variation: foreign currency agreement)*.

The loan agreement between A and the B-Bank provides for repayment and interest in a foreign currency. In the last 10 years before the agreement, the relevant exchange rate had been relatively stable within a range of 20 percent. Subsequently, the national currency is devaluated by 80 percent compared to the foreign currency.

A asks for an adjustment or for a termination of the contract.

21 Case 4 Unexpected benefit: *Long-term lease – extraordinary increase of the rental value*

B leases business premises from A for a fixed period of 15 years. Shortly after concluding the contract, the character of the area changes strongly and unexpectedly: A military airport located nearby is shut down and an enormous amount of public funds is invested in the area (infrastructure etc.). As a consequence, B's business soars and his profits are 500% of what he could reasonably have expected. By the same token, the rental value of comparable business premises in the same area rises to 500% of the amount A and B have agreed upon. A claims that the leasing price is to be adjusted accordingly or, alternatively, that the agreement is to be terminated.

Is A's claim justified?

22 Case 6 Confiscation of petrol: *Government intervention makes the use of a rented petrol station impossible*

A leases a petrol station from B. Due to the outbreak of war, the government confiscates all petrol in that area and it is impossible for A to obtain petrol from any source. As a result, A can make no use of the petrol station. He stops the payment on the lease.

Is A's refusal to pay the rent justified?



ban would be suspended.<sup>23</sup> The reason for upholding the contract in this case is that the parties knew about the risk of the ban and the misjudgement of an identified risk is held not to justify a relief.

2) When a promised work of construction (in our case: a cellar) becomes useless to the client due to a natural disaster (destruction of the rest of the building), all legal systems give him the right to cancel the completion of the work because it has become useless. With regard to the question of compensation, the jurisdictions are basically divided into two groups: according to one approach, the contractor remains entitled to the full contract price less the expenses he saves by not having to carry out the work, e.g. wages, material etc (Belgium, Czech Republic, Denmark, France and Slovenia). Thereby the contractor is awarded his contractual profits and the risk that the contract has become useless is allocated to the client. The argument for this is that the house is in his sphere of risk and control. In other jurisdictions, the contractor's claim for his contractual profits is reduced by some form of equitable adjustment and therefore the risk is distributed between both parties (e.g. Germany, the Netherlands, Portugal, England and Ireland). This solution is based upon the notion that the risk in question is not rooted in the house itself but in the natural disaster which is beyond either party's control.<sup>24</sup>

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23 Case 10 Export ban: *Purchaser of technical equipment is affected by export ban*

Firm A purchases technical equipment which is to be produced by firm B. The parties know that firm A plans to resell the equipment to Iraq. At the time of contracting, exports to Iraq are illegal but the parties expect that the status quo will change before the time of delivery. The parties are aware that the equipment can only be sold to Iraq at a reasonable price. When firm B has completed production and offers delivery, exports to Iraq are still illegal and no change is in sight. Firm A refuses acceptance and payment.

Is A's refusal to accept and pay justified?

24 Case 5 Destruction of cellar: *Renovation of cellar becomes useless due to the destruction of the building by a natural disaster*

A agrees to refurbish B's cellar into a wine cellar. The work is scheduled to start one month after the agreement. Before the work has started, B's house is completely destroyed during a violent summer storm. However, the cellar of the house remains fully intact. B immediately informs A and asks him not to perform. A insists on the agreement. He argues that B's cellar is still intact, that he has reserved two weeks to carry out the work and that he has already purchased the necessary materials.

Is B obliged to pay the contract price or, alternatively, to compensate A for his losses?

3) In the hotel reservation case the four events presented<sup>25</sup> display different tendencies: there is broad correspondence with regard to the conclusion that the frustration of individual purposes (exhibition cancelled<sup>26</sup>) and disturbances in transport (strike<sup>27</sup>) do not relieve the customer from his contractual obligations as these risks fall in the sphere of the customer. There is a certain tendency towards relief in the case involving terrorist threats;<sup>28</sup> however, much seems to depend on the facts (e.g. the probability and the foreseeability of the attacks). A clear tendency for relief can be stated in the coronation case: the fact that the price reflects the procession leads most reports to conclude that the hotel owner has to bear the risk.<sup>29</sup>

4) With regard to the shop rental case, a clear majority of the jurisdictions denies relief to the shop owner who claims that the business environment has developed unfavourably. This risk is considered not to be unusual and therefore the shop owner could and should have provided for it by implementing a protective term.<sup>30</sup> The jurisdictions under scrutiny are more likely to grant relief, however, if the owner of a bar is bound under a long-term supply agreement to sell only one kind of beer and this beer turns out to be unpopular among the guests.<sup>31</sup> Here, the long-term character of the contract may

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25 Case 7 Hotel reservation: *Individual purpose of the visit frustrated; strike by airport personnel; general safety endangered; coronation case*

A booked a room at B's hotel, but:

a) The exhibition he wants to visit is cancelled at the very last moment.

b) A terrorist movement declares that it is to launch a campaign against tourists in that town.

c) An unforeseeable strike by airport personnel prevents A from travelling to the city where the hotel is located at the specified time.

d) The coronation procession scheduled on the respective date is cancelled. The room has a view of the street where the procession was supposed to take place. Due to the extraordinary event, the agreed price is ten times higher than the regular price.

Is A entitled to cancel the reservation?

26 Case 7 (a).

27 Case 7 (c).

28 Case 7 (b).

29 Case 7 (d).

30 Case 8 Shop rental: *Renting a retail outlet; unexpected business environment at a shopping centre*  
A is the owner of a bookshop. He contracts with B to rent business accommodation in B's shopping centre. The fixed period of the lease is 5 years. The shopping centre has just been built and a large part of the accommodation is still unoccupied. Both parties expect at the time of contracting that a variety of shops (the hotel and catering trade, retail sales) will be located there. One year later almost all the accommodation is rented, but ¾ of the shopping centre consists of restaurants and cafes. For that reason most potential customers visit the shopping centre after A closes the doors of his bookshop.

Is A entitled to an adjustment or to a termination of the contract?

31 Case 9 Beer supply agreement: *Long-term supply of beer; beer sales are far below expectations*  
A, the owner of a bar, enters into an exclusive supply agreement with beer brewery B for a fixed period of 15 years. Pursuant to the contract, A is obliged to accept and pay for a specific quantity of beer on a monthly basis, while he is allowed to use technical equipment

strengthen the case for relief as well as the fact that the risk in question (the popularity of the beer) might be qualified as falling within the sphere of the brewery.

c) *Failure of a specified purpose (other than a) and b))*

Both of the cases that were dealt with under the heading ‘specified purposes’ show a tendency in favour of relief:

- 1) The assumption that the sold property will be used for cultural purposes will suffice for setting aside the agreement if it is used for other purposes because this assumption is – similarly to the coronation case – reflected in the price.<sup>32</sup> Here, the requirements of equity can quite easily be reconciled with the principle of *pacta sunt servanda* on the basis of ‘conventional’ doctrines (especially constructive interpretation).
- 2) In the case of divorce, the investment of one spouse in the property of the other one can give rise to a claim for compensation in most jurisdictions if divorce law does not provide for just results.<sup>33</sup> This solution can be based on the consideration that the reliance on the durability of the marriage should be legally protected.

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and furnishings owned by B. The consumption of beer, however, remains far below expectations. The bar is well attended but the ‘B beer’ is unpopular amongst customers at A’s bar. A requests an adjustment or the termination of the agreement. Is A’s claim justified?

- 32 Case 11 Sale of real estate involving expectation of cultural use: *Use of real estate by transferee does not comply with expectations of the transferor*

A sells his family home to B at a price far below its market value. Both parties assume that B would dedicate the house to cultural purposes only. However, this assumption was not inserted in the contract as an explicit condition. B changes his mind and gives it to one of his daughters instead.

Is A entitled to ask for the difference between the agreed price and the market value or, alternatively, to reclaim the house?

- 33 Case 12 Investment in spouse’s house is frustrated by divorce: *Equitable compensation if divorce laws lack a basis for compensation*. Before A and B marry, they enter into a prenuptial agreement, in which they agree on the separation of property. During the marriage A buys a house and A and B use the house as their family home. The price of the house is €500,000. A is the sole proprietor of the house, but B has contributed €100,000 to the purchase price. In addition, B carries out extensive renovation work before they move in. The renovation would have cost €50,000 if professional services had been employed. After A and B have lived together in the house for one year, they separate and then divorce. Divorce law does not provide a basis for compensation.

Is B entitled to compensation for his contributions to the family home?

d) *Mutual mistake and miscellaneous issues*

1) A clear tendency can be stated in the case in which the parties of a share deal were mutually mistaken concerning the market value of shares.<sup>34</sup> Here, the burdened party is generally entitled to set aside the agreement on the fixed price, as both parties share the responsibility for the mistake. Another tendency is that the party burdened by the false price fixing is not entitled to enforce a price agreement that reflects the 'true value' because the other party's reliance on the written price agreement must equally be taken into account. Notable exceptions are the common-law jurisdictions of England and Ireland where no remedy is granted and thereby the risk of the mutual mistake is allocated only to the party burdened by the 'false' price calculation in the written contract.

2) In Case 14,<sup>35</sup> the effect of unexpected circumstances on the respective rules on breach of contract was analysed. The question here is whether the seller would be excused from his liability in damages due to the unexpected nature of the impediment. Even though many jurisdictions tend to solve this case on the basis of their ('conventional') doctrines on breach of contract, a clear distinction between the 'open' and 'closed' jurisdictions can be observed. The main reason for this is that the distinction between the 'open' and the 'closed' jurisdictions is in line with the division between systems that apply a fault liability regime with regard to contractual damages and those jurisdictions that provide for strict liability. On the basis of their strict liability regime, there is a clear tendency to holding A liable for damages among the 'closed' jurisdictions. The findings of the 'open' jurisdictions remain somewhat vague due to the limited factual basis of the given case. However, it becomes quite clear that, subject to the factual details of the case, A has strong arguments to challenge his liability in many of the 'open' jurisdictions. The lack of a clear

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34 Case 13 Share deal – mutual mistake: *False determination of the market value in a share deal*. A holds shares of X corporation. He agrees to sell the shares to B at the current price as listed by the stock exchange on the day of contracting. In the written contract, the parties set a price of €10 per share. However, the actual price per share on the day of contracting is €12. The Internet service from which the parties derived the price had displayed an incorrect number. When A discovers the correct price, he demands that the purchase price be increased to €12. Can A ask for a price of €12 per share? Can he, alternatively, terminate the contract?

35 Case 14 Impediments of production beyond seller's control: *Production of contractual goods is inhibited by a strike/ restriction of electricity supplies*. A agrees to deliver some goods to B on a certain date, but:

- a) The workers of a subcontractor go on strike.
- b) Due to problems with the State energy production and distribution system the Government decides to cut the electricity supply at night thereby making it impossible to work at night.

As a result, A cannot deliver the goods for an uncertain period of time. Is B entitled to terminate the contract and to ask for damages?

tendency reflects the division as to the liability regime, but also the ambivalence of the risks in question. While neither strikes nor the energy supply are under the complete control of the seller, one may argue that he is closer to these sources of risk than the purchaser.

3) With regard to Case 15,<sup>36</sup> it is remarkable to note that a general disclaimer will predominantly be regarded as invalid in both the ‘open’ and in the ‘closed’ jurisdictions. There are, however, some exceptions (Belgium and France from the group of the ‘closed’ and Germany, Portugal and Spain from the group of the ‘open’ jurisdictions). The rationale for the majority perspective is that unexpected events are beyond the parties’ imagination and thus beyond their dispositions. One may also draw the conclusion that the equity principles from which the doctrines governing unexpected circumstances are derived are qualified as *ius cogens*.

## 5 THE PREFERENCE FOR OPENLY ADDRESSING THE ISSUE

Let us now turn to the doctrinal distinction between ‘conventional’ and ‘exceptional’ concepts. The doctrines that specifically address the issue of unexpected circumstances and identify the unexpected event as the source for relief (e.g. *Wegfall der Geschäftsgrundlage*, doctrine of assumptions, *clausula rebus sic stantibus*) have been referred to as ‘exceptional’ doctrines. ‘Conventional’ doctrines, on the other hand, are the traditional doctrines of contract law, which are based on the parties’ (hypothetical) intentions or on flaws in the mechanism of contracting. Such doctrines can address unexpected events with reference to the contractual agreement (e.g. interpretation, mistake, impossibility of performance and *laesio enormis*;

In favour of the ‘conventional’ concepts one may argue that they are in harmony with the principle of *pacta sunt servanda*: if the parties’ (hypothetical) intentions can be referred to as the basis of relief or if flaws can be identified in the contracting process, there is no conflict between the contract and an equitable allocation of risks. The harmonising character of the ‘conventional’ concepts may make it easier for the courts to set the contract aside.

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36 Case 15 Disclaimer: *Disclaimer concerning the rights arising from unexpected circumstances; other clauses related to unexpected circumstances*

The construction company A agrees to build a double-floor building on B’s land for the price of €2,000,000. In the contract the parties stipulate a disclaimer which excludes ‘all the rights of both parties arising from unexpected circumstances’. Two weeks after the construction work has begun a granite rock, which could not have been detected by the parties before the conclusion of the contract, is revealed on B’s land. As a result the costs of the construction increase by 300 %.

Can A ask for an adjustment of the contract or can he terminate the contract in spite of the disclaimer?

However, quite often the ‘conventional’ concepts provide no precise and persuasive rationale for relief in cases of unexpected circumstances – even if they are referred to by the courts. If the contract does not address the unexpected event explicitly or by clear implication, relief cannot be based on the parties’ actual intentions. Hence, ‘conventional’ concepts are always dealing with hypothetical assumptions as to what the parties would have agreed upon if they had foreseen the event. This reconstruction of the parties’ hypothetical intentions will often be fictional. If the parties have not foreseen the risk in question, it is equally fictional to qualify their non-perception as a mistake. Therefore, in many cases of unexpected circumstances the application of a ‘conventional’ doctrine amounts to concealing the essential equitable conflict between the (flawless but silent) contract and the extrinsic effect caused by the unexpected event in question.

The ‘exceptional’ doctrines, on the other hand, openly address the conflict between the contract and the requirements of equity in the light of the unexpected event in question. These doctrines and their application reveal that in most cases the problem of unexpected circumstances cannot be solved with reference to the intention of the parties and that an external standard of law is to be applied in the assessment of the event and its consequences for the contract. This becomes evident in the ‘open’ jurisdictions, where on the basis of a general ‘exceptional’ doctrine the contractual agreement itself can be adjusted to match the requirements of equity.

The European model rules on contract law presented so far all propose to recognize such a general ‘exceptional’ doctrine. The conflict between the principle of *pacta sunt servanda* and the requirements of equity is particularly evident in the rules of the DCFR (Draft Common Frame of Reference), which are based on the PECL (Principles of European Contract Law). In Art. III-1:110 DCFR and Art. 6.111 PECL the principle of sanctity of the contract is confirmed as the general rule. However, at the same time, it is confronted with the relevant exceptions in the case of a change of circumstances.

## 6 MINIMUM REQUIREMENTS FOR SETTING ASIDE THE CONTRACT

As I have already mentioned and as the national reports illustrate there are various ‘exceptional’ doctrines, i.e. concepts specifically addressing the issue of unexpected circumstances both in the ‘open’ and in the ‘closed’ jurisdictions. In the ‘open’ jurisdictions, these doctrines will allow for termination as well as adjustment of the contract, while in the ‘closed’ jurisdictions termination is generally the only remedy available.

Even though the different concepts vary strongly in detail, we can identify three basic prerequisites for the application of such ‘exceptional’ doctrines, as far as their doctrinal justification is concerned:

- 1) The transaction must have been affected *fundamentally* by a certain event. This requirement expresses the general idea that the principle of *pacta sunt servanda* and the stability of the contract may only be disregarded in exceptional cases.
- 2) The event affecting the transaction *must not have been provided for in the contract or foreseen by both parties* at the time of the conclusion of the contract. This requirement reflects the prevalence of the parties' specific dispositions within the scope of their foresight.
- 3) The burden resulting from the event may *not be attributed to one party by any particular legal rule*. This postulate accounts for the principle of *lex specialis derogat legi generali*: the law provides rules for certain unexpected events and these rules demand priority over a general doctrine on unexpected circumstances.

These requirements can be characterized as 'minimum conditions': even though further restrictions may (and often do) apply under the law of the individual jurisdictions, these requirements must be met in any case if the contract is to be challenged successfully.

Evidently, the 'minimum conditions' are phrased in general and ambiguous terms and they cannot guarantee convergence with regard to the findings in a certain case, as the complementary rules vary throughout the jurisdictions. But this ambiguity and divergence often reflect the ambiguous and manifold character of the problem of unexpected circumstances rather than diverging concepts in the different legal systems which admittedly exist as well. Even if the complementary rules were identical, the question of what amounts to a 'fundamental effect' or which contractual risks are provided for in the agreement or by a particular rule of law is largely based on the individual appreciation of the event in question. The fundamental conflict between legal security and the binding force of contract on the one hand and equity on the other hand will always leave room for diverging judgements.

## 7 DISTINCTION BETWEEN ISSUES OF INITIAL MISTAKE AND OF UNEXPECTED EVENTS ARISING AFTER THE CONCLUSION OF THE CONTRACT

A mistake of one party or a mutual mistake of both parties with regard to factors that were already present before or at the time the contract was concluded differs significantly from the occurrence of unexpected events arising after the conclusion of the contract. A clear distinction between pre-existing and supervening factors is meaningful for the doctrinal treatment of unexpected circumstances, because it is generally easier for the parties to recognize and control pre-existing factors than future developments. Furthermore,

by submitting themselves to a contractual agreement, the parties are aware that they generally assume the risk of future changes and they may only be relieved from this risk under exceptional circumstances. A lack of information about pre-existing factors, on the other hand, will in most jurisdictions allow parties to terminate a contract even if they are not heavily burdened by the contract. The absence of a relevant mistake is a precondition for the binding effect of the contract and the assumption of risks provided therein. Hence, if a party is mistaken about certain factors that were present at the time of contracting, the case should only be treated according to the respective rules on mistake.

If some jurisdictions tend to apply their 'exceptional' doctrines on unexpected circumstances in cases of mistakes as to pre-existing factors, this can mainly be explained with certain deficiencies in their respective law of mistake. Germany, where the rules on *Geschäftsgrundlage* are applied in cases of mutual mistakes, may serve as an example because the rules on mistake in the BGB were only designed for cases of one-sided responsibility for the mistake and the principles on *Geschäftsgrundlage* offer a more flexible instrument that is necessary in cases of mutual mistake. From a doctrinal point of view, these problems can be solved more adequately by refining the rules on mistake.

However, the fact that the problem of initial mistake and the issue of supervening unexpected circumstances both tend to be approached on the same doctrinal basis shows that they are in fact similar with regard to the issue of remedies. In both types of cases, the binding force of the agreement is disregarded because one or both parties have failed to take into account certain factors that were of relevance for the contract. And both cases can essentially be solved with two remedies: the contract can either be discharged or it can be adjusted to take into account the relevant aspect. A legal system therefore has to answer this question with regard to both constellations discussed. It is suggested that, in a rational legal system with a systematic approach, both problems should be addressed in the same way.

## 8      LEGAL CONSEQUENCES – THE UNSOLVED MYSTERY OF 'ADJUSTMENT'

The convergences of the court findings (see under 2) and the similarities in the doctrinal approach (see under 4) only concern the primary issue whether or not the contract is suspended due to unexpected circumstances. With regard to the secondary issue, i.e. the precise definition of the legal consequences, it is very hard to identify convergence between the different jurisdictions. Upon a closer look, this obscurity is not due to the comparative perspective; rather, the cause for this can be traced back to the legal systems themselves, neither of which presents a clear, systematic, complete and convincing concept with regard to the legal consequences that apply once an unexpected event suspends



the binding effect of the contract terms. The same holds true for the various European model codes of contract law.

The remedy of termination is quite simple and does not involve much judicial discretion. It is not surprising that this remedy is widely available in cases of unexpected circumstances in all jurisdictions. However, in a large number of cases termination does not achieve fair results, as it may distribute the losses arising from the unexpected event arbitrarily to one party. Therefore, it can be said that the recognition of a mechanism of adjustment is a postulate of equity if the contract is set aside due to unexpected circumstances.

This conclusion is explicitly drawn in the 'open' jurisdictions and in the model codes (e.g. Art. III. – 1:110 DCFR; Art. 6:111 PECL, Art. 92 Feasibility study), as there are established sets of rules under which the burdened party may seek adjustment of the contract in cases of unexpected circumstances. Even in the 'closed' jurisdictions, where there are no such mechanisms established as a general rule, the reports show that the courts may find a way to reach results that amount to adjustment of the contractual terms, e.g. on the basis of constructive interpretation or by granting ad-hoc compensation based on the standards of equity and good faith. Also, the development of the doctrine of frustration in England shows that the all-or-nothing approach of termination (or discharge) is inadequate for dealing with all the issues of unexpected circumstances. In England, the strict effects of the common-law doctrine of frustration leading to a discharge of the contract had to be amended by an obligation to compensate in the Law Reform (Frustrated Contracts) Act 1943, granting the judge a great extent of discretion in order to achieve just results.

The details of adjustment, however, involve a number of difficult issues:

- 1) The *relation between termination and adjustment* (i.e. the conditions under which termination or adjustment is the appropriate remedy): this aspect also includes the question whether the party that is not burdened by the unexpected circumstance in question is entitled to object to the adjustment and can thereby compel termination.
- 2) The *form of adjustment*: it must be determined whether the adjustment may interfere with the contractual obligations in kind or whether there is only monetary compensation available.
- 3) The *standard for determining the extent of adjustment*: this issue raises the difficult question of whether the burdened party has to bear the losses from the unexpected circumstances up to a reasonable extent or whether – alternatively – the losses are to be divided equally among both parties.
- 4) The *technical implementation of adjustment*: it must be determined whether adjustment comes into force by operation of law (determined by the court)

or whether the burdened party has a right to claim adjustment by specifying the contents of the adjustment. In addition, it must be decided whether adjustment must be preceded by a renegotiation process and whether and how such a renegotiation process can be governed by rules of law.

The reports show that these issues have not yet been fully resolved in any one of the jurisdictions explored in this volume. Hence, it is unsurprising that convergent and convincing solutions cannot be identified from the comparative perspective. It appears that the conditions for adjusting the contract are the unsolved mystery of the legal rules on unexpected circumstances. This unresolved issue is of great influence for the entire problem as the willingness to grant relief depends very much on reliable consequences of the remedy available.

In order to provide fair solutions it is unavoidable to recognise a legal regime for the adjustment of a contract that is affected by relevant unexpected circumstances. One may resort to judicial discretion which is relied upon by all of the 'open' as well as the 'closed' jurisdictions to a certain extent. However, if more precise guidelines are required, the material is inconclusive. Thus, the conditions of adjustment appear to be the most important topic for further research in the field of unexpected circumstances.

9 BY WAY OF CONCLUSION: UNCERTAINTY, THE LACK OF PRECEDENTS AND HARMONISATION BY ADVANCING THE LEGAL DISCOURSE

As was mentioned above, the uncertainty of judgements on unexpected circumstances is an unavoidable characteristic of the conflict between legal security and the binding force of contract on the one hand and the requirements of equity on the other. There are possibilities for strengthening certainty on the comparative level by further harmonisation with regard to the doctrinal background in general and the mechanism of adjustment in particular. Yet, there is another structural source of uncertainty that is particularly important in cases of unexpected circumstances. That is the lack of reliable precedents in many jurisdictions.

Many cases in which relief on the basis of unexpected circumstances is discussed are quite eccentric and rare. Some national reporters have had difficulties identifying precedents similar to our cases at hand and some may have had to go back several decades. Especially in continental countries, the question may be raised whether 'old' precedents still have – persuasive – value as they reflect an antiquated legal and social background and could arguably be overruled if they were submitted to the respective Supreme Court today.<sup>37</sup>

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37 Ewoud Hondius (ed.), *Precedent and the law/Les précédents et le droit*, Bruxelles: Bruylant, 2007, p. 19.

Further harmonisation of the law in Europe may enlarge the basis of precedents. It would mean that instead of a meagre trickle of cases, every member state would fully profit from the case-law of the other member states of the European Union. However, the harmonisation on the basis of precedents does not necessarily depend on a common Civil Code.<sup>38</sup> The American example shows that the various states of the Union refer to the case law of other states. The process of harmonisation by precedents may be enhanced by a restatement of European contract law without binding effect. In fact, in Europe several such restatements are available such as the DCFR, the PECL, the Principles of the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de Législation Comparée*, the *Acquis-Principles*, the *Gandolfi Code*, the Feasibility study of the European group of experts (art. 92),<sup>39</sup> the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (art. 89),<sup>40</sup> as well as other international instruments, such as the UNIDROIT Principles for International Commercial Contracts.

We have already seen that there is a considerable amount of similarity between the different European legal systems both in terms of the results achieved as well as in terms of their doctrinal approach (cf. 2 and 4). Hence, even without a uniform mandatory European rule on unexpected circumstances, courts and practitioners may profit from an analysis of cases from other European legal systems. Such an exchange is particularly important in cases of unexpected circumstances as, due to the variety of the potentially relevant factors, the legal doctrines applied and their requirements are necessarily vague and as it may always be argued that the solution will greatly depend on the facts of the individual case. Furthermore, it should be stressed again that, as far as precise doctrinal guidelines are concerned, no legal systems seem to have presented an comprehensively convincing approach to the problem of unexpected circumstances so far. Therefore, the volume *Unexpected circumstances in European contract law* is intended to serve as a guide that may help to improve the understanding between the different European legal systems and to refine the rules on unexpected circumstances, either on the level of the national jurisdiction or with regard to harmonisation projects.

Of course, the process of harmonisation on the basis of precedents involves the problem of languages. An Estonian case on change of circumstances will have little impact in Portugal if it is not available in a language which is accessible to Portuguese lawyers. A database in the present European *lingua*

38 See Ilka Klöckner, *Grenzüberschreitende Bindung an zivilgerichtliche Präjudizien*, PhD thesis Freiburg 2005, Tübingen: Mohr, 2006, 254 p.

39 A European contract law for consumers and businesses: publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and Legal practitioners' feedback, May 2011. See Reiner Schulze and Jules Stuyck (eds.), *Towards a European Contract Law – An Introduction*, München: Sellier, 2011.

40 COM(2011) 635 final.

*franca* – and ideally in more than just one language – would therefore be necessary. This need not necessarily be a database in the formal sense, such as the former CLAB.<sup>41</sup> A more user-friendly option is ECTIL's Yearbook of Tort Law, which is discussed at annual meetings in Vienna.<sup>42</sup> Likewise, Torino could be the platform, long after the Common Core project has finished, for annual updates as to national case law on the various topics, such as unexpected circumstances. An alternative would be Vienna, the newly selected site of the European Law Institute, founded in 2011. But then, why not remain in Torino?

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41 DG SANCO's one time database on unfair contract terms (*clauses abusives*) – see Thomas Wilhelmsson, in: Torbjörn Andersson, Bengt Lindell (eds.), *Festschrift till Per Henrik Lindblom*, Stockholm: Iustus, 2004, pp. 781-800.

42 This year's 10th annual conference was held in Vienna from 28-30 April 2011.



## 10 | Change of circumstances in Latin American law. A comparative overview

Rodrigo Momberg <sup>■</sup>

### 1 INTRODUCTION

Latin American law is without any doubt part of Western law. Besides this, Latin American jurisdictions are, to a great extent, civil-law systems. Traditional comparative law places Latin America within the Romano-Germanic legal family, attached to the French group of influence.<sup>1</sup> With a different terminology, Zweigert and Kötz categorize Latin America in the Romanistic legal family, i.e. those legal systems which adopted the French Civil Code as a main source of inspiration.<sup>2</sup>

Therefore, the links between Latin American private law and European private law cannot be denied, particularly with regard to its origins. However, the originality of Latin American law has also been stressed because of the variety and selection of its sources:<sup>3</sup>

‘Latin America is original in a first sense, and it is interesting to study, because it has adopted in whole neither French law, nor Spanish law, nor Portuguese law, nor Italian law, nor German law. It has made the effort to take the best of each from those laws (...).’

The special and typical features of Latin American legal systems have been sometimes oversimplified in terms of their public law being ‘more North American than European’ and their private law ‘more European than North American’.<sup>4</sup> In the end, although being placed undoubtedly in the civil-law tradition, Latin American jurisdictions should be regarded as systems with

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1 See R. David, *Traité élémentaire de droit civil comparé: introduction à l'étude des droits étrangers et à la méthode comparative*, LGDJ, Paris, 1950.

2 K. Zweigert, and H. Kötz, *An Introduction to Comparative Law*, Clarendon Press Oxford, Oxford, 1998, p. 73.

3 R. David, *L'Originalité des Droits de l'Amérique Latine*; cited by J.L. Esquirol, ‘The Fictions of Latin American Law’ (Part I), *Utah Law Review* (1997), 425, p. 463.

4 J.H. Merryman, and D.S. Clark, *Comparative Law, Western European and Latin American Legal Systems: Cases and Materials*, Bobbs-Merrill, Indianapolis, 1978, p. 207.

unique and particular features, and not as simple replicas of one or more European legal systems.

This paper has the aim to present to the reader an introduction to the subject of change of circumstances or *imprevisión* as it is provided by the main Latin American jurisdictions. To this end, a comparative overview will be presented with regard to Argentina, Brazil, Chile, Colombia, Paraguay, Peru and Uruguay (section 3), followed by special reference to Argentinian private law, which both in legal doctrine and case law has developed a complex and comprehensive system for the application of the subject (section 4). Previous to the comparative survey, a brief historical approach is introduced as a means to give an idea of the development of the subject in Latin America (section 2).

## 2 HISTORICAL REMARKS

After independence from Spanish colonization in the early nineteenth century, one of the first objectives of the new republics was the enactment of civil codes, as a consolidation of their new status:<sup>5</sup>

‘the very act of establishing new national law was an assertion and validation of national identity and power.’

Additionally, Spanish colonial law was a symbol of the old regime and was also based on a complex system of sources, which included a lack of uniformity and contradictory rules, making it difficult to know and apply the law.<sup>6</sup> As to the task of codification, the French Civil Code was the main source of inspiration for the drafters of Latin American codes. On the one hand, from a legal perspective, because of its strong links with Roman law, this does not represent a complete break with the previous colonial sources such as *Las Siete Partidas* or the *Fueros*; and it was the only available model of a national and unifying Code at that time.<sup>7</sup> On the other hand, from a philosophical perspective

5 M.C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, University of Texas Press, Austin, 2004, p. 104. The invasion of Spain by Napoleon in 1808 was the starting point for the independence process of Latin America. For instance, Argentina declared its independence in 1816 and Chile in 1818.

6 M.C. Mirow, ‘Individual Experience in Legal Change: Exploring a Neglected Factor in Nineteenth-Century Latin American Codification’, *Southwestern Journal of Law and Trade in the Americas* 11, 301, p. 304 (2005).

7 Zweigert and Kötz, *supra* note 2, p. 113. The Prussian General Land Law of 1794 and the Austrian Civil Code of 1811 were also available at that time, but both were linked to absolute and monarchical regimes and had a conceptualism and abstraction which was not familiar to Latin American jurists. Besides, regarding their structure, both instruments included not only private-law but also public-law provisions and also considering the huge volume of the Prussian General Land Law (almost 20,000 articles), these were decisive factors to exclude them as main sources of inspiration.

ive, it was considered a reflection of the ideals of the French Revolution as individual freedom, equality under the law, private property and the separation of powers.<sup>8</sup> Finally, in practical terms, it was easily accessible for Latin American jurists and for the elites who were at that time highly competent in the French language.<sup>9</sup>

The influence of the French *Code Civil* on the 19<sup>th</sup>-century Latin American codifications, and more important, of the liberal doctrine on which it was based, were the main reasons for the great relevance given by that Civil Code to the *pacta sunt servanda* principle, including provisions on supervening circumstances only in cases of impossibility and force majeure. The analysis of the two most influential Latin American Civil Codes of the 19<sup>th</sup> century confirms this assertion. Thus, in its original version, the Argentinian Civil Code did not include a general provision on *imprevisión*, and on the contrary, article 1197 stated that 'Agreements made in contracts are for the parties a rule to which they should conform as to the law itself'.<sup>10</sup> The notes of the drafter of the Code, Dalmacio Vélez Sarfield explained the provision on the ground that 'the free consent of the parties, given without fraud, mistake or duress and in accordance with the legal formalities, should make contracts irrevocable'.<sup>11</sup> In the same sense, article 1545 of the Chilean Civil Code, which is based on article 1134 of the *Code Civil*, provides that 'Contracts lawfully entered into are a law for the contracting parties and cannot be invalidated except by mutual consent or for causes authorized by law'.<sup>12</sup>

However, as it will be analysed in the following sections, the severe economic circumstances and social changes of the 20<sup>th</sup> century, as well as the influence of modern civil codes and the reception of new legal theories such as the socialization of private law and solidarity in contract law led to the inclusion of rules on change of circumstances in the reform of the Latin American civil codes.

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8 M. Murillo, 'The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification', *Journal of transnational law policy* 11, 163-182, p. 5 (2001).

9 Mirow, *supra* note 6, p. 305, adding that 'France served as a model in mid-nineteenth century Latin America not only in politics and legislation, but also in culture, fashion, language and intellectual outlook.'

10 Art. 1197: 'Las convenciones hechas en los contratos forman para las partes una regla a la cual deben someterse como a la ley misma'. Author's own translation.

11 Cited by A. Alterini, *Teoría de la imprevisión y cláusula de hardship* (2007). Available at <<https://www.u-cursos.cl/derecho/2007/2/D122A0311/1/.../150228>>.

12 Article 1545: 'Todo contrato legalmente celebrado es una ley para los contratantes y no puede ser invalidado sino por su consentimiento mutuo o por causas legales'. Author's own translation.



### 3 COMPARATIVE OVERVIEW

As stated above, provisions on change of circumstances or *imprevisión* were included in Latin American civil codes during the 20<sup>th</sup> century. The main exception to this trend has been the Chilean Civil Code, whose Book IV on ‘Obligations in General and Contracts’ remains without any significant amendment to its original draft.

However, the non-existence of an express legal provision does not necessarily imply the rejection by a given legal system of change of circumstances as a ground for relief for the affected party. In this sense, a distinction will be made between receptive and unreceptive legal systems, based on the readiness (or not) of the legal system to recognise situations of changed circumstances as being legally relevant, granting the possibility to the affected party to rely on a system of remedies in that case.<sup>13</sup>

#### 3.1 Receptive legal systems

##### 3.1.1 Argentina

The *imprevisión* theory was introduced in the second part of article 1198 of the Argentinian Civil Code by Act 17.711 of 1968. The provision was based mainly on the rules of the Italian Civil Code of 1942, and has been the model for subsequent reforms in Paraguay and Brazil. Because of its relevance, Argentinian law will be analysed in detail in section 4.

##### 3.1.2 Brazil

Although the subject of change of circumstances was not recognised by the Brazilian Civil Code of 1916, the legal doctrine and an important number of judicial decisions had accepted its application based on the principle of good faith.<sup>14</sup> The new Brazilian Civil Code of 2002 regulates the subject under the title of ‘Termination by excessive onerosness’ (*Resolução por onerosidade excessiva*). The provisions are based on the corresponding provisions of the Italian and Argentinian Civil Codes. Thus, the affected party has the right to claim

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13 For a similar approach see E. Hondius, H. Grigoleit, (eds.), *Unexpected Circumstances in European Contract Law*, Cambridge, University Press, 2011, where the legal systems are grouped in ‘open’ and ‘closed’, based on the criterion whether or not a jurisdiction recognises a general rule under which the contract can be adjusted to unexpected circumstances by the courts.

14 S. Sanches, *Questões relevantes sobre a resolução de contratos por onerosidade excessiva no direito brasileiro*, available at <[http://www.fiesp.com.br/download/assessoria\\_juridica/artigo\\_sydney\\_sanches.pdf](http://www.fiesp.com.br/download/assessoria_juridica/artigo_sydney_sanches.pdf)>; and J. Neves, *A nova dimensão dos contratos no caminho da pós-modernidade*, Doctoral thesis, Universidade Federal do Rio Grande do Sul, 2006, p. 239.

the termination of the contract in case of excessive onerousness derived from extraordinary and unforeseeable events (article 478) and the other party may prevent the termination of the contract by offering its equitable modification (article 479). In case of unilateral contracts, i.e. those with obligations for only one of the parties, the affected party may claim the reduction or modification of his performance, in order to reduce the effects of the excessive onerousness. These provisions are the consequence of the express recognition by the new Civil Code of the 'social function of contract' as a parameter for the performance and interpretation of contracts as well as a complement of the general principle of freedom of contract.<sup>15</sup>

Before the enactment of the new Civil Code, change of circumstances was already included in the 1990's Code for the Defence of the Consumer (*Código de Defesa do Consumidor*), providing as a basic right of the consumer the revision of the contract terms 'in case supervening circumstances make their performance excessively onerous for the consumer' (article 6.V). Brazilian legal doctrine has stressed that this provision is far less strict than the Civil Code's rules on the subject, this being justified by reason of the position of the consumer as the weaker party in the relationship.<sup>16</sup>

### 3.1.3 Colombia

The Colombian Civil Code, like its Chilean model, does not provide a legal rule on change of circumstances. However, the Colombian Supreme Court has expressly recognised *imprevisión* as a general principle of law (*principio general del derecho*). Besides, the Colombian Commercial Code of 1971 includes in its article 868 a provision on excessive onerousness which is applicable to commercial contracts with periodic or deferred performance. Under that provision, the affected party is entitled to request the adaptation of the contract and the court has the power to revise the contract based on equity parameters. If the revision is not possible, the court may terminate the contract. With regard to that article, Colombian legal doctrine has stated that such a provision is applicable vis-à-vis civil contracts.<sup>17</sup>

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15 Article 421 of the new Brazilian Civil Code states that 'Freedom of contract should be exercised considering and within the limits of the social function of the contract'. Author's own translation.

16 J.H. Neto, 'A resolução por onerosidade excessiva no novo código civil: uma quimera jurídica?', *Revista da Escola Superior da Magistratura de Sergipe*, n° 04, 41-56 (2003).

17 W. Jiménez, *La teoría de la imprevisión ¿Regla o principio general del derecho?* Available at <<http://www.docentes.unal.edu.co/wjimenezg/docs/LA%20TEOR%3FA%20DE%20LA%20IMPREVISI%3FN.pdf>>; and L. Moisset de Espanés, 'Imprevisión: legislación de América del Sur', *Anuario de Derecho Civil*, 1147-1182 (1996).

### 3.1.4 Paraguay

In 1876 Paraguay integrally adopted the Argentinian Civil Code which, as stated above, did not contain any general rule on changed circumstances. The work for reforming the code started in the middle of the 20<sup>th</sup> century and finally in 1987 a new Civil Code was adopted. The new Code includes an express rule on *imprevisión* (article 672), which is almost a literal translation of the provisions on *eccessiva onerosità* (articles 1467 and 1468) of the Italian *Codice Civile*.<sup>18</sup>

### 3.1.5 Peru

The Peruvian Civil Code of 1984 contains a complete and innovative regulation of the subject, devoting six articles under the title of the ‘excessive onerosness of the obligation’ (*excesiva onerosidad de la prestación*, articles 1440 to 1446). The rules are applicable to bilateral and aleatory contracts whose performance has become excessively onerous because of unforeseeable and extraordinary circumstances. The affected party is entitled to request the adaptation or termination of the contract and his claim (action) is subject to a brief prescription period (three months since the occurrence of the event which has given rise to the excessive onerosness).<sup>19</sup>

## 3.2 Unreceptive legal systems

### 3.2.1 Chile<sup>20</sup>

The main obstacle to the application of *imprevisión* in Chilean private law has been the above-cited article 1545 of the Civil Code, which strongly affirms the principle of sanctity of contracts. Based on that provision, traditional Chilean legal doctrine rejects the possibility of a revision of contracts in cases of *imprevisión* and in any other case which is not expressly regulated.<sup>21</sup> On

<sup>18</sup> And therefore, also very close to the provisions of the Argentinian Civil Code. See M. Liksenberg, and A. Maine, *La teoría de la imprevisión en el ámbito del Mercosur*, Academia Nacional de Derecho y Ciencias Sociales de Córdoba (2009). Available at <<http://www.acaderc.org.ar/doctrina/articulos/la-teoria-de-la-imprevision-en-el-ambito-del/?searchterm=ciencias>>.

<sup>19</sup> See Moisset de Espanés, *supra* note 17.

<sup>20</sup> For an extensive analysis of the subject in Chilean law, see R. Momberg, *The Effect of a Change of Circumstances on the Binding Force of Contracts. Comparative Perspectives*, Intersentia, Antwerp, 2011.

<sup>21</sup> Some particular rules of the Chilean Civil Code do allow the modification of specific contracts in cases of unexpected circumstances: articles 2003 rule 2a (construction contracts – *contrato de construcción*), 2180 (loan for use – *comodato*) and 2227 (bailment – *depósito*). Conversely, articles 1983 (lease of rural property – *arrendamiento de predios rústicos*) and

the contrary, most of the contemporary Chilean legal doctrine argues for the application of *imprevisión* in Chilean private law, based on article 1546 of the Civil Code, which provides for the principle of good faith in the performance of contracts.<sup>22</sup> However, in a number of decisions the Chilean Supreme Court reaffirmed the principle of the sanctity of contracts. Recently, in the *South Andes* case,<sup>23</sup> the Court expressly rejected the possibility of applying *imprevisión* in the light of the legal provisions in force, which were interpreted as excluding the revision of contracts in cases of changed circumstances and, on the contrary, as a manifestation of the absolute prevalence of the principle of *pacta sunt servanda*.<sup>24</sup>

### 3.2.2 Uruguay

The situation of Uruguayan private law is analogous to that described above for Chile. Thus, there is no express recognition in the Civil Code of the theory of *imprevisión*, and legal doctrine is divided about its admission as a ground for relief for the affected party. Additionally, Uruguayan case law has unanimously rejected the application of changed circumstances in cases of excessive onerousness, stating that the legal provisions in force leave no room for the admission of *imprevisión*.<sup>25</sup>

## 4 UNEXPECTED CIRCUMSTANCES IN ARGENTINIAN LAW

As stated above, in its original version, the Argentinian Civil Code strongly supports the principles of freedom of contract and *pacta sunt servanda*. The *imprevisión* theory was incorporated into the second paragraph of article 1198 of the Argentinian Civil Code by Act 17.711 of 1968, which introduced relevant

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2003 rule 1 (construction contracts – *contrato de construcción*) expressly reject the modification of such contracts on the basis of a change of circumstances.

22 Article 1546: ‘Contracts must be performed in good faith and are consequently binding not only as to what is expressed therein, but also with regard to all consequences which are derived from the nature of the obligation, or belong to it by statute or usage’ (*Los contratos deben ejecutarse de buena fe, y por consiguiente obligan no sólo a lo que en ellos se expresa, sino a todas las cosas que emanan precisamente de la naturaleza de la obligación, o que por la ley o la costumbre pertenecen a ella*). Author’s own translation). The direct sources of this provision are articles 1134 and 1135 of the *Code civil*. However, the Chilean legislator did not incorporate the concept of equity (*l’équité*) in the provision, because it was considered unnecessary regarding other provisions of the Code. See R. Abeliuk, *Las obligaciones*, Editorial Jurídica de Chile: Santiago, 2001, p. 119.

23 *South Andes Capital S.A. c/ Empresa Portuaria Valparaíso*, Corte Suprema, 09.09.2009, rol 2651-08.

24 There is only one reported case, delivered by the Court of Appeal of Santiago, in which the application of *imprevisión* was accepted, *Guillermo Larraín Vial con Servicio de Vivienda y Urbanización de la Región Metropolitana*, (11.11.2006).

25 See Liksenberg and Maine, *supra* note 18.

reforms to the whole law of obligations in the Code. The direct source of such a rule is Recommendation 15 of the Third National Congress of Civil Law (Córdoba, 1961) which, in turn, was based on article 1467 of the Italian *Codice Civile*.<sup>26</sup>

Since then, Argentinian legal theory and case law have developed a consistent doctrine with regard to the subject of unexpected circumstances. In this sense, the conditions and effects of *imprevisión* have been widely analysed in theory and tested in practice, especially in periods of economic crisis which have affected Argentina since 1975. Because of these reasons and the similarities between the Argentinian legal provisions and the corresponding articles of the Brazilian and Paraguayan Civil Codes, a detailed analysis of the matter with regard to Argentinian private law is given in the following sections.

#### 4.1 The conditions for the application of article 1198

Article 1198 (second part) of the Argentinian Civil Code provides:

In bilateral commutative contracts and in unilateral onerous commutative contracts for deferred performance or for continuous performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the affected party may demand the termination of the contract. The same principle is applicable to aleatory contracts when the excessive onerousness is derived from causes which are external to the inherent risks of the contract.

In contracts for continuous performance, their termination will not affect that which has already been performed.

Termination cannot be demanded if the affected party has been at fault or is in default.

A party against whom the dissolution is demanded may prevent this by offering to improve the conditions of the contract equitably.<sup>27</sup>

26 M.A. Araujo, Revisión de los contratos: Teoría de la excesiva onerosidad sobreviniente o teoría de la imprevisión. *Trabajos del Centro de Investigaciones de Derecho Civil, Facultad de Derecho, U.N.R.*, 95-101, p. 96 (1997). The Second National Congress of Civil Law (Córdoba, 1937), which analysed the reform project of 1936, also recommended the inclusion of the *imprevisión* doctrine in such a project; see Moisset de Espanés, *supra* note 17. Even before the introduction of the present text of article 1198 into the Civil Code, case law had recognized the application of the *imprevisión* theory. For reported cases see Moisset de Espanés, *supra* note 17; and L.R. Flah, M. Smayevsky, *Teoría de la imprevisión*, LexisNexis-Depalma: Buenos Aires, 2003, pp. 141-142.

27 Art. 1198 (second paragraph): 'En los contratos bilaterales conmutativos y en los unilaterales onerosos y conmutativos de ejecución diferida o continuada, si la prestación a cargo de una de las partes se tornara excesivamente onerosa, por acontecimientos extraordinarios e imprevisibles, la parte perjudicada podrá demandar la resolución del contrato. El mismo principio se aplicará a los contratos aleatorios cuando la excesiva onerosidad se produzca por causas extrañas al riesgo propio del contrato. En los contratos de ejecución continuada

#### 4.1.1 Contracts covered by the provision

Article 1198 is applicable to bilateral commutative contracts and to unilateral onerous commutative contracts for deferred performance or for continuous performance, and to aleatory contracts when the excessively onerous nature is derived from causes external to the inherent risks of the contract.

As in Chilean law, *bilateral contracts* are those with reciprocal obligations (art. 1138) and *unilateral contracts* are those where only one of the parties assumes an obligation to the benefit of the other. The contract is *onerous* if the mutually expected benefit relies on the performance of the reciprocal obligations, and *gratuitous* if one party obtains a benefit without any performance of its own (article 1139). Finally, the contract is *commutative* where the reciprocal obligations are considered to be equivalent by the parties;<sup>28</sup> and *aleatory* if the expected equivalent consists of an uncertain possibility of a loss or gain for one of the parties (article 2051). With regard to the latter, the provision requires that the excessively onerous nature was not the consequence of the inherent risk of the contract. For instance, contracts which included a 'U.S. dollar clause', i.e. a clause linking the amount of the contract price to the value of the U.S. dollar on the exchange market, concluded during the economically extremely unstable period after the governmental change in the exchange policy of February 1981, were considered by the courts to be aleatory contracts and therefore excluded from the application of article 1198, because the risk of variations in the U.S. dollar exchange rate was considered to be inherent to the contract.<sup>29</sup> The express inclusion of aleatory contracts is arguable because in such contracts uncertainty is part of the nature of the agreement, and therefore, the parties have assumed the change of circumstances as a normal consequence. In this regard, the Italian *Codice Civile* expressly excludes aleatory contracts from the application of the rules of *eccessiva onerosità*.<sup>30</sup>

As a common feature the contract should concern deferred or continuous performance, i.e. those obligations which are not performed at the same time as the conclusion of the contract but during a period of time after such conclusion. In this sense, it has been held that for the application of this requirement it is enough that

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la resolución no alcanzará a los efectos ya cumplidos. No procederá la resolución, si el perjudicado hubiese obrado con culpa o estuviese en mora. La otra parte podrá impedir la resolución ofreciendo mejorar equitativamente los efectos del contrato.' Author's own translation.

28 The Civil Code contains no definition of such a category of contracts, but legal doctrine agrees with the concept set out above. See Flah, Smayevsky, *supra* note 26, p. 34.

29 C1° Civ. y Com., San Isidro, sala II, 1985/02/19, *Climberg G. c/ Chiro Tarrab, A.*; CNCiv., sala B, 1987/04/07, *Spada de Makintach, S. c/ Tonelli, C.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, Leiva Fernández, L. (Dir.), La Ley, Buenos Aires, 2003, p. 235.

30 See article 1469 of the Italian *Codice Civile*.

‘the change of circumstances takes place in the period of time between the conclusion of the contract and its performance, without formally requiring a contract for deferred or for continuous performance.’<sup>31</sup>

Moreover, most of the case law agrees that the obligation which is alleged to be excessively onerous should not yet have been performed. Therefore, if the price has been paid completely, the seller who has accepted it without any reservation of his/her rights cannot subsequently invoke the remedies of article 1198 to terminate or revise the contract. In general, ‘the provision of article 1198 is not applicable when the juridical relationships derived from the contract have already been extinguished’.<sup>32</sup>

#### 4.1.2 *The excessively onerous nature of the performance*

Article 1198 requires that the performance of one of the parties has become excessively onerous. This condition has been linked by Argentinian legal doctrine and case law to the (relative) equivalence of the counter-obligations which is considered to be part of the nature of commutative contracts. Thus, it is argued that the contract, as the most important instrument for the exchange of goods and services, is subject to the principle of commutative justice and therefore intervention by a third party (the judge) in the contract is legitimate when extraordinary circumstances lead to a complete rupture in the economic balance of the contract as was intended by the parties upon its conclusion.<sup>33</sup> Therefore, the performance becomes excessively onerous if it loses its economic relationship with the counter-performance, making the sacrifice much larger than the benefit for one of the parties and vice versa.<sup>34</sup>

As a consequence, the assessment of this degree of onerousness requires a comparison between the counter-performances, is intrinsic in the contractual relationship and cannot be made only with reference to the performance of the affected party.<sup>35</sup> Therefore, if both counter-obligations have increased or

31 CNCiv., sala C, 1979/07/05, *Hofman, M. c/ González, E.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 234.

32 CNCiv., sala E, 1978/09/05, *Barcheta, C. y otro c/ Asociación Civil Santísima Cruz*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, with further references to similar cases on pp. 244-246.

33 See M. Cornet, ‘La aplicación de la teoría de la imprevisión y la emergencia económica’, *Anuario de Derecho Civil, Universidad Católica de Córdoba* 7, 77-115 (2002).

34 C. Gherzi, *Contratos civiles y comerciales*, p. 307, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 164.

35 Flah, Smayevsky, *supra* note 26, p. 38, See CNCom. Sala D, 08.03.84 *Beltramino A. c/ Banco Argentino de Inversión*: ‘The onerousness required by article 1198 cannot be valued taking into account only the performance of the party which alleges the *imprevisión*, but is related to the equivalence of the reciprocal obligations of the parties, so that the deferred performance ceases to be economically correlative and therefore the performance of the contract as concluded leads to a disproportion in such a performance to the benefit of one of the parties and to the detriment of the other’; cited by Cornet, *supra* note 33.

decreased in value with similar intensity, the original balance is not altered and so there is no case of an excessively onerous performance.<sup>36</sup> Similarly, external considerations, such as the effects of the contract's performance on the economic situation of the affected party, are not sufficient or adequate standards for the configuration of excessive onerousness if they do not affect the internal equilibrium of the counter-obligations of the parties.<sup>37</sup>

Case law has stated that because of the general terms of article 1198, the determination of excessive onerousness cannot be made by arithmetical parameters, but is a task for the judge who has to consider the circumstances of the particular case in order to establish the seriousness of the detriment in the balance of the contract as considered by the parties at the time of its conclusion.<sup>38</sup>

Finally, the loss of value of the agreed counter-performance has also been recognized by case law as a situation of excessive onerousness, especially in cases related to the sale of immovable property where the contract price has become insignificant because of the devaluation of currency or hyperinflation.<sup>39</sup>

#### 4.1.3 Extraordinary and unforeseeable events

For the application of article 1198, the excessively onerous nature of the performance should be caused by extraordinary *and* unforeseeable events. Both concepts are intrinsically linked and it is mostly difficult to distinguish them in legal doctrine and especially in case law. As a common feature, the events have to take place after the conclusion of the contract and should be external to the parties.<sup>40</sup>

However, due to the theoretical difficulties in distinguishing the above-mentioned conditions, the concept of 'extraordinary' has been related by legal doctrine to unusual events, which do not normally occur and are therefore unpredictable for the average citizen. The event should be of a general nature, affecting society as a whole or at least an entire category of parties in the same situation and should not only be related to the personal circumstances of the affected party.<sup>41</sup> On the other hand, unforeseeability is related to the aptitude

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36 M. Smayevsky, *Reflexiones acerca de la aplicación de la teoría de la imprevisión en el contrato de compraventa*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 166.

37 R. Lorenzetti *La excesiva onerosidad sobreviniente*, p. 165; and case law cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 167 and pp. 260-262.

38 See references to case law in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 260-261.

39 CNCiv., sala B, 1981/05/14, *Pasqualucci, D. y otra c/ Sticca, J.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 259, with further references to case law.

40 See *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 250-252.

41 See C. Ghersi, *Contratos civiles y comerciales*, p. 307, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 164.



of the parties to foresee and to anticipate such events, acting with proper diligence and care, according to the circumstances of the particular case.<sup>42</sup>

Additionally, for qualifying a circumstance as extraordinary and unforeseeable, case law has usually used the same parameters as in cases of force majeure, especially in relation to articles 514 and 901 of the Argentinian Civil Code, stating that ‘such an event should be analysed in relation to the provision of article 514 of the Civil Code, and therefore it should be supervening, external to the will of the parties and outside the normal standard of foreseeability for such parties, as well as being unavoidable even with the diligence required in similar cases’ and that ‘similar to the cases of *force majeure* and *cas fortuit*, the events in cases of *imprevisión* have to be serious, exceptional, abnormal and unavoidable, supervening in the conclusion of the contract and outside the *alea* or risk inherent to the contract’.<sup>43</sup>

#### 4.1.4 Inflation as an extraordinary and unforeseeable event

The fact that Argentina has suffered at least three serious economic crises since the 1970s with devastating effects on the performance of deferred or periodic obligations derived from contracts concluded before such crises, makes it necessary to analyse inflation as a relevant event for the application of article 1198. All of the above-mentioned crises were characterized by an accelerated hyperinflationary process and/or a dramatic drop in the value of currency caused by the government’s economic decisions and policies.<sup>44</sup>

Bearing that in mind, both legal doctrine and case law have stated that since inflation became a normal feature of the Argentinian economic system from the early twentieth century onwards, its occurrence and effects are indeed foreseeable for the parties to long-term contracts or to contracts with deferred performance. Thus, inflation has become an inherent risk in most types of contracts and then the parties cannot invoke it as an extraordinary and unforeseeable event to appeal to the remedies provided by article 1198.<sup>45</sup> In this sense, case law has stated that ‘according to settled and uniform case law, endemic or structural inflation is not an unforeseeable event which can be alleged for the termination or readjustment of the counter-performance under

42 H. Cáceres and R. Pizarro, *Cláusula de pago en ‘valor dólar’*, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 165.

43 CNEsp., Civ. y Com, sala III, 1979/12/18, *Minedar S.A. y otro c/ Cohen, L.*, and CNFed. Civ. y Com., sala II, 1979/08/30, *López, M y otra c/ Gobierno Nacional*. See also CNCom., sala B, 1985/08/28, *Turimar S.A. c/ Banco Río de la Plata*, interpreting *a contrario sensu* article 901 and stating that an event is extraordinary and unforeseeable if ‘it is totally outside the ordinary and natural course of things’. All cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 252-253.

44 The three crises mentioned above are those of June 1975 (*‘rodrigazo’*), February 1981 and December 2001 (*‘corralito’*).

45 J. Mayo, *Teoría de la imprevisión y cláusula dólar*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 162.

the doctrine of *imprevisión*, because it has been part of our economy for a long time';<sup>46</sup> and that 'the inflation in Argentina is a circumstance which is not extraordinary or unforeseeable, because it was incorporated many years ago as a normal trend in our economy'.<sup>47</sup> The same criterion is applicable when the contract was concluded in a period of economic instability or when hyperinflation had already begun. Then it is considered that the parties deliberately assumed the risks related to serious variations in the value of currency: 'the parties who concluded a contract before June 1975 were astonished by a sudden inflation which was extraordinary and unforeseeable; but the contracts concluded after that date, in a period of extreme economic instability, should be regarded as transactions in which the economic consequences of the governmental policies were foreseen by the parties'.<sup>48</sup>

However, both legal doctrine and case law agree that the general rule set out above is not applicable in cases of a sudden and accelerated inflation deriving from the government's economic policies which could not be anticipated by reasonable and diligent parties. In such cases, the normal evolution of the inflationary curve is disrupted dramatically and cannot therefore be regarded as integrating the foreseeable risks assumed by the parties in a completely different social and economic environment.<sup>49</sup> More precisely, it is the *intensity* of the inflation which can be regarded as an extraordinary and unforeseeable circumstance, and therefore totally outside the legitimate expectations of the parties.<sup>50</sup> Therefore, even if the contract includes devices such as stabilization clauses, such clauses do not prevent the application of *imprevisión* when the contract was concluded under normal economic conditions which were subsequently radically disturbed by extraordinary and unforeseeable events. It is argued that the aim of such clauses is to anticipate reasonably foreseeable circumstances and consequently cannot be regarded as covering events which were never considered (because they were unforeseeable) by

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46 CNCiv., sala C, 1978/10/19, *Buscarini L. c/ Rut Don S.A.*; cited in Digesto Práctico La Ley: Revisión de los Contratos, *supra* note 29, p. 278.

47 CNCiv., sala F, 1979/06/29, *Vitulio, A. c/ Wadek, S.A.*; cited in Digesto Práctico La Ley: Revisión de los Contratos, *supra* note 29, p. 280.

48 CNCiv., sala C, 1978/11/16, *Bocaratto, O. y otros c/ Asociación Santísima Cruz*; cited in Digesto Práctico La Ley: Revisión de los Contratos, *supra* note 29, p. 264.

49 M. Smayevsky, *Reflexiones acerca de la aplicación de la teoría de la imprevisión en el contrato de compraventa*; E. Abatti, A. Dibar and I. Rocca, *La imprevisión contractual*; cited in Digesto Práctico La Ley: Revisión de los Contratos, *supra* note 29, pp. 160-161. A large number of decisions handed down in relation to the economic crises of 1975 and 1981 have confirmed these statements. See Flah, Smayevsky, *supra* note 26, pp. 166-176; and Digesto Práctico La Ley: Revisión de los Contratos, *supra* note 29, pp. 263-286.

50 See Cornet, *supra* note 33, adding that in some cases the contract changed its nature from being commutative to aleatory.

the parties.<sup>51</sup> Thus, it has been held that ‘when the contractual terms which were agreed upon to provide stability to monetary obligations are surprisingly altered in their normal course by an event which is external to the parties and is extraordinary and unforeseeable, then judicial intervention is allowed to reduce the unfair effects of a contractual unbalance’.<sup>52</sup>

#### 4.1.5 The influence of the affected party in relation to the disruptive events: fault and default<sup>53</sup>

The condition that the party affected by *imprevisión* should not be in default when invoking article 1198 has been criticized by Argentinian legal doctrine. The main objection is that in most cases a breach of contract by the affected party will be precisely the consequence of the excessively onerous nature of its performance. Thus, if that party cannot rely on the remedies provided by article 1198, the *ratio legis* of such a provision would be distorted.<sup>54</sup> As a consequence of such criticism, this requirement has been strictly construed: only if the debtor’s default is the *cause* of the excessive onerousness, will the affected party not be allowed to invoke *imprevisión* to be released from its obligations. Conversely, if the breach of contract is irrelevant to the occurrence of the excessive onerousness, which is independent from such a breach, the affected party is not prevented from relying on the provision of article 1198.<sup>55</sup> Thus, case law has stated that ‘the breach of contract of the affected party is not an absolute obstacle to invoke the *imprevisión* theory, if its default has been irrelevant to the excessive onerousness of its performance, since in that case the cause of such excessive onerousness is not the debtor’s default but an external cause and therefore it would also have taken place without such default’.<sup>56</sup> In the same vein, it has been held that ‘only if the breach of contract

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51 J. Mosset Iturraspe, *Dólar e imprevisión*; and H. Cáceres and R. Pizarro, *Cláusula de pago en ‘valor dólar’*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp.159-160.

52 CNCiv. Sala C, 24.11.83 *Rinkevich Alberto y otra v. Uresandi Jorge A.*, E.D. 107-631, cited by Cornet (2002). However, rejecting the application of article 1198 in such a case, see CNEsp., Civ. y Com., sala III, 1981/06/19, *Fipa S.A. c/ Casco S.A.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 246.

53 In the context of this research, default means any nonperformance of his obligation by the debtor or affected party.

54 Flah, Smayevsky, *supra* note 26, p. 40.

55 C. Ghersi, *Contratos civiles y comerciales*, p. 308; and A. Alterini, *Contratos civiles, comerciales y de consumo*, p. 452; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 168-169.

56 CNCiv., sala g, 1984/10/09, *Scialabba, M. c/ Petracca Inmobiliaria S.R.L.*; cited by Flah, Smayevsky, *supra* note 26.

is previous to the extraordinary and unforeseeable event, is the debtor prevented from relying on the provision of article 1198'.<sup>57</sup>

Closely related to the above condition, the provision also requires the absence of fault on the part of the affected party, i.e. that the event which is the cause of the excessive onerousness should be external to the affected party.<sup>58</sup> Therefore, such an event should not be caused by the affected party's fault and neither should the fault be the cause of the excessive onerousness deriving from such an event.<sup>59</sup> If the debtor had the opportunity to avoid the consequences of the disruptive events he cannot subsequently invoke the provision of article 1198.<sup>60</sup>

This requirement is also strongly linked to the unforeseeable nature of the events, because the party who did not take the necessary measures with regard to a foreseeable event which might affect its performance can be regarded as negligent and, therefore, is prevented from requesting the termination or adaptation of the contract within the terms of article 1198. Thus, 'if the excessive onerousness alleged by the debtor is the consequence of omitting to take measures which he could take, he is not allowed to rely on his own negligence to obtain relief from his obligations'.<sup>61</sup>

#### 4.1.6 *Express assumption of risks. The exclusion of article 1198 by the parties*

Similarly to most Western legal systems, one of the basic principles of the Argentinian law of contracts is freedom of contract (article 1197). As a consequence, the parties may freely agree on the allocation of risks in the contract, e.g. stating that one or more particular risks are assumed exclusively by one of the parties. Argentinian legal doctrine agrees that this kind of clause is valid, provided that the party assuming the risk consents thereto.<sup>62</sup> Thus, the bargaining process and the situation of the parties are relevant in establishing the extent of the clause. Furthermore, such an assumption should be strictly construed and in good faith, being only applicable to the specific situations provided in the contract and in cases which can be regarded as reasonably

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57 CNCiv., sala B, 1982/05/17, *Amestoy, R. c/ Pontineri, L. y otros*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 291.

58 J. Mosset Iturraspe, *Contratos en dólares*, Ediciones La Rocca, Buenos Aires, 1990. p. 76 ff., cited by Araujo, *supra* note 26.

59 A. Spota, *Desvalorización monetaria e imprevisión contractual*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29.

60 CNCiv., sala D, 1981/06/12, *Ragno C. c/ Lovecchio, N.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 288.

61 CApel. Concepción del Uruguay, sala civ. y com., 1978/07/11, *Musachi, V. c/ Benítez, R.*, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, 288.

62 Cornet, *supra* note 33; Flah, Smayevsky, *supra* note 26, p. 44.

foreseeable by the parties.<sup>63</sup> It is added that outside the cases which can be clearly derived from the nature of the contract, this assumption should be express.<sup>64</sup> Case law has held that waiving the right to invoke *imprevisión* by the affected party *after* the occurrence of the disruptive events may also be implied from the behaviour of the affected party and the circumstances surrounding the case, e.g. whether such a party has completely performed its obligation despite the excessive onerousness.<sup>65</sup> Nevertheless, the mere fact that the affected party did not rely on the *imprevisión* remedies immediately after the occurrence of the extraordinary events, or that the burdensome obligation was partially performed, are not sufficient to amount to an implied waiver of its right.<sup>66</sup>

It is disputed in legal doctrine whether the parties may exclude the application of *imprevisión*, as provided by article 1198, in their contractual relationship. Based on the freedom of contract and the undisputed right of contractual parties to assume the consequences of *force majeure* (article 513 of the Argentinian Civil Code), some of the legal authors accept the validity of clauses which generally exclude the application of article 1198. It is argued that if the debtor is legally allowed to assume the consequences of a performance which has become impossible, the debtor may equally assume the consequences of a performance which has become *only* excessively onerous.<sup>67</sup> On the other hand, it has been stated that as an application of the principle of good faith, the provision of article 1198 is imperative and therefore cannot be excluded from the contract by the parties.<sup>68</sup> It is added that the provision allowing for a waiver of *force majeure* as an excuse for performance is related to ordinary and reasonably foreseeable cases of *force majeure*, and therefore the same logic should be applied to cases of *imprevisión*: a party cannot assume the risk of an unknown or unforeseeable event, because such an assumption logically implies the foreseeability of the event and the associated risk.<sup>69</sup> Therefore, the consequences of an unforeseeable risk which is not allocated by the nature of the contract or by a specific and express provision in that contract must be shared by the parties with regard to the circumstances of the particular

63 G. Borda, *La reforma del Código Civil. Teoría de la imprevisión*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29; and L. Rezzónico, *Estudios de las obligaciones en nuestro Derecho Civil*, T. I, p. 184; cited by Cornet, *supra* note 33.

64 See Cornet, *supra* note 33.

65 CNCiv., sala B, 1987/04/07, *Spada de Makintach, S. c/ Tonelli, C.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 303.

66 CS, 1981/10/13, *Cicero, R. c/ Romero, J.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 303.

67 Cornet, *supra* note 33.

68 A. Borda, *Influencia de las medidas económicas del año 2002 sobre las relaciones contractuales entre particulares*; cited by Cornet, *supra* note 33.

69 J. Mosset Iturraspe, *La Interpretación económica de los contratos*, Rubinzal Culzoni: Santa Fe (1994).

case. In any case, the exclusion of *imprevisión* is not allowed in consumer contracts because such a provision is regarded as an unfair contractual term.<sup>70</sup>

With regard to this subject, case law has accepted the validity of a general exclusion of article 1198, stating that such a provision is inapplicable 'if the parties foresee in the contract 'any' kind of alteration in the exchange market' and that 'there is no impediment to give full effect to the waiver of the right to invoke the *imprevisión* theory (...);'<sup>71</sup> but also stressing that such an exclusion cannot be presumed and should be interpreted under strict standards.<sup>72</sup>

## 4.2 The effects of *imprevisión*

### 4.2.1 The rights of the parties

Provided that the above-mentioned requirements are met, article 1198 states that the affected party can demand the termination of the contract and the other party has the right to avoid such a dissolution by offering to modify, in an equitable way, the conditions of the contract.

Nevertheless, an important part of legal doctrine supports the opinion that the affected party has the right to request not only the termination of the contract, but also its modification or adaptation to the new circumstances. In this sense, it is argued that the principle of *favor contractus*, which can be derived from several provisions of the Civil Code (e.g. articles 656, 1069, 1633, 1638 and 2056) and the aim of Act 17.711 to introduce equity standards in contractual relationships, also allows the affected party to request an adaptation of the contract.<sup>73</sup> Therefore, the interpretation of article 1198 should provide a solution which preserves the reasonableness and equity of the transaction as concluded by the parties, an aim which is not satisfied in all cases with the termination of the contract.<sup>74</sup> Additionally, it is argued that if the affected party may claim the termination of the contract, which is an extreme remedy, logically he is entitled to request a less absolute and not expressly prohibited remedy such as the modification of the contract.<sup>75</sup> On the other hand, it is contended that compared with the provision of article 954 where in cases of

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70 Article 37 of Act 24.240 on the Defence of the Consumer and its regulation (D.R. 1798/94).

71 CNCom., sala E, 1984/10/08, *Nelson, J. c Di Tomaso, Z.*, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 241.

72 CCiv. y Com. Rosario, sala IV, 1981/09/24, *Izquierdo, J. c/ Miotto, A.*; cited by Cornet, *supra* note 33.

73 Flah, Smayevsky, *supra* note 26.

74 See A.M. Morello, *La adecuación del contrato: Por las partes, por el juez, por los árbitros*, Librería Editora Platense: La Plata, 1994.

75 A. Spota, *Desvalorización monetaria e imprevisión contractual*; and G. Borda, *Tratado de Derecho Civil*, pp. 146-147; cited by *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 174.

*laesio* the affected party is expressly entitled to request the adaptation of the contract, in article 1198, in contrast, the legislator has not provided such a remedy to the party affected by *imprevisión*. Therefore the will of the legislator cannot be interpreted differently from that expressed in the legal norm. Moreover, it is argued that the revision of a contract is a much more complex and significant remedy than its termination, because it implies setting the common consent of the parties aside and imposing the will of a third party (the judge) upon them.<sup>76</sup>

Case law is not uniform with regard to this subject, but in a 1992 decision the Argentinian Supreme Court strongly rejected the right of the affected party to request the adaptation of the contract in cases provided for by article 1198. The Court stated that<sup>77</sup>

‘the text of article 1198 only gives the affected party the right to request the termination of the contract, granting the offer of an equitable modification only to the other party. This Court has repeatedly decided that the first rule for the interpretation of the law is to give full effect to the legislator’s intention, that the first source for the determination of that intention is the text of the law, and that judges should not replace the legislator but should apply the legal norm as is stated. It would be a serious infringement of such rules to concede to one of the parties a right that the law does not confer upon him (...) especially when an omission or mistake by the legislator cannot be presumed, which clearly chose one of the different options proposed by the foreign legal doctrine and legislation(...)’

In the same sense, the Supreme Court has rejected *ex officio* modifications in cases where neither party had requested the revision of the contract, but only its termination, based on the constitutional right to due process and other procedural rules as *ultra petita*.<sup>78</sup>

Finally, with regard to the right of the advantaged party to propose an equitable modification of the contract, although some decisions have stated that such a proposal should be made in specific terms and the judge may only assess its equity with no power to modify it,<sup>79</sup> most of the doctrine and case law supports the possibility for the advantaged party to propose the modification in general terms, indicating its willingness to modify the conditions of

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<sup>76</sup> Flah, Smayevsky, *supra* note 26, p. 41.

<sup>77</sup> CS 21/04/92 *Kamenszein, Víctor J. y otro c/ Fried de Goldring, Malka y otros*; J.A. 1992-IV-166; full text in Morello, *supra* note 74, pp. 21-24.

<sup>78</sup> Araujo, *supra* note 26, p. 99.

<sup>79</sup> CNCiv., sala C, 20/10/78; CNEsp., Civ. y Com., sala V, 13/12/76; CNEsp., Civ. y Com., sala III, 18/12/79; cited by Araujo, *supra* note 26, p. 100.

the contract equitably and allowing the judge to establish the specific terms of such a modification.<sup>80</sup>

#### 4.2.2 Remedies provided by article 1198: Termination and adaptation of the contract

Regarding the termination of the contract, article 1198 states that in contracts for continuous performance their termination (*resolución*) will not affect that which has already been performed. Thus, in these cases a termination has no retroactive effect, e.g. in a lease contract the lessor does not have to return to the lessee the payments already made and the same can be applied to contracts for personal services. But in a sales contract by instalments,

‘the sums already paid by the buyer should be returned monetarily corrected (...) to attempt a fair compensation to the creditor’ and ‘to preserve, even in the termination of the contract, the equivalence of the counter-performances which have to be returned’.<sup>81</sup>

In addition, the remedy of termination has to be limited to ‘cases where a revision is not possible or does not lead to satisfactory solutions’.<sup>82</sup>

On the other hand, if the advantaged party’s proposed equitable modification is accepted or the contract is revised by the judge, the adaptation of the contract should have as its primary aim the equitable share between the parties of the effects of the unforeseeable risk and ‘to correct the evident unfairness imposed by the new circumstances, so that the transaction will still be a good deal for the creditor and a bad but bearable deal for the debtor’.<sup>83</sup> Thus, the judge does not have to restore the counter-obligations to an absolute equivalence or to rewrite the contract to ideally adapt it to the standards of commutative justice, but only to equitably rectify the significant imbalance between the counter-performances.<sup>84</sup> In this sense, the Supreme Court has stated that<sup>85</sup>

80 CCCiv. y Com. Córdoba, 1978/06/05, *Yapur, J. c/ Giorno, M.*; adding that ‘such an interpretation prevents the risk that the judge, confronted with an insufficient proposal by the advantaged party, determines that a termination of the contract is necessary’. Cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 330.

81 SC Bs.As. 03.06.80; cited by Cornet, *supra* note 33.

82 CNCiv., sala G, 1982/05/03, *Fucaracce, J. c/ Capellán, J.*; cited by *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 318.

83 CNCiv., sala D, 1984/02/22, *Martínez, M. c/ Gentile*; CNCiv., sala G, 1981/02/10, *Hughes, L. c/ Alonso Soto, L. y otros*, adding that ‘the *imprevisión* doctrine is not an instrument to set aside bad deals but to avoid a gross infringement of justice’. Cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 317-318.

84 CNCiv. Sala G, 1980/10/03, *Sommer, E. c/ Kirschenheuter, L.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 319.

85 C.S., 10/06/992, *Astilleros Príncipe y Menghi S.A. c/ Banco Nac. De Desarrollo*; cited by Morello, *supra* note 74.



‘the protection granted to the affected party by article 1198 of the Civil Code cannot lead to simply transferring to the other party the consequences of the imbalance which was sought to be remedied (...) the nature of the *imprevisión* theory prevents that, under the excuse of protecting one of the parties, the burden is placed on the other party, thereby resulting in a situation which is analogous to the alleged unfairness and creating a new affected party replacing the former’.

Therefore, the application of the remedies provided by article 1198 cannot involve the transfer of the excessive onerousness from the affected party to the creditor.

## 5 CONCLUSIONS

The comparative overview of the Latin American jurisdictions included in this paper has shown a clear trend towards the acceptance and recognition of cases of change of circumstances as a ground for relief for the party affected by supervening onerousness. Thus, of the seven jurisdictions included, only Chile and Uruguay may be qualified as unreceptive, and conversely, Argentina, Brazil, Colombia, Paraguay and Peru are receptive legal systems, even where the subject is not expressly regulated by a legal provision (as in the case of Colombia).

This tendency is in line with modern developments in contract law. Non-legislative codifications such as the UNIDROIT Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) include a set of one or more rules to deal with the subject.<sup>86</sup> The same can be said with regard to modern codifications such as the Dutch Burgerlijk Wetboek (Dutch Civil Code 1992) and the German Bürgerliches Gesetzbuch (German Civil Code, after the reform of 2002).<sup>87</sup>

Finally, it is interesting to note that most of the receptive Latin American jurisdictions have followed the Italian *Codice Civile* on this subject.<sup>88</sup> Then, the system of remedies for the case of change of circumstances is structured by granting as primary and exclusive remedy to the affected party the right to claim the termination of the contract; a claim that can be avoided by the advantaged party offering to equitably modify the terms of the contract. Therefore, the affected party is not entitled to request any adaptation or modification of the contract by the court, and no duty to renegotiate is imposed

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<sup>86</sup> Articles 6.2.1 to 6.2.3 of the PICC, article 6:111 of the PECL and article III.- 1:110 of the DCFR.

<sup>87</sup> Article 6:258 of the BW and §313 of the BGB.

<sup>88</sup> For an outline of the Italian law on the subject, see F. Macario, ‘Change of circumstances’, in: L. Antonioli, A. Veneziano (Eds.), *Principles of European Contract Law and Italian Law*. Kluwer Law International: The Hague, 2005.

on the advantaged party, who is free to decide whether or not to offer an equitable modification of the contract.<sup>89</sup>

In this regard, the system of remedies provided by the PICC and the PECL seem to be a better alternative to protect the interests of both parties in a situation of changed circumstances. Thus, as a first effect of a change of circumstances a duty to renegotiate must be imposed on the parties. If negotiations do not succeed within a reasonable period, either party may resort to the court to request an adaptation of the contract to the new circumstances, and the court has wide powers to either modify the contract or terminate it, according to the circumstances of the particular case.<sup>90</sup> Together with the important and interesting domestic developments (such as in the case of Argentinian law), future reforms of both receptive and unreceptive Latin American jurisdictions should consider the above-mentioned instruments as a model for the regulation of the subject.

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89 However, as mentioned above, Argentinian legal doctrine and some case law has argued that the court has the power to adapt the contract.

90 It is not the aim of this paper to analyse the best alternatives for a system of remedies in case of a change of circumstances. For a comprehensive study of the subject, see Momberg, *supra* note 20.

## 11 | France and Belgium

Denis Philippe <sup>■</sup>

### 1 THE DOCTRINE OF IMPRÉVISION

#### 1.1 Definition

In French and Belgian discourse, the doctrine of *imprévision* is the most important concept dealing with the effects of unexpected circumstances on contractual obligations. This idea generally refers to cases in which unforeseen economic circumstances become apparent after a contract has been concluded and which make its performance extremely difficult or much more costly, but do not render it impossible.<sup>1</sup> The doctrine of *imprévision* can be based on the

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1 J. Ghestin, *Les obligations, Effets*, Paris: LGDJ 2001; P. Voirin, *De l'imprévision dans les rapports de droit privé* (thesis), Nancy: 1922; E. Gaudin de la Grance, *La crise du contrat et le rôle du juge* (thesis), Montpellier: 1935; P. Azard, 'L'instabilité monétaire et la notion d'équivalence dans les contrats', *Jurisqueur Périodique*, 1953.I.1092; M. El Gammal, *L'adaptation du contrat aux circonstances économiques*, Paris: 1967; Le Rôle du juge en présence de problèmes problématiques, *Travaux Association R. Capitant*, t. XXII 1970, avec notamment le rapport sur le rôle du juge en présence de problèmes économiques en droit civil français par B. Oppetit, 185n et le rapport général par R. Perrot, 260; P. Catala, 'Les effets de la dépréciation monétaire sur les rapports juridiques contractuels en droit civil français', *Travaux Ass. H. Capitant*, t. XXIII, 1971, 439, Ghestin et Billiau, *Le prix dans les contrats de longue durée* (1990); J. L. Devolve, 'L'imprévision dans les contrats internationaux', *Travaux comité fr. DIP*, 1988-1990, p. 147; L. Grynbaum, *Le contrat contingent* (thesis), Paris: 1998; C. Jamin, 'Révision et intangibilité ou la double philosophie de l'article 1134 du code civil', *Droit et Patrimoine*, 1998, n° 58, p. 46 et seq.; H. Lecuyer, 'Le contrat, acte de prévision', *Mélanges Terré*, 1999, p. 643; R. David, 'L'imprévision dans les droits européens', *Mélanges Jauffret*, 1974, p. 211; D. Tallon, 'La révision du contrat pour imprévision au regard des enseignements récents du droit comparé', *Mélanges Sayag*, 1997, p. 403 et seq., sp. 406, P. Stoffel Munck, *L'abus dans le contrat* (thesis), Aix Marseille, 1999, LGDJ, 2000.  
In Belgium Cass., 30 October 1924, *Pas.*, 1924, I, p. 565; H. De Page, *Traité élémentaire de droit civil belge* (Brussels: Bruylant, 3<sup>rd</sup> ed. 1964), p. 560. See for criticism of these definitions D. Philippe obs. comm. Brussels, 16 January 1979, *J.T.*, 1980, p. 459 et seq.; L. Vael, 'Beschouwingen over het imprevisieelstuk: omtrent de eventuele ontsluiting van de overeenkomst in geval van een gewijzigd contractueel verhoudingskader', in: *Liber Amicorum Tijdschrift voor Privaatrecht en Marcel Storme*, Story Scientia, 2004, p. 703 et seq.; P. Wéry, 'L'imprévision et ses succédanés', *J.L.M.B.* 1996, p. 105. D. Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle* (Bruylant, 1986). J.F. Germain & Y. Ninane, *Droit des Obligations*, CUP, 2010, p. 81 et seq.

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assumption that there is an economic imbalance between the contractual obligations at the time of performance. The doctrine of *imprévision* is not applied to speculative contracts like stock exchange transactions, as this 'speculative' nature is part and parcel of such contracts.<sup>2</sup> From a theoretical point of view the concept of *imprévision* is directed at resolving a conflict between commutative justice demanding a balanced exchange on the one hand and, on the other, the principle of *pacta sunt servanda* which corresponds to the more general objective of legal certainty.

## 1.2 Historical developments

In Roman law *force majeure* was a well-accepted concept. Meanwhile, in the medieval period, the importance of commutative justice was stressed. Saint Thomas of Aquinas asserted that one who makes a promise and does not keep it because of changing conditions cannot be blamed for any unfaithfulness.<sup>3</sup> This view implied the notion of *clausula rebus sic stantibus*. According to this concept contracts providing for successive acts of performance over a future period of time must be understood as being subject to the condition that the circumstances will remain the same.<sup>4</sup> Post-glossators adopted this doctrine of *imprévision*, while Cujas and Pothier did not even mention it.<sup>5</sup> In the French Civil Code the idea of *imprévision* was not recognised, which may be seen as the result of the influence of the historical school of Roman law, the Natural law school and the liberal economy.<sup>6</sup> Article 1134 of the Code Civil (Cciv) lays down the principle of the immutability or sanctity of contracts. The same idea underlies Article 1793 Cciv. This confirms that the French position is inspired by the notion of the autonomy of will.<sup>7</sup> Historically, Article 1134 Cciv is construed as a demarcation between the power of the courts and legislation

2 Art. 7 par. 2, loi 'Faillot' 21 January 1918 in France.

3 Saint Thomas of Aquinas in his *Somme théologique*, IIa-IIae p. 110, arts. 3 to 5.

4 The Latin adage is: '*Contractus qui habent tractum successivum et dependentiam de futuro rebus sic stantibus intelleguntur*'.

5 Voirin, De l'imprévision, pp. 46-47; 'La genèse de la '*clausula rebus sic stantibus* – *Contractus qui habent tractum successivum et dependentiam de futuro rebus sic stantibus intelleguntur*' (droit romain, Moyen Age, ancien droit)', in: A. Ruelle & M. Berlingin, *Le Droit Romain d'hier à aujourd'hui. Collationes et oblationes. Liber Amicorum en l'honneur du professeur Gilbert Hanard*, Facultés Universitaires St Louis, 2009.

6 Liberalism, as the predominant philosophical movement in the eighteenth century, gave rise to some ideas which were incompatible with a restrictive application of the *rebus sic stantibus* as provided by the canonists. *Pacta sunt servanda*, on the contrary, was perfectly coherent with the concept of laissez-faire. Therefore the code enacted during this period did not adopt *rebus sic stantibus*.

7 'Le contrat est une emprise sur l'avenir': Ripert, *La règle morale dans les obligations civiles*, n° 84, p. 151.

forbidding judges from interfering with contracts and, therefore, reserving contractual justice for legislative regulation.

### 1.3 Legislative exceptions

One will first notice an increasing number of legislative or judicial exceptions to the principle of the sanctity of contracts. Temporary legislation dealing specifically with hardship was enacted as a reaction to the world wars and economic crises. After the outbreak of World War I the legal literature looked for theoretical justifications to exculpate the debtor who could not perform his contractual obligations because it had become extremely burdensome. The concept of *rebus sic stantibus* attracted new interest and obtained legal acceptance in specific statutes.<sup>8</sup> Furthermore, a growing number of statutes generally protecting the 'weaker parties' in contracts were enacted. Many of these statutes are directly related to the *imprévision* doctrine as is particularly the case with the Act of 30 July 1930 (Arts. 17 and 20) on insurance contracts. This is also the case with Art. 37 of the Act of 11 March 1957 on Copyright (L.131-5 Code of Intellectual Property).<sup>9</sup> One may also refer to the Act of 3 July 1971 (Art. 833-1 Cciv),<sup>10</sup> the Act of 11 July 1975 on divorce reform (Art. 276 Cciv),<sup>11</sup> the Act of 4 July 1984 (Art. 900-2 Cciv) and, finally, the Act of 25 January 1985, in its Art. 98 par. 2.<sup>12</sup> All these examples demonstrate how far the principle of the sanctity of contracts is subject to exceptions when major changes occur in society.

Also in Belgium, in specific sectors statutes were later enacted on a non-temporary basis in order to deal with unexpected circumstances concerning

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8 The Act of 21st January 1918, the 'Loi Faillot', allowed for the *résolution* (but not the *révision*) of contracts concluded before 1914 if one of the contractors had been the victim of a reasonable assumption when concluding the contract; see also the Act of March 1918 (regarding the modification of a lease for real property), as well as the Acts of 6 July 1925, 8 April 1933, 1 January 1924, 11 November 1932, 12 July 1933, and 22 April 1949, concerning contracts entered into before 2 September 1939 (relating to delivery, construction contracts, performance, and successive or postponed contracts). See in Belgium, Act of 11 October 1919, *Moniteur belge*, 29 October 1919; see D. Philippe, *Le changement*, p. 156.

9 Article 37 of the Act of 11 March 1957 provides that, having sold his exploitation rights, an author of intellectual work who has suffered a loss of more than 7/12 due to a *lésion*, or an insufficient prediction, is entitled to claim a revision of the contract price.

10 In succession law or gratuitous contracts or unilateral contracts, A. 855-1 of the Civil Code (based on the Act of 3 July 1971) provides for an adaptation of the contract under certain circumstances when the value of the contracted goods has increased or decreased by more than a quarter since the division.

11 Amending maintenance payments for a spouse.

12 In the case of a lease including commitments by the lessee to acquire commercial establishments, when the lessee is not able to acquire the establishment due to a reason which is beyond his control. See Fin-Langer, pp. 367-375.

especially long-term contracts,<sup>13</sup> like leases (Art. 7 of the Law of 16 February 1991 on residential leases, Art. 6 of the Law of 30 April 1951 on commercial leases,<sup>14</sup> Art. 17 *et seq.* of the Law of 4 November 1969 on tenancies and leasehold property),<sup>15</sup> divorce by mutual consent (Art. 1288 of the Belgian Civil Code [Ccivil]) or public works (Art. 16 of the general terms on public works). According to Art. 710 Ccivil the judge can also order the expiry of a servitude when it has lost its purpose for the beneficiary.

#### 1.4 Case law

##### a) *Administrative law*

The principle of sanctity also became subject to a large number of judicial exceptions. In France, in administrative law, the *imprévision* doctrine has been generally recognised since the famous decision in *Gaz de Bordeaux*<sup>16</sup> where the *Conseil d'Etat*, the highest Administrative Court, allowed a contract to be renegotiated when there were unexpected circumstances. In the absence of an agreement, administrative law grants an indemnification to a contracting party based on the principle of continuity of public services.<sup>17</sup> This applies in particular to transport, public works and distribution markets.<sup>18</sup> However, the contractual imbalance must have been caused by an event that is external and unforeseeable to the contracting parties and that event must result in an excessive burden for the contracting party. If the imbalance is definite, the contract can be cancelled.<sup>19</sup>

Unlike in France, the *Conseil d'Etat* is not competent to deal with public contracts; therefore the restrictive approach of the Belgian Cour de cassation concerning unforeseen circumstances would, in principle, also apply to public contracts.

13 S. Heremans, 'Le bouleversement', *R.G.D.C.*, 2000, p. 473 *et seq.*; D. Philippe, *Le changement*, p. 156. E. De Bock, 'Stijgende metaalprijzen, is er tegemoetkoming', *NJW*, 2005, p. 477.

14 See my comment, D. Philippe, *Le changement*, p. 162.

15 Law of 15 June 1955 modified by the law of 2 July 1974.

16 In the case '*Gaz de Bordeaux*', the *Conseil d'Etat* established the *imprévision* doctrine. An unpredictable increase in coal prices had disrupted the balance of a concession contract. The Administrative High Court granted damages to the concessionaire. CE. 30 March 1916, *D.P.* 1916.3.25, S. 1916.3.17, *Les grands arrêts de la jurisprudence administrative*, 11<sup>th</sup> ed., n° 50: "Cf.: Annexes XXX.; J. Antoine, 'La mutabilité contractuelle née des faits nouveaux extérieurs aux parties', *R.F.D.A.*, 2004, p. 80.

17 CE. 5 November 1982, soc. Propétrol, *Rec.*, p. 380, *A.J.D.A.*, 1983, p. 259, conc. Labetouille.

18 The interpretation of a contract where a public body is involved is not governed by the rules of droit civil in France, but is a matter of droit administratif. So the reasoning of the *Conseil d'Etat* is different from that of the civil and commercial courts.

19 CE. 9 December 1932, Tramways de Cherbourg, *D.P.* 1933.3.17, *Les grands arrêts de la jurisprudence administrative*, 11<sup>th</sup> ed., n° 50.

b) *The principle of inviolability established by the Cour de cassation*

Contrary to the administrative courts, the civil courts have consistently refused in the past to recognise a revision on the basis of *imprévision*. However, a tendency can be observed that civil judges will also intervene even though the scope of their intervention is quite limited. In any case, this opposing view between civil and administrative courts shows how difficult the implementation of *imprévision* is in French law.

After coming close to recognising the *imprévision* doctrine at the beginning of the 19th century,<sup>20</sup> the Cour de cassation, the highest civil court, rejected the concept in 1856<sup>21</sup> and established the principle of the sanctity of contracts on 6 March 1876<sup>22</sup> in the famous case of ‘Canal de Craponne’.<sup>23</sup> The contracts in question, dating from 1560 and 1567, referred to the water supply for an irrigation canal in the plains of Arles at a fixed price. Much later, in the 19th century, confronted with inflation and an increase in labour costs, those in charge of canal maintenance requested that the price be increased. The Aix Court of Appeal confirmed the tribunal’s judgment in which the price had been increased. However, this decision was overruled by the Cour de cassation arguing that time and equity could not allow a judge to modify the agreement between the parties according to Article 1134 Cciv.

c) *Exceptions*

The principle of the sanctity of contracts has been consistently adhered to by the highest civil courts. Yet, in a growing number of cases, judges have been allowed to revise contracts.

The civil courts generally take into consideration changed circumstances that render the performance of a contract more difficult and give the parties an incentive to renegotiate the terms of their contract.<sup>24</sup> The obligation to renegotiate is justified by the principle of good faith between the parties in

20 Req., 20 August 1838, S. 1838, 1, p. 973; D.P. 1838, 1, p. 380.

21 Cass. civ., 9 January 1856 (7 cases) D.P. 1856, 1, p. 33, report Nicias-Gaillard, which considered that an unpredictable increase in a contingent fee did not constitute *force majeure* since it would not make the performance of an insurance contract against the risks of military recruitment impossible. Despite changing circumstances, the contract should be declared valid: Cass., 11 March 1856, D.P. 1856, 1, p. 100. 2 April 1856, D.P. 1856, 1, p. 101. 7 March 1859, 1, p. 118. Adde. Cass. civ., 24 March 1874 (2nd case), S. 1874, 1, p. 428.

22 D.P. 1876, 1, p. 193, note A. Giboulot; S. 1876, 1, 161.

23 Cass. civ., 6 March 1876, (De Galliffet c/. Commune de Pélissanne) D.P. 76.1.195.S. Giboulot, 76.1.161, *Grands arrêts* n° 94.

24 Cf.: Cass. com., 3 November 1992, ‘arrêt Huard’, Bull. 1992 IV n° 338 p. 241, J.C.P., 1993-11-24, n° 46-47, p. 469. See also, Cass. com., 24 November 1998, Bull. 1998 IV n° 277 p. 232, J.C.P.E., 1999-07-22, n° 29, p. 1242, obs. C. Jamin; Cass., 29 June 2010, D. 2010, 2481 and obs. Mazeaud; see, however, for a confirmation of the *pacta sunt servanda* principle Civ. 3, 18 March 2009, no 07-21260, *Bulletin*, RTD civ. 2009.528, obs. B. Fages.



the execution of a contract as laid down in Article 1134 Cciv. The instability of the contract must be due to an exterior event after its conclusion and must not have been caused by either of the parties.

At this stage, great uncertainty still exists with regard to the conditions for the application of *imprévision*. It is particularly unclear whether or not these circumstances really have to be new and unforeseeable upon the conclusion of the contract and whether they have to be beyond the control of the parties.

A report (by Professor Catala and his team of distinguished legal scholars) recommending that the French Civil Code be reformed was submitted to the French Minister of Justice on September 22, 2005. It is currently still under discussion and the Ministry of Justice is preparing to revise the Civil Code on the basis of this report.<sup>25</sup> The report does not expressly recognise the doctrine of *imprévision* because the drafters consider that the parties themselves have to foresee the difficulties in performing their obligations.<sup>26</sup> But the draft does introduce a rule that recognises the relevance of unexpected circumstances. Article 1135-1 of the draft Cciv allows the parties to insert a renegotiation clause in case of unexpected circumstances that affect the equilibrium of the contract so that one of the parties loses its interest in performing the contract. Article 1135-2 Cciv provides that, in the absence of such a clause, the parties can request the president of the court of first instance to order a renegotiation. This draft article specifies that the negotiations must be conducted in good faith. If such negotiations are of no avail, the parties can terminate the contract. With reference to the Unidroit Principles, it has been suggested that such negotiations must be conducted on a constructive and timely basis.<sup>27</sup> It has been pointed out that the proposals for the adaptation of a contract must be in conformity with the original contractual framework. Damages can be claimed if one party does not negotiate in good faith.<sup>28</sup> There are many authors who argue in favour of the renegotiation of a contract by the judge if there are unexpected circumstances.<sup>29/30</sup>

The draft prepared by the Ministry of Justice goes further; in case of failure of the renegotiation by the parties, the judge can not only terminate the contract (as proposed in the Catala report), but he is also entitled to revise it in agreement with the parties.<sup>31</sup>

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25 See the report presented to Parliament by the Ministry of Justice in July 2008, article 136.

26 See *commentary*, p. 35, by A. Ghozi.

27 S. Primont, *L'économie du contrat*, PU Aix-Marseille: 2004, p. 272, n° 414.

28 Primont, *L'économie*, p. 273.

29 See for a revision of the contract by the judge: C. Jamin, 'Révision et intangibilité du contrat ou la double philosophie de l'article 1134 du code civil', *March* 1998, p. 46, p. 55 *et seq.*; C. Thibiergen-Guelfucci, *Libres propos sur la transformation du droit des contrats* (RTD civ., 1997), p. 357, n° 11 s., p. 366; Ripert wrote already 'l'immutabilité du contrat apparaît comme un anachronisme', *La règle morale*, n° 84, p. 151.

30 See also a recent proposal aiming to expressly recognise the 'imprévision' in Article 1134 of the Civil Code dd. 22 June 2011, n° 3563, submitted by M.T. Thoraval and others.

31 See <http://crfpa.unblog.fr/2009/01/19/point-sur-la-reforme-du-droit-des-contrats/>.

In Belgium, in the past, the Cour de cassation did not recognise the doctrine of *imprévision*.<sup>32</sup> However, some lower courts have referred to this principle, but have rejected its application due to the fact that the conditions for its application have not been met.<sup>33</sup> In the literature, various authors argue that this principle should be recognised.<sup>34</sup>

Furthermore, we can underline a recent decision of the Supreme Court of 19 June 2009. In a long-term international contract, the price of raw materials rose sharply. The Court of Appeal proceeded to the adaptation of the contract. This decision was confirmed by the Cour de cassation. The Court considered that on the basis of Article 7 of the Vienna Convention, the international usages apply to the sale of goods. Unidroit principles are international usages. These principles recognise the adaptation of the contract in case of a change of circumstances; consequently the contract could in this case be adapted on this basis. Furthermore, the Supreme Court considered that Article 79 of the Vienna Convention which exonerates the debtor in case of impediment must have a broad interpretation and must also apply in case of a change of circumstances which renders the performance of the contract substantially more burdensome.<sup>35</sup>

Another interesting case of the Supreme Court dd. 14 November 2010<sup>36</sup> entitled the husband to cease the payment of alimony after 30 years in case of a substantial decrease in his income and increase in the income of his previous wife. This decision was based on abuse of right.

## 2 OTHER CONCEPTS

*Imprévision* can be distinguished from other concepts which might also be relevant when it comes to a change of circumstances.

32 See Cass., 14 April 1994, *Pas.*, 1994, I, 365; 20 April 2006, *Juridat*, See also Cass., 7 February 1994, *Juridat*, JC94271\_2, *Pas.*, I, 150; Cass., 4 September 2000, *Juridat*, JC00942\_1, *Pas.*, 2000, I, 345; JL02CG1\_2; Liège, 7<sup>th</sup> chamber, 16 December 2002, JL02CG1\_2.; Cass., 20 April 2006, *Juridat*, JC064K1\_6.

33 S. Heremans, 'Le bouleversement de l'économie contractuelle à la suite d'un changement de circonstances : quelques éclairages nouveaux', *R.G.D.C.*, 2000, 2<sup>nd</sup> part, p. 573 with the analysis of various decisions, among others comm. Liège, 15 September 1995, *R.D.C.*, 1998, p. 446; P. Wery, 'L'imprévision et ses succédanés', *J.L.M.B.* 1996, p. 105.

34 See A. Van Oevelen, *Kroniek van het verbintenissenrecht*, (1993-2004), *R.W.*, 2004-2005, p. 1644; S. Heremans, 'Le bouleversement', p. 573; L. Vael, *Beschouwingen*, p. 703; C. Delforge, *La spécificité des contrats à long terme*, (thesis), UCL, 2006, note p. 247; E. De Bock, *op. cit.*; D. Philippe, *Le changement*; J.-F. Romain, *Le principe de convention-loi (portée et limites): réflexions au sujet d'un nouveau paradigme contractuel – Les obligations contractuelles* (Jeune barreau de Brussels, 2000), n° 38.1, p. 142.

35 This case can be read on the website *Juridat*; it will be published with observations of D. Philippe in the next number of *DAOR*. (*droit des affaires/ondernemingsrecht*).

36 C.09.0608.F; justel 20101014-4.

## 2.1 Force majeure

In general, the courts are reluctant to equate an unforeseen event rendering the contract more onerous with an impossibility to perform. Accordingly, new circumstances which make the performance substantially more difficult do not constitute a case of *force majeure*.<sup>37</sup> However, some decisions have given this concept a wide interpretation so that it can be extended to cases of changed circumstances. To give an example, *force majeure* has been applied in cases of frustration of purpose. The famous case, well known in comparative law, of *Dispot Merlin v. Robillard* is the best example. A contract between the parties regulated an express service by road between Rouen and Paris. Two years later, with unexpected speed, a rail connection between these two cities was established. The judge allowed the contract to be terminated by applying the doctrine of *force majeure*.<sup>38</sup>

The way in which the doctrine of *force majeure* is applied depends on how the effects of an obligation are defined.<sup>39</sup> In one case, the lessor was released from his obligation to repair because the leased property could not be retained without excessive expenses. Although it did not make the performance of the contract impossible but merely more costly, it came close to a fortuitous loss. This was based on the definition of the content of the lessor's obligation.<sup>40</sup> The obligation to repair was held not to extend to repairs caused by unforeseeable circumstances, which led to substantial expenses.

In Belgium, the courts have often given a broad interpretation to the concept of impossibility and the position is that the debtor is not required to ruin himself by performing the contract.<sup>41</sup> Thus, e.g., expensive renovations to living accommodation by a landlord due to new legislation have been con-

37 See J. Carbonnier, *Les Obligations*, vol. IV, Paris: P.U.F 21<sup>st</sup> ed. 1998, n° 144, p. 270; P.H. Antonmattéi, *Contribution à l'étude de la force majeure*, Paris: LGDJ 1992, n° 118, p. 82; P. Voirin, *De l'imprévision*, pp. 81-84, Cass. civ., 18 January 1950, 1950, I, 227.

38 Comm. Rouen, 28 August 1843, upheld on appeal Rouen, 9 February 1844, *D.*, 1845, p. 4.

39 Applying the doctrine of *force majeure*, it is important to establish the content of an obligation. Tunc distinguishes between obligations of means and obligations to procure. If the contractual obligation qualifies as an obligation of means, the debtor is only liable if he is proved to be at fault, whereas with regard to obligations to procure, the debtor bears the burden of proof that he was not at fault. Nevertheless, Tunc considered that *imprévision*, on the one hand, and the determination of the content of an obligation, on the other, are distinct. While *imprévision* extends to the question whether the contract must be continued or terminated, this doctrine assesses the level of 'diligence' which is required in the performance of the obligation. Cf. A. Tunc, 'Force majeure et absence de faute en matière contractuelle', *R.T.D.Civ.*, 1945, p. 235; 'La force majeure dans ses rapports avec le contenu de l'obligation contractuelle', *J.T.*, 1946, p. 313.

40 See, Y. Rouquet, 'De l'étendue de l'obligation d'entretien du bailleur', *Dalloz* 2001, p. 3622.

41 Comm. Brussels, 9 March 1981, *J.C.B.*, 1982, p. 165.

sidered as a case of *force majeure*. The judge considered that these expenses were disproportionate to the equilibrium of the contract.<sup>42</sup>

## 2.2 Cause

A *cause* is the legal reason for an obligation, but it is also used as an expression for the motives or the counterpart of an obligation. In the absence of a *cause*, an obligation does not have to be performed. In the last few years, this concept has been applied more and more frequently.<sup>43</sup> The *cause* must be present at the formation of the contract so that future developments are consequently not taken into consideration. However, some situations are very close to the concepts of *imprévision* and frustration of purpose. If, for example, a patent does not lead to the results that the parties had sought in the contract, case law considers that the contract lacks any *cause*.<sup>44</sup> Similarly, a contract concluded between potential heirs and a genealogist was held to lack a *cause* when the heirs could have had knowledge of the succession without the intervention of a genealogist. A promise to sell agreed in 1908 but only invoked in 1965 was declared void due to a lack of cause because the price had become ridiculous.<sup>45</sup> In certain borderline cases, future circumstances can deprive a contract of its cause, which is seen as the purpose of the contract.<sup>46</sup>

In Belgian law, the cause must be present at the conclusion of the contract and does not apply in principle in case of a change of circumstances.<sup>47</sup>

## 2.3 Mistake

A contract which has been concluded due to a mistake is void. A mistake is only considered relevant (1) if it determined the consent of the mistaken party, (2) if it concerns essential qualities of the object of the contract, and (3) if the mistaken party is not at fault. A unilateral mistake is not operable under the

<sup>42</sup> Civ. Brussels, 15 February 1973, *J.T.*, 1973, p. 258.

<sup>43</sup> J. Ghestin, *La notion d'erreur en droit positif français actuel* (1963), p. 262 *et seq.* Cf. J.M. Guegen, 'Le renouveau de la cause en tant qu'instrument de justice contractuelle', *D.*, 1999, p. 352; criticising this concept, see X. Lagarde, 'Sur l'utilité de la théorie de la cause', *D.*, 2007, p. 740; the draft Catala maintains the concept of cause (see Articles 1124 to 1126-1).

<sup>44</sup> Cass., 21 February 1837, *S.*, 1837, I, 187; 22 August 1844, *S.*, 1844, I, 831; Cass. req, 12 April 1861, *S.*, I, 735. J. Ghestin, *L'erreur*, n. 220.

<sup>45</sup> Cass. civ., 20 February 1974, *Bull. civ.*, III, nr. 85, p. 65.

<sup>46</sup> See société pour l'extension et l'embellissement de la ville de Biarritz c/ Guillaume, quoted by E. de Gaudin de la Grande, 'La cause', *Jurisclasseur Périodique*, art. 1131-133 Cciv.

<sup>47</sup> See J. Dabin, *La théorie de la cause*, Brussels, 1919; P. Van Ommeslaghe, Observations sur la théorie de la cause dans la jurisprudence et doctrine moderne, *RCJB* 1970, p. 326 *et seq.*

doctrine of mistake.<sup>48</sup> A mistake must be present at the formation of the contract; mistakes as to future circumstances cannot be taken into consideration. For example, the fact that an advertisement is not as successful as expected is not sufficient to apply the rules of mistake.<sup>49</sup>

A mistake concerning motives is only considered relevant if the motives and their realisation in the future become part of the contractual agreement. Some borderline cases concern the following situation: a piece of land was sold and the buyer's intention was to build a house.<sup>50</sup> No guarantee was given by the seller that planning permission would be granted, but the property was sold at the normal price for building land. Furthermore, the seller knew of the buyer's plans. Planning permission was eventually refused, however. In the absence of a contractual guarantee the seller was not held liable. However, the doctrine of mistake was applied.<sup>51</sup> This case concerned circumstances which were present at the formation of the contract (no planning permission) although there were strongly related unexpected developments which occurred subsequently (the refusal of planning permission although both contracting parties had expected that it would be granted).

In Belgium, a mistake relating to future circumstances cannot be taken into consideration.<sup>52</sup>

A mistake as to motives is only accepted if such motives were integrated into the framework of the contract.<sup>53</sup> When, for example, a feasibility study carried out by the seller was a decisive element in the buyer entering into the contract, and the subsequent sales were not in line with the forecasts in the study, the Cour de cassation held that the contract was void.<sup>54</sup>

## 2.4 Sujétions imprévues (unforeseen burden)

The doctrine of *sujétions imprévues* applies under similar conditions as *imprévision*, i.e. with regard to new circumstances, which are unforeseeable and

48 Cass., 24 April 2003, n° 01-17.458 (n° 503 FS-P+B) , D., 2004, p. 450.

49 See Cass., 16 May 1939, *Giurisprudenza comparata di diritto civile*, 1948, n° 88 and obs. G.B. Funaioli. See J. Ghestin, *L'erreur*, p. 63.

50 See also Rennes, 28 March 1999: The case also concerned a contract for the sale of land where planning permission was subsequently refused. The Court of appeal decided that the lack of a possibility to build constituted a substantial quality of the land and applied the regime of hidden defects instead of the regime of mistake. An appeal was rejected, Cass. civ., 11 February 1981, *Bull. Civ.*, III, n° 31.

51 Riom, 17 May 1979, D., 1980, J, p.12 with obs. G.A.

52 See Ghent, 12 May 1923, *Pas.*, 1924, II, p. 1, Brussels, 8 June 1972, *Pas.*, 1972, II, p. 167.

53 See Ghent, 5 April 1979, *Recueil général de l'enregistrement et du notariat* 1980, p. 436, n° 22551.

54 Cass., 27 October 1995, *Pas.*, 1995, I, 95, *J.T.*, 1996, 61 (this case is not so clear-cut because the feasibility study had been carried out by the other party; the buyer could also have invoked misrepresentation); Cass., 3 March 1967, *Pas.*, I, 811.

beyond the control of the parties, leading to a substantial distortion of the contractual framework. However, contrary to *imprévision*, it concerns ordinary circumstances which are a *natural* occurrence (for instance, the discovery of rocks in the ground) in a construction contract. Sporadically, the courts have extended this doctrine to cases where the circumstances did not have a natural essence. This has been the case with regard to the increased prices for raw materials.<sup>55</sup>

If the requirements of *sujétions imprévues* are met, French law recognises a change of circumstances and grants the contractor an indemnification.<sup>56</sup> Article 1793 Cciv provides that, in a construction contract, the price of the work cannot be modified when a lump-sum payment has been stipulated. This article has been subject to various exceptions in cases of a substantial disruption of the contractual agreement due to unforeseen circumstances.<sup>57</sup>

The same principles apply in Belgium. *Sujétions imprévues* has also been applied by the courts, although rarely, in cases where the circumstances were not ones which occurred naturally. This was the case with regard to price increases for raw materials, for example.<sup>58/59</sup>

## 2.5 Interpretation

According to Article 1156 Cciv, in case of doubt, judges will interpret the will of the parties in order to determine the effects of a contract. Frequently, parties have not thought about various situations that give rise to a dispute and have not expressly regulated this matter. Some authors have denounced the hypocrisy of determining a will that does not exist, arguing that a more honest approach would be to construe a solution based on good faith or usage.<sup>60</sup> The *rebus sic stantibus* clause is related to interpretation. The parties only accept

55 See Civ. Brussels, 11<sup>th</sup> chamber; 30 May 1969, SABCA v. Etat belge, unpublished, confirmed by Brussels, 4<sup>th</sup> chamber, 10 December 1970, RG 1753, quoted by A. De Grand Ry, M.A. Flamme & P. Matheï, n° 374, p. 607.

56 F. Llorens, p. 300; Cass. civ., 23 June 1873 & Cass. req., 20 April 1874, *D.P.*, p. 329; Cass. civ., 6 March 1967, *J.C.P.*, IV, p. 58.

57 L. Fin-langer, *L'équilibre contractuel*, Paris: LGDJ, p. 384, n° 542; Cass., 8 March 1965, *G.P.*, 1997, 32 with obs. M. Peisse; Cass. civ., 12 March 1997, *Bull.*, III, n°54; S. Primont, *L'économie*, p. 274.

58 Brussels, 8 March 2001, *Juridat* JB01381\_1, RG 95/AR. See for a recent application, Brussels, 4<sup>th</sup> chamber, 3 April 2007, RG 1999/AR/2591.

59 See Civ. Brussels, 11<sup>th</sup> chamber; 30 May 1969, SABCA v. Etat belge, unpublished, confirmed by Brussels, 4<sup>th</sup> chamber, 10 December 1970, RG 1753, quoted by A. De Grand Ry, M.A. Flamme & P. Matheï, n° 374, p. 607.

60 Mazeaud, n° 346; F. Llorens, p. 302; J. Maynau, *Les fictions de contrats dans le Code civil et depuis le Code civil* (thesis), Montpellier: 1924, p. 146; F. Terre, *L'influence de la volonté individuelle et qualification*, Paris: 1957, p. 200.

that they are bound by the contract on the basis of an implied term that the contract will not be binding if unforeseeable circumstances occur, which render the performance of the contract extremely burdensome for one of the parties.<sup>61</sup>

Judges have, for instance, applied the mechanism of interpretation in the following case of unexpected circumstances: a labour contract signed before World War II contained a clause referring to the jurisdiction of Rouen. The war divided the country into two parts and the contracting parties were subsequently in the free zone of the country. The judge disregarded the competence clause and held that the court of Lyon had jurisdiction.<sup>62</sup>

In Belgium, there have indeed been decisions in which interpretation has been invoked as the legal basis for amending the contract in cases of changed circumstances.<sup>63</sup>

Furthermore, the presence of a tacit condition precedent can be implied by the judge on the basis of interpreting the contract. For instance, with the sale of land the parties may assume that planning permission will be granted. If planning permission is refused after the conclusion of the contract, the contract can be brought to an end *ex tunc* on the basis of the condition precedent doctrine.<sup>64</sup>

## 2.6 Lésion

The doctrine of *lésion* allows a party to rescind the contract when there is a profound imbalance between the values of the respective obligations at the time of concluding the contract.<sup>65</sup> This doctrine is only recognised by the legislator under specific assumptions.<sup>66</sup> As a general rule, a change of circumstances after the conclusion of the contract does not give rise to the notion of *lésion*.<sup>67</sup>

There are some cases, however, in which the courts have invoked *lésion* in a case of unexpected circumstances. For example, a judge resorted to *lésion* instead of *imprévision* to justify the rescission of a contract. The contract,

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61 Bomsel, *La théorie de l'imprévision en droit civil français*, Paris: Jouve 1922, p. 22.

62 Cass. soc., 11 June, 1942, *D.C.*, 1943, p. 135 with obs. J. Flour.

63 See Civ. Brussels, 24 May 1884, *Pas.*, 1884, III, p. 247; see P. Orianne, *Le contrat de concession*, *Novelles*, p. 247; E. Causin, 'L'interprétation des contrats', in *L'interprétation en droit*, Brussels, 1978.

64 See Liège, 25 March 1970, *J.Lg.*, 1970-1971, p. 115.

65 C. Chantepie, 'La lésion', *L.G.D.J.*, 2006; I; Fin-Langer, 'L'équilibre contractuel', *L.G.D.J.*, 2002; M.A. Perot-Morel, *De l'équilibre des prestations dans la conclusion du contrat*, Paris, 1961.

66 For instance, in case of the sale of land, if the difference in value is higher than 7/12; Art. 1674 *et seq.* of the Civil Code.

67 P. Voirin, *De l'imprévision*, p. 70 *et seq.*; J. Ghestin, *Le contrat*, p. 451; B. Margo, *Lésion « a posteriori » et imprévision dans les contrats* (thesis), Paris: 1949, pp. 150-179.

concluded just before World War I, granted one of the parties an option to buy property some years later at a fixed price. The option could be cancelled within 5 years. Due to a significant depreciation in currency after World War I, the actual price represented only ? of the value of the original agreed price. In order to overcome this unjust result, the judge applied the doctrine of *lésion*.<sup>68</sup> This solution was confirmed by the legislator in the Act of 28 November 1949, according to which a *lésion*, in case of a unilateral promise to sell, must be assessed at the time of performance.<sup>69</sup>

Similar solutions apply in Belgium.<sup>70</sup>

## 2.7 Good faith (Article 1134, 3 Cciv) and equity (Article 1135 Cciv)

The parties are bound by the content of a contract, but the contract must be performed in accordance with the norms derived from the law, usage and equity. The relationship between good faith (Article 1134, 3 Cciv) and equity is not clearly defined. Good faith can entail an obligation to renegotiate a contract. However, the effects of good faith remain uncertain in French law.<sup>71</sup> Nonetheless, it is admitted that, in principle, good faith cannot have a corrective effect.<sup>72</sup> In a recent decision, the Cour de cassation refused to intervene concerning the content of contractual obligations.<sup>73</sup> The judge nevertheless sanctioned an unfair use of contractual rights. For example, it needs to be stressed, as mentioned earlier, that the obligation of renegotiation in case of a change of circumstances is based on good faith.

Some authors propose that equity could have a corrective function so that the judge can adjust the contract in case of a change of circumstances.<sup>74</sup> Article 1135 Cciv permits a court to impose obligations on the parties on the basis

68 See Cass. req., 19 April 1926, *S.*, 1926, I, p. 128. See Article 1674 of the Civil Code.

69 Art. 1675, §2 of the French Civil Code.

70 See Cass., 13 July 1923, *Pas.* 1923 with the conclusions of Terlinden, rejecting recourse against Brussels, 5 April 1922, *Pas.*, 1922, II, p. 65, appeal by the judgment of Civ. Brussels, 22 June 1921, *Pas.*, 1923, II, p. 67; Civ. Ghent, 23 May 1923, *J.T.*, 1921-1924, c. 490; Civ. Liège, 10 July 1923, *Pas.*, 1923, III, p. 145. In my opinion this was an incorrect application of the doctrine of *lésion* because the imbalance was not present when the contract was concluded, but only when the contract was performed.

71 See B. Fauvarque Cosson & S. Amrani Mekki, *Droit des contrats*, 2007, p. 2966.

72 C. Albiges, *De l'équité en droit privé*, 200, n° 305, Paris: LGDJ 2000; concerning the distinction between article 1134-3 and article 1135 C.Code, see P. Jacques, 'Regards sur l'article 1135 du Code civil', *Dalloz*, 2005, 295.

73 Cass. com., 10 July 2007, n° 06-14.768, 2007, *AJ* 1955, obs. X. Delpech.

74 D. Tallon, *La révision du contrat pour imprévision au regard des enseignements du droit comparé*, *Droit et vie des affaires, Etudes à la mémoire de A. SAYAG*, Paris: Litec 1998; F. Cherigny, *La révision judiciaire des conventions en droit privé français* (thesis), Poitiers: 1994.



of equity while Article 1134, par. 3 Cciv concerns the behaviour of the parties in the performance of the contract.<sup>75</sup>

Under Belgian law good faith requires collaboration and cooperation between the parties in the performance of the contract.

With regard to the performance of a contract, the concept of good faith is recognised by Article 1134, par. 3 Cciv, while the aspect of good faith with regard to the completion of a contract is recognised by Article 1135 of the Civil Code.<sup>76</sup>

In the literature four different implications of good faith are distinguished, namely (1) the completion, (2) modification, (3) derogation or (4) adaptation of a contract. However, the Cour de cassation has rejected the adaptive effect of good faith.<sup>77</sup> Sometimes the courts have decided that insisting on the performance of a contract that is not based on a just equilibrium is contrary to good faith.<sup>78</sup> However, as we will explain in the next paragraph, the court has recognised the abuse of rights in case of a change of circumstances and abuse of rights is based on Article 1134, par. 3 Cciv.

The completing effect of good faith can, in principle, be based on Article 1135 Cciv, but only insofar as this principle can accommodate a change of circumstances. For instance, when an unforeseen event occurs, the judge can complete the contract in order to provide a legal regime for this new circumstance.<sup>79</sup>

## 2.8 Abuse of rights (Belgium)

The doctrine of abuse of rights applies when a person uses his legal position to intentionally cause harm to another person or to obtain an advantage which is disproportionate in comparison with the damage caused to another person.<sup>80</sup>

Based on the doctrine of abuse of rights, the courts might consider it abusive to insist on the performance of a contract if the debtor incurs a substantial commercial loss and the creditor realises high profits.<sup>81</sup> In the past, Belgian law did not recognise, in principle, unexpected circumstances on the

<sup>75</sup> Jacques, p. 306, n° 163.

<sup>76</sup> D. Philippe, *De Rechter en de inhoud van de overeenkomst*, in *De overeenkomst vandaag en morgen* (Kluwer, 1990), p. 543 *et seq.*

<sup>77</sup> Cass., 7 February 1994, *Juridat*, JC94271\_2, *Pas.*, I, 150; Cass., 4 September 2000, *Juridat*, JC00942\_1, *Pas.*, 2000, I, 345; JL02CG1\_2; Liège, 7<sup>th</sup> chamber 16 December 2002, JL02CG1\_2.

<sup>78</sup> Liège, 21 December 2001, *J.T.*, 2002, p. 564; see Liège 12 October 1999, *J.L.M.B.*, 99/1221.

<sup>79</sup> D. Philippe, 'De inhoud'.

<sup>80</sup> P. A. Foriers, 'Observations sur le thème de l'abus de droit en matière contractuelle', *R.C.J.B.*, 1994, pp. 189 to 240.

<sup>81</sup> See L. Champion, *La théorie de l'abus des droits* (1925), n° 226 to 227.

basis of an abuse of rights. It has, however, been recognised in the case of 14 October 2010 quoted above.

## 2.9 Caducité

The doctrine of *caducité* applies if, after the formation of the contract, new circumstances arise that lead to a lacuna regarding an essential element of the contract (i.e. the subject matter of the contract). *Caducité* does not necessarily require a distortion of the contractual equilibrium, as is the case with *imprévision*, or an impossibility to perform, as in case of *force majeure*; furthermore, the new circumstances must not have been unforeseeable. *Caducité* allows the aggrieved party to terminate the contract *ex nunc*.<sup>82</sup> The lapsing of an index mechanism to determine prices in a long-term supply contract has been considered to be an example of *caducité*.<sup>83</sup>

In a decision dated 16 November 1989, the Cour de cassation admitted that the doctrine of *caducité* not only applies in cases where certain elements of the contract are absent, but also when the *cause*, i.e. the purpose of the contract, is frustrated, thereby converging with the notion of frustration of purpose. However, the relevant decision concerned a gratuitous contract and it is questionable whether this doctrine could also be applied with regard to non-gratuitous contracts. More recently, the Cour de cassation has held in an important case that this doctrine is not relevant for non-gratuitous contracts.<sup>84</sup>

## 2.10 Deferred payment

Debtors may encounter difficulties in making payment due to unforeseeable circumstances. In such situations the judge is entitled to reschedule the payment according to Art. 1244-1 Cciv. This provision cannot be considered as a rule concerning unexpected circumstances because the content of the debtor's obligation remains unchanged.<sup>85</sup> However, in connection with the problems

<sup>82</sup> Civ. Namur 26 April 1990, *R.R.D.* 1990, p. 489.

<sup>83</sup> J. F. Romain, 'Clarifications concernant la théorie de la caducité des actes juridiques, en particulier des libéralités testamentaires, par disparition de leur cause-mobile déterminant'; obs. under Cass., 21 January 2000, *R.C.J.B.*, 2004, 77; for a recent discussion on the application of this doctrine following the entry into force of regulation 1400/2002 in case of exclusive distribution agreements, comm. Brussels, 28 March 2006, *J.T.*, 2006, and observations P. Kileste & C. Staudt, p. 511; P.-A. Foriers, *La caducité des obligations contractuelles par disparition d'un élément essentiel à leur formation*, Brussels: Bruylant 1998.

<sup>84</sup> See D. Philippe, *Les clauses relatives au changement de circonstances dans les contrats à long terme* in *La vie du contrat à prestations successives*, 1991, p. 170.

<sup>85</sup> Rôle C980335F, N Justel F-20000121-7.

<sup>86</sup> D. Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle*, Bruylant 1986, p. 143; P. Voirin, *De l'imprévision*, p. 208.

in performing obligations after World War I, some judges used this provision as a legal basis for correcting contractual obligations.<sup>86</sup>

### 2.11 Unjust enrichment

The rules on unjust enrichment could have been considered as a legal basis for renegotiating a contract in case of an imbalance in the contractual obligations where one party would profit to the detriment of the other party who suffers a loss. The application of unjust enrichment is, however, dependent upon four conditions, namely (1) an enrichment of one party, (2) at the expense of the other party, (3) a causal link between the enrichment and the expense, and (4) subsidiarity, which means that this doctrine will not apply if the enrichment has a legal cause. This concept does not apply, in principle, to a change of circumstances because in such cases the unjust enrichment can be put down to a cause. The agreed terms of the contract provide a legal ground for the enrichment and the expense incurred.<sup>87</sup>

The same solution applies in Belgium.

## 3 CONCLUSION

We can first specify that in commercial contracts, the change of circumstances is contractually regulated by hardship clauses.

Furthermore, this doctrine is in full evolution in Belgium and France and the adoption of the European optional instrument on contract law, which organises the change of circumstances, will certainly have an influence on internal national French and Belgian law.<sup>88</sup>

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<sup>86</sup> M. Planiol & G. Ripert, p. 549; P. Voirin, *De l'imprévision*, p. 208; Rouen, 19 May 1871 (the war between France & Germany), D., 1871, 2, 179.

<sup>87</sup> J. Ghestin, Ch. Jamin & M. Billiau, *Les effets du contrat*, Paris: 2001, n° 312, p. 357.

<sup>88</sup> See Proposal for a regulation of the European Parliament and the Council on the common European sales law, 11 October 2011, COM ( 2011) 635 final, 2011/284, COD, article 89 of the proposal.