Adaptation by Renegotiation

Contractual and Judicial Revision of Contracts in Cases of Hardship*

Contents

1. Introduction

When discussing long-term contracts, an important issue is the adaptation or modification of the contracts during the life of the contract. A long-term contract is by its very nature susceptible to a change of circumstances, which may lead to hardship for one of the parties in performing the contract for the remaining period. The subject of my paper is the role of renegotiation, as an instrument of contract revision. The renegotiation of the terms of the contract in the light of changed circumstances, may be triggered by the parties, whether or not based on a contract clause, requiring renegotiation under those circumstances (e.g. hardship clauses). On the other hand, the renegotiating procedure may be imposed on the parties by the court or by the arbitrators, in a explicit or implicit way. The latter phenomenon is a rather recent development in the case law of several countries; examples will be taken by the author from Dutch, American and French law. This trend may be of great importance for legal practice, it may influence the attitude of the parties in a hardship situation, as an incentive to the party having a windfall profit, to engage in renegotiations in good faith.

[414] This underlines once again the reciprocal influence of legal practice and case law in the field of contract law. A keen eye on the legal practice presupposes an insight into the standing law on these matters. Therefore, a survey is given first of the law, especially case law, of The Netherlands, which to a large extent is rep-

* In: F. Nicklisch (Ed.), *The Complex Long-Term Contract*, Heidelberg (C.F. Müller Juristischer Verlag) 1987, p. 413-441.

resentative of many jurisdictions of Civil Law and Common Law. A discussion of revision clauses follows, based on an empirical study made by the author, where the reaction in business circles to the philosophy of the courts regarding contract revision, as reflected in contract clauses, is deserving special attention. After a presentation of trend-setting American and French cases, a closer look is given to hardship clauses, and their obligation to renegotiate.

This is a fascinating branch of the law indeed. It may be characterized as the Land of Myth and Mist. As for the mist, little is known of what is really going on in legal practice, as empirical research is virtually non-existent. As regards the myth, in most jurisdictions there is a general opinion, that businessmen and their lawyers adhere to the maxim of *pacta sunt servanda*, parties are bound by the contract as it is, whereas the opposite view of adaptation on the ground of good faith, *bona fides*, usually is followed by academics and other non-practicing ethical lawyers, who sometimes have courts and statutes on their side.

As submitted in this paper, this perception is contrary to the reality, as may be gathered from the clauses used in practice, drafted to cope with a change of circumstances. Although the practice in The Netherlands was subject of our study, the outcome seems exemplary for other countries as well.

2. 'Renegotiating in the Shadow of the Law'. Revision of Contract in Dutch Law

The change of circumstances during the period of execution of a contract, be it in the sphere of monetary, economic, technical or legal changes, may disturb the equilibrium of the contract to a great extent. In the case the fulfilment of the contractual obligations would lead to considerable hardship for one of the parties, it is understandable that the party in question is interested to have the contract revised, and adapted to the new situation as a result of the occurrence of the, usually unforeseen, contingencies. A common reaction would be, to contact the other party and to try to persuade her into a modification of the contract, to suit the reasonable interests of the prejudiced party. Needless to say, that the economic power of the latter party may be an asset in such a consultation. The necessity of the continuation [415] of the business relations may be the lubrication of an otherwise stiff conversation. The threat to terminate the contract and the continuation of business relations as well, unless the other party is willing to accept the proposed modification, is a widely used instrument for contractual revision. Often the revision thus agreed, is laid down in a new contract. As always, the borderline of economic duress is easily passed, under those circumstances.

This off-the-cuff impression of the legal practice in business contracts, is confirmed by our empirical study, presented in paragraph 3. The solution of coming to a new agreement of renegotiation gets the highest score, 71%, compared to 58% for revision based on the application of a revision clause (in construction contracts the scores are even higher, 80% and 74.3%, respectively; see infra). A remarkable observation in this context is, that the oil crisis in the early Seventies has led to no litigation or case law of importance of the Dutch courts. Compared to the situation after World Wars I and II, it seems that self-help is the trend in dispute settlement. The same holds true for arbitration in The Netherlands.

Apparently parties feel no urge to go to court to have their contract revised. This leads to the question, which point of view is taken by the courts on this issue, as a possible explanation of the self-restraint of businessmen in this matter. As the title of this paragraph suggests, parties are renegotiating 'in the shadow of the law', to borrow an expression from the well-known study of Mnookin and Kornhauser on bargaining and dispute settlement[1].

The case-law, from the post World War I era until our time, has seen a considerable change in the handling of contractual revision by the court. In two leading cases of 1926, followed by a number of cases, also in the Thirties, the Hoge Raad (the Dutch Supreme Court) took the view that parties are bound by the contract as concluded, in its literal meaning, and that the principle of good faith could not be a ground for the modification or setting aside of a contract (*sarong* case, *weaving-loom* case[2]). Thus the rule of *pacta sunt servanda* was firmly established, notwithstanding the strong opposition of almost all legal scholars of repute. However, as was found out later, in the [416] reported cases most lower courts did not follow this precedent (in Dutch law there is no doctrine of binding precedent)[3].

The critical attitude of legal scholars found an expression in the imprévision-article of the New Civil Code which appeared in 1961. According to Article 6.5.3.11 NBW (New CC), the judge may at the request of one of the parties modify the contract or rescind the contract wholly or partially, on the ground of unforeseen circumstances, the character of which makes the preservation of the unaltered contract a measure not to be relied upon by the other party according to standards of reasonableness and fairness. Such a request will be dismissed, the article continues, in the case the circumstances, in view of the nature of the contract and the general opinion in business circles, are the assumed risk of the party in question (the new code is still waiting for enactment, which, if ever, will not come before the mid-Nineties)[4].

Although the draft Civil Code uses the term 'reasonableness and fairness', what is meant is the principle of good faith. For reasons of legislative policy, the use of the former term is preferred by the drafters in the law of obligations, which incidentally, has met with growing opposition. This new terminology, if it will stand,

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[1] Mnookin and Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 *Yale L.J.* 950 (1979), also cited by Richard M. Buxbaum, Modification and Adaptation of Contracts: American Legal Developments, in: *Adaptation and Renegotiation of Contracts in International Trade and Finance, Studies in Transnational Economic Law, Vol. 3*, Norbert Horn Ed., 1985, 31.

[2] *NJ* 1926, 203, and *NJ* 1926, 441, respectively. Compare for these cases and the doctrine in general: Asser-Rutten-Hartkamp II, *Verbintenissenrecht*, Deel II, 1985, 286; Pitlo-Bolweg, *Algemeen deel van het Verbintenissenrecht*, 1979, 253; P. Abas, *Beperkende werking van de goede trouw*, diss. Amsterdam 1972.

[3] Abas, o.c., 114; 174. On the doctrine of precedent, compare R.J.P. Kottenhagen, *Van precedent tot precedent*, diss. Rotterdam 1986.

[4] The author belongs to the non-believers in recodification and in the New Civil Code in particular. Compare *NJB* 1977, 342; idem, 1984, 669; also published in: J.M. van Dunné, *De dialektiek van rechtsvinding en rechtsvorming. Opstellen over rechtsvinding, Serie rechtsvinding, deel 1a*, 1984, 204; 209 (unabridged version); *Advocatenblad*, 1987, 125.

is not too awkward; one may think differently of another term, which is even misleading: 'unforeseen circumstances' should not be taken as contingencies 'not foreseen' by the parties. In the official comment it is stated that the parties may actually have foreseen certain events, but what counts only is, whether they have negotiated the events and have come to terms about them in the contract ('verdisconteerd' in the contract, as the Dutch expression goes)[5].

Furthermore, the article reads, in its latest version, that the modification may be granted by the court 'at the request of one of the parties'. This means, that the plea may also be made in defence by a party, e.g. when sued for breach of [417] contract[6]. The drafters have always stressed their view, that only the court may grant relief in a imprévision case, and have rejected the idea of parties coming to a revision of the contract by themselves. It has been observed, that the present change of the article opens the door to party initiative in revising the contract: after the claimed revision of the contract and its execution on that basis by one of the parties, the latter may use the imprévision article in defence, when sued for execution on the terms of the original contract[7]. It is not clear whether the drafters took these consequences for granted, or just overlooked them.

Leaving aside the hazards of legislation, let alone of codification, one thing may be evident, that the Hoge Raad's doctrine of *pacta sunt servanda*, dating from the Twenties and still in force by 1961, has been turned down by the draftsmen of the new code. The reactions from business lawyers and from the bar were very critical at first, but have become more lenient in recent years[8]. The proposed article, however, is still often quoted as an example of unwanted innovation of the law.

The influence of the draft imprévision article on the case law of the last decades cannot easily be overestimated. In 1967 the highest court in the *Saladin v. HBU* case stirred up discussion whether the court had abandoned the pre-war rule on revision of contract, and had adopted a more liberal view: the discussion became livelier only after a similar decision in 1976, the *pseudo-bird pest* case[9]. In more recent cases speculation was put to an end as it became clear that the Hoge Raad had taken over the New Civil Code rule. The *social health insurance* case of 1977 dealt with a contract between a social health insurance foundation and a local doc-

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[5] MvA 1976, 228, Gewijzigd Ontwerp (Amended Draft). For a criticism of the use of the term 'unforeseen', see Abas, o.c., 276, and more extensive in, *Onvoorziene omstandigheden*, 1978; Van Dunné, *WPNR* 5371 (1976) 754, also published in: *De dialektiek van rechtsvinding en rechtsvorming. Opstellen over privaatrecht, Serie Rechtsvinding, Deel 1b*, 1984, at 160.

[6] See for a elucidation of this change, MvT, Tweede Kamer, 17 541, nr. 3, 41, 1981/82, Draft Law of Enactment.

[7] This aspect was stressed by Advocaat-generaal Mok in his conclusion for *Nationale Volksbank v. Helder*, *NJ* 1984, 679, at p. 2346. The view of the New Code, that the parties have no autonomy in contract revision, but should invoke the assistance of the court was criticized by the present author in his 1976 article, see note 5.

[8] See the article mentioned in note 7. Compare also, Nota van advies van de Commissie, ingesteld door de Nederlandsche Maatschappij voor Nijverheid en Handel, 1977, 4.

[9] *NJ* 1967, 261, and *NJ* 1976, 486, respectively. For a discussion of these cases, see Abas, o.c. note 2, at 179; o.c. note 5, and also Hofmann-Abas, *Het Nederlands verbintenissenrecht*, 1977, 201.

tor, which contained no termination clause. The legal question was, whether the foundation could terminate the contract in the case of fraud of the doctor. The court held, that if no other solution in good faith could be found, the foundation could lawfully terminate the contract, even in the case that the fraudulent acts of the doctor [418] would not lead to the assumption of breach of contract. The New Civil Code rule was used explicitly by the court[10].

In 1984 a case of a straightforward claim of changed circumstances was brought before the Hoge Raad, concerning a business contract: *Nationale Volksbank v. Helder*[11]. Here a bank of credit had made a long-term contract with Mr. Helder, who was acting as a mediator for the bank obtaining contracts of credit with third persons. The contract, drafted by the bank, contained a provision clause and further a penalty clause, 'not subject to mitigation'. After a few years, the bank unilaterally changed the regulation of the payment of provision, against the protest of Helder. In doing so, the bank followed a circular, issued by a credit banking association. The new regulation happened to be in the bank's favour: provision payments would only be made when the mediated credit contracts proved successful after a certain lapse of time. The new regulation was designed, it was contended, as an endeavour at cutting out hard selling practices of credit mediators, allegedly made at the request of the government, in a policy of consumer protection. The bank proceeded to the execution of the contract under the new regulation at short notice, notwithstanding the objections of Helder, and half a year later completely broke off the relations with Helder. The latter sued the bank mainly on the ground of the penalty clause, besides a small claim for the payment of provision in arrear ($ 590,000.- and $ 8,000.- respectively; the bank had infringed the contract 59 times by paying at the new provision rate). The Court of Appeal Leeuwarden awarded the first claim completely, and denied the second claim, as an unlawful cumulation of claims according to Article 1347 Dutch CC. The bank's plea of changed circumstances, and the request of revision of the penalty clause was dismissed without argumentation. In appeal, the Hoge Raad supported the Appeal Court's decision, 'in view of the facts of the case, and of the reserve which should be observed by the courts in accepting a plea of unforeseen circumstances'. Another argument put forward by the bank was, that Helder's claim on the penalty clause was against good faith. The Court of Appeal had held in this regard, that the bank's breach of contract was not slight nor partial, and therefore the court could not find a reason for the mitigation of the clause, which moreover was explicitly drafted as 'not subject to mitigation'.

[419] The Hoge Raad, again, was prepared to follow the Court of Appeal, and stated that the court meant to say that, considering the acts of infringement of the bank, the fines were not excessive to such an extent that the claim of Helder would be barred by the standards of good faith. The appeal court's judgment being intertwined with the valuation of the facts of the case, in consequence could not be

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[10] *NJ* 1978, 156. The Hoge Raad, however, did not use the term 'unforeseen by the parties', but 'circumstances not provided by the parties', which is in line with the elucidation of the New CC article (MvA), but not with the text of the article, compare note 5 and accompanying text.

[11] *NJ* 1984, 679, with annotation by W.C.L. van der Grinten; compare also E.H. Hondius, *Kwart. Bericht NBW*, 1984, 100.

tested by the Hoge Raad (which as a court of cassation in the system derived from French law, has to abstain from the judgment of the facts). The appeal court's decision, the Hoge Raad continued, was not incomprehensible, considering inter alia the arrears in the payment of provision due to the policy of the bank during a number of months to pay provision on the basis of the new regulation, set by the bank unilaterally, and explicitly rejected by Helder.

Evaluating the *Nationale Volksbank v. Helder* case, it may be observed at first, that the Hoge Raad did not revoke the acceptation of the imprévision rule, but only did not approve of its application in the present case. The court also stressed the 'reserved' use of the rule. As to the more general claim based on good faith, which induced the highest court to more elaborate statements, it is apparent, that only an excessive penalty for the infringement of the contract will have a chance in a claim for the use of the shield of good faith. The claim will be considered in the light of the circumstances of the case, and, above all, of the judgment of standards of good faith of the position taken by the claiming party herself. The English maxim: 'ye who comes to equity must come with clean hands'. The circumstances weighed by the court included the one-sided action: taken by the bank in the modification of the provision clause, and the fact that the original contract had been drafted by the bank. The 'not subject to mitigation' term of the penalty clause, apparently meant to restrain the other party, came back to the drafting party herself, like a boomerang.

Although there is not much room to discuss this case at length, it may be noted, that in my opinion the District Court's decision, unmentioned thusfar, to mitigate the fines to one tenth of the total sum, seems an appropriate approach to punish the bank for its rude behaviour. Furthermore, the clause cannot easily be imagined to have been written also for a situation like that of the present case where the bank thought, although wrongly, that the old regulation could be disregarded, and acted accordingly over a period of time. It is submitted however, that the measure of mitigation can only be assessed with knowledge of the facts of the dossier; in this context, indemnification of some sort of Helder for the termination of the contract may be taken into consideration. Finally, the like or dislike of banking practices like the one described, may influence the view taken in this [420] case[12]. The bank, as a matter of fact, was a small credit bank, a daughter of a big commercial bank.

Summing up, the view taken by the highest court on revision of contracts by the courts in imprévision cases, it is standing law that the courts may do so, but apparently in a very restricted way. The Hoge Raad seems also to go at great length to save a decision of a court of appeal given without any argumentation of significance. Unless the criteria for contract revision are made more clear, a court procedure seems to be an unattractive solution for a party in distress. We probably need a more typical case of changed circumstances to be brought before the Hoge Raad,

[12] In this sense also, Van der Grinten, o.c. note 11. Under the New CC a term 'not subject to mitigation' in a penalty clause will not be binding upon the parties, and may be disregarded by the court. Surprisingly, this development did not influence the present decision, by way of 'anticipatory interpretation' of the new code, a method frequently used by the Hoge Raad.

to have some light shed on this matter. In afterthought, the 1984 decision may have been just one of policy, the reassurance that the new rule will not lead to an opening of 'floodgates' in litigation[13], thus serving the critics of the New Civil Code (the principal drafter of the code, Mr. Snijders, is a member of the Hoge Raad, which body is playing an active role with the introduction of rules derived from the NCC through case law).

In this situation of the law, a decision of the Amsterdam Court of Appeal of 1982 is of great importance, the *Bijenkorf II* case[14]. The Bijenkorf ('Beehive'), a company owning a number of fashionable department stores in the country, in 1974 made a contract with the city of Utrecht to build a department store at a location in the centre of the city, to be in operation in 1980. Early 1977 they concluded a new, collateral contract, at the initiative of Bijenkorf, postponing the opening date to 1982, and enabling Bijenkorf to start 'fundamental research' and a 're-orientation' in view of the bleak economic situation of the time, unfavourable for the exploitation of a department store at that site. A year later, Bijenkorf on the basis of the outcome of her study, proposed an adaptation of the contract in the light of the changed circumstances, leading to a department store of less pretentious features and of smaller extensions. This is rejected strongly by Utrecht, as the city is aiming at a redevelopment of the heart of the city, the Bijenkorf store being a pacesetter for the whole area. Bijenkorf alleges that the standpoint of [421] the city is unreasonable: in executing the original contract she is to lose 30 million guilders over the first 5 years, on an investment of 100 million guilders. This loss is seen by the other party as a normal business risk, which should be taken as it is, even if that means the ruin of the contracting party. The changed circumstances, agreed by the parties as being unforeseen, where inter alia: a back-fall in population growth of the city and surrounding towns; a tendency of prospective buyers to flee the city and settle in the countryside, where new department stores had been built ('in the meadows'), creating a re-allocation of purchasing power; a general price raise since 1974.

The first law suit, brought ultimately before the Amsterdam Court of Appeal in summary proceedings, was lost by Bijenkorf[15]. In the main procedure, started after this failure, a change had occurred regarding Bijenkorf herself: from a healthy, first-class company, she had turned into a mere shadow of herself, on the brink of bankruptcy, due to mismanagement in real property, where a dramatic price fall had taken place. In this light, a disastrous contract like the present, could possibly contribute to the downfall of the company.

This factor, a daily issue in the newspapers of those days, may have been of some weight in the consideration of the court. At any rate, the opinion of the court this

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[13] The same view is taken by the drafters of the New CC, MvA 1976, 229 and also, Van der Grinten, o.c. note 11.

[14] Hof Amsterdam, 6 mei 1982, rolnr. 314/81, *WPNR* 5625 (1982), 623 (by Abas). The decision has not reached the law reports yet, as no final judgment has been given thusfar.

[15] Hof Amsterdam, *NJ* 1981, 242. In this procedure Bijenkorf took the position that her role in the city renovation project was comparable to that of a public body, and that she acted in the general interest; in consequence her plea of imprévision should be admitted, according to the case law in that field. See for this doctrine, infra.

time, based on the same facts as those put forward in the first procedure, actually, revealed a completely different view, compared to the position taken in the earlier summary proceedings. In this state of affairs, the court considers the consequences of building the store on the basis of the original plan negative for both parties: for the city this would mean 'over-cropping' in regard of existing stores in the centre of Utrecht, to find the extra purchasing power for the new department store. These negative developments, the court continues, in view of the contract meant to serve the interests of both parties, are the common risk of the parties. Its consequences for the exploitation of the department store, lead to the conclusion that the city of Utrecht cannot reasonably demand the execution of the original contract at this moment. The city does not have a reasonable interest in the building of a non-viable department store; in the light of the nature of the present contract, the city cannot take the position that the change in circumstances as described should be considered the normal risk of the entrepreneur, in which she does not take part.

[422] Although Bijenkorf is not under the obligation to fulfil the original contract, she has to search for other possibilities to execute the contract in a way which is satisfying for both parties. For this purpose, the court requests information of the parties.

In consequence of this decision by the appeal court, parties started negotiations and found a solution which served the interests of both parties: a smaller sized department store, combined with offices.

In the absence of specific case law of the Hoge Raad on the revision of business contracts in a typical imprévision setting, the above decision of the Amsterdam Court of Appeal of 1982 may be considered to be the leading case on this subject of this moment. It may be observed, that there are striking points of resemblance with the American *ALCOA* case of 1980, the landmark case in contract modification in the United States, where 'equitable reformation' was deemed necessary, and 'essential to avoid injustice', and also with the French case of 1976, *Electricité de France v. Shell Française*, where the Paris Court of Appeal sent parties hence to settle, 'sous l'égide d'un observateur'[16]. In the last case, a collision with the Cour de Cassation's doctrine prohibiting contract revision was evaded by the use of the construction that the court was only repairing a non-functioning indexation clause. Thus the intention of the parties still is at the bottom of the judicial intervention, a technique generally followed in French case law. Incidentally, the *ALCOA* case also concerned a malfunctioning indexation clause, not covering a

[16] *Aluminium Co. of America v. Essex Group, Inc.*, No. 245 (E.D. Va. Oct. 27, 1978), discussed by Richard E. Speidel, Court-imposed Price Adjustments under Long-term Supply Contracts, 76 *Northwestern Univ. L.R.*, at 377 (1981); Michael N. Zundel, Equitable Reformation of Long-term Contracts – The 'New Spirit' of ALCO, *Utah L.R.*, at 992 (1982); Buxbaum, o.c. 47.
Electricité de France v. Shell Française, 1.re Ch. A. 28 sept. 1976, *Jurisclasseur Périodique, La Semaine Juridique* 1978, 18810, note Jean Robert, discussed by Jean-Louis Delvolvé, The French law of 'imprévision' in international contracts, *The International Contract*, 1991, at 8.
Compare for a discussion of both cases and some other American cases (*Westinghouse* cases): Van Dunné, De verplichting tot heronderhandelen in geval van 'hardship', in: *Iustitia et Amicitia*, J.M. van Dunné, W.G. van Hassel and E.J. Numann, Eds., 1985, at 132.

500% increase of costs. Both cases will be discussed in par. 4.

The Amsterdam Court of Appeal did not explicitly urge the parties to renegotiate, as was the case in the American and French decisions cited, but the decision had the same effect, its message being clear enough. In this relation a landslide case of the Hoge Raad on the subject of pre-contractual negotiating should be mentioned, which may cast its shadow on post-contractual [423] negotiating as well. In *Plas v. Valburg* of 1983[17] the highest court held, that the termination of contract negotiations may be against good faith, if the parties have reached a certain stage, where they may rely on the conclusion of the contract as a result of the negotiations. In that situation damages for lack of profit may be awarded. When such a stage has not been reached yet, there still may be assumed an obligation for the party stepping out of the negotiations to compensate, wholly or partially for the costs made by the other party during the negotiations. This certainly is a far-reaching decision for the law of the conclusion of contracts; to my opinion it even reaches farther, it has also something to say about our subject, the negotiating of the revision of contract, which is generally considered to be under the rule of the principle of good faith (see also infra, the examination of the clauses of renegotiating, and in general, Articles 1374 and 1375 Dutch CC, stating that the performance of contract should be according to good faith). The pre-contractual relations of the parties are deemed to be governed by the same rule, since the leading case of *Baris v. Riezenkamp* of 1957 (*NJ* 1958, 67).

Summing up, there is considerable support in case law to hold parties to the standards of good faith in the process of negotiating the revision of contract under changed circumstances. It must be noted though, that only business contracts between private parties have been taken into consideration thusfar. As is the case in French law, it makes an essential difference in Dutch law when a government body is involved as a contracting party. The doctrine established by the Hoge Raad in 1964, the *Landsmeer* case (*NJ* 1964, 202), contains a special treatment of government contracts, where the revision of contract is accepted on the ground of good faith[18]. In recent years though, this doctrine has met with increasing criticism; as a result the range of the doctrine is nowadays thought to be more restricted in comparison with the general opinion over the last decades[19]. Therefore, the reliance of an administrative body on the Landsmeer doctrine to have a contract revised or set aside on the ground of a change of policy in the public interest, is not easily [424] accepted anymore. The administration is treated like a private party when operating *in civilibus*, and its discretionary power limited accordingly.

Coming to a close of this paragraph, too long already, the above sketch of the state of the Dutch law on revision of contracts indicates in which shadow parties are

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[17] *NJ* 1983, 723, for further comments on this case, see Van Dunné, o.c. note 16, with references.

[18] This case law is comparable to the well known doctrine of the Conseil d'Etat in France. Surprisingly, there is a trend in the same direction in The United States, see Speidel, o.c., at 410; Buxbaum, o.c., at 42.

[19] The doctrine was reconfirmed in the case *Zijpe and Hazepolder*, *NJ* 1979, 289. For the criticism see: J. Spier, *Overeenkomsten met de overheid*, diss. Leyden 1981, 144; D.A. Lubach, *Beleidsovereenkomsten*, diss. Groningen 1982, 210; R.M. Schoonenberg, *WPNR* 5765 (1985).

renegotiating in the event of changed circumstances. As the cases discussed are fairly recent, it may be presumed that their influence on the legal practice will not be impressive at the moment. This however, is not the case with the draft-article 6.5.3.11 New CC on imprévision, but its rejection in circles of business lawyers and advocates may hinder its effect in changing the law. To most lawyers these days, the rule of *pacta sunt servanda* is considered to be existing law, to my impression[20]. In arbitration one finds a reflection of this attitude; in commercial arbitration only few reported cases of revision of contract exist[21]. In construction law a claim based on paragraph 47 UAV (Uniform Administrative Conditions, generally applied), dealing with adaptation to changed circumstances, is rare indeed[22].

These are the backgrounds for the study of the results of our little empirical study, how legal practice copes with the *pacta sunt servanda* doctrine in contract drafting and dispute solving, which is the topic of our next paragraph.

3. An Empirical Study of the Use of Revision Clauses

Little is known of the use of revision or adaptation clauses in Dutch legal practice; empirical studies are not available. In order to fill up this gap, I designed a mini-study of my own, based on a questionnaire consisting of 9 questions and some sub-questions. The questionnaire was sent to 550 [425] companies of which 186 responded[23]. For reasons of brevity, only a brief discussion of the results is given here[24].

If one is to draw conclusions from this questionnaire, it will not be too bold to conclude that the rule of *pacta sunt servanda* is not well established in legal prac-

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[20] The rule is cited with approval as the main rule regarding changed circumstances by Van der Grinten, o.c. note 11.

[21] Compare for commodity sales, R. van Delden, *Handelskoop*, 1983, 98, 381; a different view is taken by Abas, o.c. note 2, at 172, as regards commercial arbitration in general. For the international arbitration Van Delden takes the view that the Lex Mercatoria contains rules of adaptation or revision of contract in the case of changed circumstances (rule 10) or hardship (rule 13), compare *Lex Mercatoria of Ius Commune?*, inaugural address, Rotterdam 1986, 11.

[22] Compare M.A. van Wijngaarden, *Handleiding tot de UAV*, 1974, nr. 209; *Hoofdstukken Bouwrecht 3*, 1985, nr. 165.

[23] The selection of the companies was simply on the annual turnover: the 550 biggest companies were taken, among them multinationals and small firms turning over a few million guilders a year.
I wish to express my gratitude to Mr. Axel de Boer and Mr. Hugo Sack, student-members of my staff, who took care of the execution of the questionnaire, acting beyond the call of duty.
One should be careful in assessing the results of this questionnaire, as the respondent companies vary strongly in commercial character; moreover, as will be noticed from the scores, some respondents are active in several fields. Therefore, an indication of e.g. 'construction contract' may refer to a company which is a construction company, doing virtually nothing else but concluding those contracts, but also to a company which incidentally is a party in such a contract. As a general caveat the inexperience of the author with this kind of research should be stressed.

[24] For the full results, compare my paper in: *Netherlands Reports to the Twelfth International Congress of Comparative Law, Sydney-Melbourne 1986*, 1986, 75, at 83.

tice. The reverse seems more likely: there is a well accepted custom of contract revision due to changed circumstances. The outcome of Question 1 indicates, that roughly one third of the respondents never or hardly ever deal with contract revision, another third rarely, and a last third regularly (and 4% often). Considering the character of imprévision, as an abnormal situation, these are striking figures indeed. The outcome seems to offer some support for the theory of Atiyah of the recline of the paradigm of the binding character of the set of promises as the basis of contract[25]. It must be noted, however, that the source for contract adaptation in the majority of cases is provided for in the contract through a revision clause (score of approximately 60%) or by negotiating a new contract (approximately 70%, see Question 2). In construction contracts the figures are even higher, 74% and 80%, respectively.

In two-third of the cases the new contract is at variance with the old contract, to a greater or less extent (Question 3). As for the motives for revision, they can in majority be found in monetary changes, with changes in technology and market developments coming second, and commercial reasons on the third place (Question 4a).

The outcome is an illustration of the basic philosophy of parties in business contracts, to see the contract not as a historical legal act, binding parties by a [426] *vinculum iuris*, but as a common venture of 'reasonable businessmen', in reliance of performance in good faith by both parties when caught by hardship. As usual, prudent businessmen, inclined to keep the life of contract under control and to stay out of court, may provide for the situation of imprévision in the contract. Not surprisingly, the use of revision clauses in long-term contracts is conspicuous: regularly, 23.4%; often, 17.5%; always, 17.5%. Again, the figures relating to construction contracts are higher, 40, 25.7 and 11.4%, respectively (Question 5a).

Examining the use of revision clauses in general (Question 4b), it may be observed that price adjustment clauses are scoring highest, followed at a long distance by clauses referring to the quantity of products and terms of delivery, and, finally, clauses on the quality of products. The application of revision clauses is strongest in the field of finished articles, followed by that of raw materials, and at the last place, of semi-manifactured articles (Question 4c).

In the majority of cases (ca. 60%) the revision clauses are used as standard clauses in all contracts (Question 5c). As follows from Question 6, most revision clauses are drafted by the companies themselves; the ICC-clause, for instance, is hardly used. The type of contract in which the clauses are used, was the subject of Question 7; the results are an overall view of contract types in which the clause is applied, depending on the background of the respondent company. Furthermore, the respondents in many cases proved to be dealing with different types of contract at the same time. Therefore no conclusions can be drawn from the results as to the relative occurrence of the clause in the various fields of contract.

Finally, as Question 8 shows, the indexation clause is the most popular one, fol-

[25] P.S. Atiyah, *The rise and fall of freedom of contract*, 1979; for a discussion of this theme, see van Dunné, *NJB* 1980, 668 (also o.c. 1984 note 5, 54).

lowed by force majeure clauses as general clauses, and lastly, the hardship clauses. The last clause apparently is more widely used in construction contracts. The scores are, respectively: 71%, 64.5% and 28.4% (in construction contracts: 80%, 71.4% and 42.9%).

4. American and French Case Law on Contract Revision by Renegotiation

In American law the question of contract adaptation in the case of changed circumstances was, until recently, not too complicated. The answer was in the negative, an only exception being par. 2-615 of the Uniform Commercial Code, which grants excuse from performance of contractual obligations for [427] reasons of 'commercial impracticability'[26]. However, this article, an invention of Llewellyn, the drafter of the Code, has in all the years of its existence not found application by the courts. Some thirty cases reflect the upheavals of our time: Suez crisis, Vietnam war, oil crisis, etc. In recent years, a considerable change has occurred. In one judicial approach an obligation to renegotiate is imposed on the parties; in another approach the court directly turns to 'equitable reformation' of the contract. Thus the solid surface of the *pacta sunt servanda* doctrine is showing considerable cracks. The further development of the law is subject of speculation in the American literature.

The *Westinghouse cases* are illustrative of the first approach[27]. Here Westinghouse had concluded a large number of contracts for the delivery of uranium fuel in 25-year contracts at a fixed price of $ 10 per pound. The contracts were combined with the sale of nuclear reactors; the total delivery amounted to 80 million pounds of uranium. Partially due to Westinghouse's own market share, the uranium price rose to $ 40 per pound in 1976, leading to a potential loss of 2.6 billion dollars by 1993. In 1975 Westinghouse announced that it would not honor the delivery contracts, with an appeal to par. 2-615 UCC. A consolidated litigation followed, in which 17 law suits were combined before the U.S. District Court for the Eastern District of Virginia for pretrial procedures. Ultimately all suits were settled out of court in 1981[28]. In that course an active part was taken by the court (Judge Mehrige), *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, in the view that the issues were really 'business problems, and should be settled as business problems by businessmen', so the parties should 'go hence, and settle'[29]. To that purpose the court appointed a settlement 'master' under Federal Rule of Civil Procedure 53. It was stressed by Judge Mehrige 'the Court's availability, willingness, and eagerness to participate, even more fully than I have already, in the settlement negotiations for those parties who deem it appropriate that I do so'. He also expressed his expectation that the parties would 'enter into serious and

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[26] Compare for this subject: Richard W. Duesenberg, Exiting from Bad Bargains via UCC Section 2-615: An Impractical Dream, *UCC Law Journal* 1980, 32; Tannenbaum, Commercial Impracticability Under the UCC: Natural Gas Distributor's Vehicle for Excusing Long-Term Requirements Contracts?, 20 *House L. Rev.* 771 (1983).

[27] Compare P.L. Joskow, Commercial Impossibility?: The Uranium Market and the Westinghouse case, *Journal of Legal Studies* 1977, 6. The cases are treated at length by Buxbaum, o.c. note 1; Speidel, o.c. note 16; Zundel, idem.

[28] See *Wall St. J.*, Apr. 16, 1981, at 16.

[29] No. 235 (E.D. Va., Oct. 27, 1978) discussed by Speidel at 413; Zundel, at 992.

intense negotiations' and 'continue the ones that you have already commenced'.

[428] In *Florida Power & Light Co. v. Westinghouse Elec. Corp.* long-term contracts to remove spent fuel from nuclear power plants were dealt with[30]. At the time of contracting, Westinghouse, encouraged by government policy, believed a profitable reprocessing was possible, which later proved not to be the case, due to stricter environmental legislation in this field. The disposal cost of the nuclear waste would be between 20 and 44 million dollars. The court, although finding for Florida Power, refused to order specific performance, but informed the parties that it intended to 'meet and confer with counsel, in an effort to assist them in reaching agreement', and ordered the parties to settle. This was done 'in view of the fact that the interests of both parties and the public would be best served by an expeditious and final resolution of this matter.'

The second approach of the courts, by a direct contract adjustment, as an equitable measure under the circumstances, is linked with the *Alcoa-case, Aluminium Co. of America v. Essex Group Inc.*, which shook academic and business circles alike in 1980[31]. In a 20-year aluminum smelting contract the parties had drafted an elaborate price escalation clause, one of the factors being Alcoa's nonlabor production costs. Due to the Opec oil embargo those costs (electricity) rose dramatically to 500%, whereas the index clause could only handle a 100% increase. As a result the loss for Alcoa under the original index over the balance of the contract would exceed 60 million dollars. In the view of the court this expected loss made performance impracticable in a commercial sense; the relief Aloca was entitled to was not rescission but 'equitable reformation'. It was stated: 'A remedy modifying the price term of the contract in light of circumstances which upset the price formula will better preserve the purposes and expectations of the parties than any other remedy. Such a remedy is essential to avoid injustice in this case'. The general interest the court was trying to serve was the prevention of 'a general disruption of commercial life by inflation' and the preservation of 'the future of a commercially important device - the long-term contract'. The court stated furthermore:

> The Court gladly concedes that the parties might today evolve a better working arrangement by negotiation than the Court can impose. But they have not done so, and a rule that the Court may not act would have the perverse effect of discouraging the parties from resolving this dispute of future disputes on their own. Only a rule, which permits judicial action will provoke a desirable practical [429] incentive for businessmen to negotiate their own resolution to problems which arise in the life of long term contracts.

The Alcoa decision has met strong criticism, but also support, combined with criticism on the method followed. Speidel, for instance, thinks the court's imposition of price adjustment premature. On basis of a complete analysis, the court should first have inquired why the ex post bargaining failed. Bargaining should run its course and the advantaged party's improper conduct should be established. In his view duties of cooperation should be imposed upon the parties' renegotia-

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[30] 517 F. Suppl. 440 (E.D. Va. 1981), also discussed by Robert W. Reeder, Court-imposed Modifications: Supplementing the All-or-Nothing Approach to Discharge Cases, 44 *Ohio St. L. J.*, 1079, at 1086 (1983).

[31] Supra, note 16.

tions or 'ex post bargaining': the advantaged party has, at a minimum, a duty to bargain in good faith and, at a maximum, the duty to accept an equitable adjustment proposed in good faith by the disadvantaged party[32]. Speidel's final condusion is, that the court may impose a price adjustment for the advantaged party's failure to accept an equitable adjustment proposed in good faith, as a remedy of last resort.

In the Civil Law jurisdictions a decision comparable to the *Westinghouse cases* is the decision of the Paris Court of Appeal in *Electricité de France v. Shell Française* of 1976[33]. A long-term contract for the delivery of fuel oil contained a complicated 'clause d'indexation' for price adjustment and a hardship clause with a 'hausse – baisse' system. The contract was concluded in 1971; due to the Kippur war Shell's production costs had increased dramatically. Renegotiations had failed and delivery was continued in the expectation of the agreement to a new price. Shell then seeks termination of the contract, the contract price being undetermined and undeterminable. In French law the doctrine of *pacta sunt servanda* is firmly established in the civil courts; in administrative law however, the *imprévision* doctrine gives relief in government contracts. The Cour d'Appel decides as follows:

> 'Considérant que par leur attitude commune, les contractants démontrent que, loin de vouloir rendre leurs accords caducs, ils entendent seulement les adapter aux circonstances nouvelles; qu'il leur appartient donc, pour le calcul du prix et de ses variations, de substituer à une référence disparue ou devenue inapplicable, [430] une formule qui assure à E.D.F., pour chaque catégorie de fuel, un prix d'achat réduit en rapport avec l'importance exceptionnelle des fournitures en quantité comme en durée et la mission de service public de cet organisme, tout en laissant au raffineur une marge bénéficiaire suffisante; qu'il convient, avant dire droit au fond, de renvoyer les parties, selon leur engagement, à conclure un accord sur ce point, sous l'égide d'un observateur; que c'est seulement en cas d'échec de cette négociation et en connaissance des solutions proposées que la Cour dira si la formule qui pourrait éventuellement convenir sur le plan financier modifie les données des contrats en cours et interdit par conséquent au juge de l'imposer, ou bien si elle se borne, comme l'ont voulu les parties, et sans altérer l'économie des contrats, à adapter le prix aux fluctuations du marché et peut donc être substituée d'office'.

Here too, parties are being sent hence, to settle, with the assistance of an 'observateur', appointed by the court. In the line of Speidel's thought, the court will impose an adjustment only after the failure of the renegotiations. An indication of the solution which the court would reach, when in the position to do so, is also indicated in the decision. Along objective guidelines, the court intends to do justice to the public service of the power company and a reasonable profit for Shell as well.

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[32] Speidel, 411. This is illustrated with a number of cases. Following Eisenberg's Rule-Making Negotiation, Speidel accepts the existence of two norms: 'The obligation to negotiate in good faith and the duty of restraint in the exercise of bargaining power' (416). See M. Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rule Making, 89 *Harv. L. Rev.* 637 (1976).

[33] 1.e Ch.A. 28 sept. 1976, Juris-classeur Périodique; *La Semaine Juridique* 1978, 18810, note Jean Robert; discussed by Jean-Louis Delvolvé, The French law of 'imprévision' in international contracts, *The International Contract*, 1981, 3 at 8. Compare also Georges Rouhette, La révision conventionelle du contract, *Rev. Internat. Droit Comp.* 1986, 369, at 404.

In doing this, the court steers clear of the prevailing doctrine of *pacta sunt servanda* of the Cour de Cassation, with the use of a well known construction: the mal-functioning of the 'clause d'indexation' may be repaired by the court by the substitution of a new index, adjusting the price to the new conditions of the market. The intention of the parties lies at the bottom of this construction. Subsequently, a settlement was reached by the parties.

5. Adaptation or Hardship Clauses and Renegotiation

5.1 Characteristics of the Clauses

In this paragraph an endeavour is made to analyze some 50 odd hardship clauses used in Dutch practice, and to discuss some of the features and the legal questions they raise. First of all, a rough dividing line should be made with another common clause, the force majeure clause, also written for changed circumstances causing hardship to one of the parties: with the latter clause parties only provide for the right of termination of the contract by notice to the other party. The typical hardship clause, on the other hand, goes beyond that, and seeks the restoration of the contract, by adapting it to the change in circumstances, within the context and scope of the original contract. A common feature is the obligation agreed by the parties to [431] renegotiate the contract in that event, sometimes combined with some basic rules of procedure[34].

In view of the common background of both clauses, there is a considerable overlap in the description of what is conceived to be 'force majeure' and 'hardship' respectively. I will not dwell on this aspect any longer, but now turn to a brief discussion of some elements of a hardship clause, namely: the description of hardship, the standards used (good faith, etc.), and the concepts of foreseeability or risk-allocation. Incidentally, it must be noted that in some contracts, like those regarding raw materials, all difficulties in contract drafting and adaptation processes are evaded by confining the term of the contract to 6 months, or even to 3 months (oil contracts). Thus a change in circumstances can be dealth with in the new contract, which is in sight already. A comparable technique is the use of a clause on price review and adjustment on an annual basis (or shorter period) in long term contracts (e.g. sale of goods). In the description of the concept of hardship caused by the change of circumstances, parties usually make a choice between two views, one being rather vague: 'restoring the equitable character of the contract' on the ground of good faith; in the other, less common, view, parties are trying to give some standard for the break down of the equilibrium of the contract. Sometimes a combination of both views is found. In the French literature the first approach is called 'subjective', and the latter 'objective'; it should be noted though, that both concepts ask for an objective or normative assessment, the common judicial practice in Dutch law. In the first approach exemplary expressions in contract terms are: 'contingencies making the contract no longer just and reasonable'; 'a severe disequilibrium arises in the mutual position or interests of the contracting parties and the continuance of this agreement under these circumstances would proof very harmful for one of the parties'; 'performance would be

[34] An introduction to the new phenomenon of hardship clauses for Dutch law was given by J.H. Dalhuisen, De betekenis van de 'hardship clausule', *NJB* 1976, 173. For a recent discussion, and international references, see Van Dunné, o.c. note 16.

to such a degree hard or disproportionately expensive, that execution of the contract could not reasonably be required'; 'substantial hardship'; 'unjust consequences'; 'to a substantial and fundamental extent causing undue and prolonged hardship'; 'one of the parties cannot reasonably be expected to comply with a provision of the agreement'.

In the second, more 'objective' approach, there are the following examples: 'consequences and effects which are fundamentally different from what was contemplated by the parties at the time of entering into this agreement (such [432] as, without limitation, the economic consequences and effects of a novel economically available source of energy), which consequences and effect place said party in the situation that then and for the foreseeable future all annual costs (including, without limitation, depreciation and interest) associated with or related to the processed gas which is the subject of this agreement exceed the annual proceeds derived from the sale of said gas' (Ekofisk contract).

Compare also: 'significant revision in costs charged by suppliers of parts to be delivered hereunder'; idem, 'due to variation of exchange rate'; 'i.e. 20% difference in price of $ 5000.-'.

Some descriptions relate to the proposed renegotiation, such as: 'the party concerned shall be entitled to require an alteration or adaptation of this agreement in order to restore the balance of their positions or interests; this clause shall not be applied if and as far as a circumstance leading to such disequilibrium ranks among the accepted risks of the party concerned nor shall it be applicable in cases mentioned in paragraphs …'.

And also: 'to bring about a mutually agreeable solution according to the economic and reasonable objective of this contract'.

Compare further: 'if the situation is such that parties entering into a similar new agreement would not agree to the terms and conditions as contained in or developed out of this agreement, but would require on balance substantially different terms and conditions'; 'the above mentioned negotiations shall be conducted on the basis of sound transport and marketing; efficient operations and reasonable return for capital employed in those parts of the operations which did not share in the basic explorations and production risks'.

Looking for standards used, all 'reasonable' and 'just' terms lead to the principle of good faith. One can join Oppetit in his being surprised, that businessmen and their lawyers seek refuge in this principle in their contracts whilst decrying it publicly at the discussion of case law and law reform[35]. Blood is thicker than water, it seems. Or as it says on the London newspaper stands: 'Everyone needs Standards'.

The nature of the contingencies is commonly described as 'not (reasonably) foreseeable for the parties'. Sometimes a juxtaposition is used: 'not regulated in the

[35] Bruno Oppetit, L'adaptation des contrats internationaux aux changements de circonstances; la clause de 'hardship', *Journal de droit internat.* 1974, 794; Van Dunné, o.c., 121.

contract or not foreseen'. Quite often one finds a different expression [433] with a force majeure ring to it: 'reasonably beyond the control of either party', or 'which he could not avoid and the consequences of which he was unable to avert even though he had taken all necessary steps to that end'. Furthermore the risk aspect may be stressed: 'this clause shall not be applied if and as far as a circumstance leading to such disequilibrium ranks among the accepted risks of the party concerned nor shall it be applicable in the cases mentioned in paragraphs …'. Sometimes the phrase of the New Civil Code is used: 'circumstances not being the risk of the claiming party according to the general opinion in business circles'.

From these examples one may conclude that 'unforeseeability' is not the standard concept any longer, a development concurring with the majority view in the literature and also the standpoint of the drafters of the New Civil Code, as was discussed earlier. In surrounding countries many authors take the same view[36]. The ICC hardship clause is very clear on this point: 'the event which gives rise to hardship must be one which was not contemplated when the parties made their contract, but it need not be one which the parties could not have taken into account'[37].

5.2 The Duty to Renegotiate

A characteristic element of the hardship clause is the duty to renegotiate, which arises from it, to reach the adaptation of contract desired by the parties in their pre-contractual foresight. The legal character of this duty, especially as regards the consequences of the breach of that duty, is still a matter to be dealt with. If one is willing to see the duty as an obligation of good faith, which may be a generally accepted view, the hard part is the question what to [434] do about the breach of that obligation, causing the failure to reach an agreement on the adaptation of the contract. A practical distinction, generally made, is to consider first the obligation to participate in the negotiations, and secondly, the obligation to co-operate in negotiations in a manner that agreement on a reasonable adaptation of the contract can be reached by the parties. The hard part, again, is the second obligation; as to the first one, there is a general opinion that breach of it would lead to an obligation to pay damages to the other party. As regards the second obligation, Dutch au-

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[36] Compare Dalhuisen, o.c. note 34, 176; Van Dunné, o.c. note 16, 123; Oppetit, o.c. note 35, 801; Ole Lando, *German Yearbook of International Law*, 1980, 37; M. Fontaine, *Droit et pratique de Commerce International*, 1976, 20. But compare also, Clive M. Schmitthoff, *Journal Bus. Law*, 1980, 85.

[37] Force Majeure and Hardship, International Chamber of Commerce, 1985, 20. This is a comment on the Hardship provisions – Drafting suggestions, at 19. The core of the ICC-hardship clause is the following:

1. Should the occurrence of events not contemplated by the parties fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the parties in the performance of its contractual obligations, that party may proceed as follows:
2. The party shall make a request for revision within a reasonable time from the moment it becomes aware of the event and of its effect on the economy of the contract. The request shall indicate the grounds on which it is based.
3. The parties shall then consult one another with a view to revising the contract on an equitable basis, in order to ensure that neither party suffers excessive prejudice.
4. The request for revision does not of itself suspend performance of the contract.

thors, few as they are, comparable to the majority opinion in surrounding countries, take the view that violation of the obligation should be seen as breach of contract, creating an obligation to pay damages. In the light of the agreed clause and the principles of good faith, it is thought that parties have the obligation to make a reasonable offer or accept such an offer from the other party[38].

There is no case law on this point available, however, the *Plas v. Valburg* case dealing with the pre-contractual negotiations, discussed earlier, may be seen as a support for this point of view. The wording of the clauses here, as so often, is not of much help. Usually, the expressions used are rather vague and 'soft', e.g.: 'the parties to this Agreement shall meet and sympathetic, equitable and diligent consideration shall be given to amend or rescind this Agreement or otherwise alleviate the hardship'; 'the parties shall contact each other with a view to bring about a mutually agreeable solution according to the economic and reasonable objective of this contract'.

The crucial point to decide when judging a breakdown of hardship negotiations, is the question whether the rejected proposal was reasonable under the circumstances of the case. Looking for standards, it is submitted by this author, that the basis for adaptation should be the allocation of risks as agreed in the original contract[39]. In general, there should be no room to repair miscalculations or commercial blunders. Parties are taken for 'reasonable businessmen', at the end, but also at the beginning of their common venture. In several clauses one finds a reference to the equilibrium of the contract at the moment of conclusion. Support for this view may be found in the theory of Levenbach of the 'economic synallagma of contract', developed for contract revision in 1923[40]. In this theory the financial consequences of [435] changed circumstances, which for instance caused an excessive raise in costs, are spread over both parties, in such manner, that the prejudiced party has to take his normal loss, considering the contractual risk allocation or custom. The core of this theory, it may be observed, is comparable with the rules developed by Speidel in 1981 for American Law, which have been recommended for Dutch law by the present author[41]. Speidel's standards for a reasonable offer are the following: '1. distinguish between changes in production costs the risks of which were assumed and those that were not; 2. establish with reasonable certainty the increased production costs, the risks of which were not assumed, that were caused or will be incurred by the unanticipated change, and 3. submit a proposed adjustment adhering to a standard of reasonableness'. For the determination of the last standard Speidel refers to the nature of the contract, business customs and prior courses of dealing.

Speidel in this context refers to the practice in government construction contracts, where the contractor is entitled to an 'equitable adjustment' in the contract price

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[38] Dalhuisen o.c. note 34, 176, following Oppetit; Van Dunné, note 16.

[39] Van Dunné, o.c. note 16, 127. In this sense also: Norbert Horn, *Archiv f. civ. Praxis*, 1981, 284; Régis Fabre, *revue Trim. de droit civil*, 1982, 20. But compare Dalhuisen, o.c. note 34, 182.

[40] M.G. Levenbach, *De spanning van de kontraktsband*, diss. Amsterdam 1923, 243; 292. References are made to Rabel and Herzfeld, at 294.

[41] Van Dunné, o.c. note 16, 127.

for cost increases caused by government conduct leading to changes in the performance of the work. He proposes a constant standard, namely 'that the disadvantaged party should be paid the actual additional costs of production plus the percentage of profit that would have been made under the original contract.'

The central question here is, what to do if the advantaged party follows the course of bad faith advantage-taking? Are there remedies available to prevent this? As was discussed earlier, Speidel takes the point of view, that the court in such situation may impose an adjustment of the contract on the parties. In Europe, several authors are of the same opinion. Steindorff has found a strong argument in the analogous application of par. 315 sub 3 and 319 sub 1 BGB[42]. This may be of importance, if one considers the criticism by many [436] German authors of the doctrine of the Bundesgerichtshof to adjust the contract in the case of changed circumstances on the ground of good faith (par. 242 BGB), when performance by the disadvantaged party would be 'unzumutbar'[43].

The chance of failure of the renegotiations may be reduced by the parties, in several ways. They may appoint a person to assist in the settlement process, as a conciliator (or 'expert', 'referee'). The task of such person is, in the words of Oppetit, to act as a 'régulateur d'une situation contractuelle, chargé de l'adapter aux données nouvelles'[44]. A recent, interesting development is the so-called 'third-party intervention'. Here we have no question of conciliation of the parties in a dispute that is keeping them divided, by persuading the parties to reach a settlement. The work of the third-party intervener is done in the preceding phase, where no dispute has arisen yet, and parties are struggling with the implementation of the contract, and grope for a solution of a point about which they are often not clear in their mind. In discussing this subject, Schmitthoff points at the illustrative practice of the Engineer under a FIDIC contract. A third-party intervener can be provided for

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[42] Ernst Steindorff, Vorvertrag zur Vertragsänderung. Ein Beitrag zu Leistungsvorbehalten und Anpassungsklauseln, *Betriebs-Berater*, 1983, 1127. The article read as follows:

§ 315. [Bestimmung der Leistung durch eine Partei] (1) Soll die Leistung durch einen der Vertragschließenden bestimmt werden, so ist im Zweifel anzunehmen, daß die Bestimmung nach billigem Ermessen zu treffen ist.

…

(3) Soll die Bestimmung nach billigen Ermessen erfolgen, so ist die getroffene Bestimmung für den anderen Teil nur verbindlich, wenn sie der Billigkeit entspricht. Entspricht sie nicht der Billigkeit, so wird die Bestimmung durch Urteil getroffen; das gleiche gilt, wenn die Bestimmung verzögert wird.

§ 319. [Unwirksamkeit der Bestimmung; Ersetzung] (1) Soll der Dritte die Leistung nach billigem Ermessen bestimmen, so ist die getroffene Bestimmung für die Vertragschließenden nicht verbindlich, wenn sie offenbar unbillig ist. Die Bestimmung erfolgt in diesem Falle durch Urteil; das gleiche gilt, wenn der Dritte die Bestimmung nicht treffen kann oder will oder wenn er sie verzögert.

(2) Soll der Dritte die Bestimmung nach freiem Belieben treffen, so ist der Vertrag unwirksam, wenn der Dritte die Bestimmung nicht treffen kann oder will oder wenn er sie verzögert.

[43] Compare Esser-Schmidt, *Schuldrecht, Band 1, Allgemeiner Teil*, 6th ed. 1984, 341, in a critical tone.

[44] O.c. note 35, at 810; also Fontaine, o.c. note 36, at 36.

in the contract by the parties. The International Chamber of Commerce has published standard clauses and rules for third-party intervention in 1978 and has established a Standing Committee for the Regulation of Contractual Relations, which may be consulted to appoint a third-party intervener.

Contrary to the view expressed by Schmitthoff, I would suggest that the parties may also resort to third-party intervention if no arrangement has been made in the contract. The ground for this may be found in the principle of good faith. In this sense also Horn, for exceptional cases, however[45]. In this particular form of renegotiation, to my opinion an obligation to cooperate in the procedure may accepted, again, on the basis of good faith. Customs of the trade and prior courses of dealing will be of importance in this context[46]. [437] As to the general obligation to participate in renegotiations in view of reaching a settlement, under Dutch law support may be found in the decision of the Hoge Raad (Supreme Court) in *Plas v. Valburg* (1983), discussed in par. 2.

6. Concluding Remarks

Our wandering in the Land of Myth and Mist is coming to an end. Summing up our impressions, it seems to be no overstatement, to say that the legal view on long-term contracts and the possibility of adaptation by renegotiation in Civil Law and Common Law countries is rapidly changing. The old Myth of *pacta sunt servanda* ('On lie les boeufs par les cornes, et les hommes par les mots', as it was said in the drafting days of the Code Civil) is being replaced in judicial law making and party law making by contract drafting as well, by an reasonable adjustment of the contract, negotiated for by the parties in good faith. The *bona fida* contract revision is built on the idea that parties should be self-supporting, and should be able, as reasonable men of business, to find each other in a compromise, serving the interests of both parties. The court, the arbitrator, the conciliator, or the third-party intervener, may give the parties a hand, bad faith-conduct leading to the failure of the renegotiations may be corrected by the court or the arbitrator through the imposition of an adaptation of the contract in good faith.

When parties have concluded a long-term contract, they are in a common venture. Their relation therefore, is resembling a partnership, where the norms of good faith require a give-and-take attitude of the parties[47]. An interesting point of further study would be the economic analysis of the dispute solution by renegotiation. It would not come as a surprise to the author, if the reasonable compromise solution of hardship disputes would be an economical sound course of dealing: in de long run, since parties will meet again in business, but in the short run as well,

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[45] O.c. note 39, at 284.

[46] Compare for instance for venture contracts for mining projects in developing countries, Martin Bartels, *Contractual adaptation and conflict resolution*, 1985, 71. And also: Wolfgang Peter, Renegotiation Clauses in Developing Agreements, paper Am. Bar Ass. Conference on International Agreements for Petroleum and Mineral Development. Risk Analysis and conflict Resolution, New York 1983 (own print), 1983; *Arbitration and Renegotiation*, 1986.

[47] In the same sense for instance Speidel, at 421, citing Charles Fried, *Contract as a Promise: A Theory of Contractual Obligations*, 1981, and authors like John Coons, Kronman, Kornhauser and Macneil (at 406).

since litigation costs, time loss, etc., will be evaded[48]. There is something reasonable in being reasonable. [438]

Summary

When discussing long-term contracts, an important issue is the adaptation or modification of the contracts during the life of the contract. A long-term contract is by its very nature susceptible to a change of circumstances, which may lead to hardship for one of the parties in performing the contract for the remaining period. The subject of my paper is the role of renegotiation, as an instrument of contract revision. The renegotiation of the terms of the contract in the light of changed circumstances, may be triggered by the parties, whether or not based on a contract clause, requiring renegotiation under those circumstances (e.g. hardship clauses). On the other hand, the renegotiating procedure may be imposed on the parties by the court or by the arbitrators, in a explicit or implicit way. The latter phenomenon is a rather recent development in the case law of several countries; examples will be taken by the author from Dutch, American and French law. This trend may be of great importance for legal practice, it may influence the attitude of the parties in a hardship situation, as an incentive to the party having a windfall profit, to engage in renegotiations in good faith.

This underlines once again the reciprocal influence of legal practice and case law in the field of contract law. A keen eye on the legal practice presupposes an insight into the standing law on these matters. Therefore, a survey is given first of the law, especially case law, of The Netherlands, which to a large extent is representative of many jurisdictions of Civil Law and Common Law (e.g. *Bijenkorf II-case*, 1982). A discussion of revision clauses follows, based on an empirical study made by the author, where the reaction in business circles to the philosophy of the courts regarding contract revision, as reflected in contract clauses, is deserving special attention. After a presentation of trend-setting American and French cases (*Westinghouse cases*, 1978-1981; *Alcoa*, 1980; *Electricité de France v. Shell Française*, 1976), a closer look is given to hardship clauses, and their obligation to renegotiate.

This is a fascinating branch of the law indeed. It may be characterized as the Land of Myth and Mist. As for the mist, little is known of what is really going on in legal practice, as empirical research is virtually non-existent. As regards the myth, in most jurisdictions there is a general opinion, that businessmen and their lawyers adhere to the maxim of *pacta sunt servanda*, parties are bound by the contract as it is, whereas the opposite view of adaptation on the ground of good faith, *bona fides*, usually is followed by academics and other non-practicing ethical lawyers, who sometimes have courts and statutes on their side.

[439] As submitted in this paper, this perception is contrary to the reality, as may be gathered from the clauses used in practice, drafted to cope with a change of circumstances. The use of vague notions like ‘reasonable’, ‘just’, ‘in good faith’,

[48] For observations on this point, of different vintage, compare the articles cited by Joskow, Speidel and Buxbaum, and Levenbach’s thesis. Speidel’s criticism of the so-called Chicago school (‘Superior Risk Bearer’) seems justified.

etc. in the clauses is striking. Although the practice in The Netherlands was subject of our study, the outcome seems exemplary for other countries as well.

The old Myth of *pacta sunt servanda* is being replaced in judicial law making and party law making by contract drafting as well, by an reasonable adjustment of the contract, negotiated for by the parties. The court, the arbitrator, the conciliator, or the third-party intervener, may give the parties a hand, bad faith-conduct leading to the failure of the renegotiations may be corrected by the court or the arbitrator through the imposition of an adaptation of the contract in good faith.

When parties have concluded a long-term contract, they are in a common venture. Their relation therefore, is resembling a partnership, where the norms of good faith require a give-and-take attitude of the parties. An interesting point of further study would be the economic analysis of the dispute solution by renegotiation. It would not come as a surprise to the author, if the reasonable compromise solution of hardship disputes would be an economical sound course of dealing: in de long run, since parties will meet again in business, but in the short run as well, since litigation costs, time loss, etc., will be evaded. There is something reasonable in being reasonable.

Zusammenfassung

In der Diskussion über Langzeit-Verträge ist ein wichtiger Punkt die Anpassung oder Modifikation während der Vertragsdauer. Ein Langzeitvertrag ist seiner Natur nach anfällig für Änderungen in den tatsächlichen Umständen, die zu einer Härte für eine der Vertragsparteien führen können, den Vertrag in der restlichen Zeit zu erfüllen. In meinem Aufsatz befasse ich mich mit der Bedeutung neuer Verhandlungen als Mittel zur vertraglichen Anpassung. Das neue Aushandeln von Vertragsklauseln wegen geänderter Umstände kann entweder durch die Parteien selbst veranlaßt sein, oder wenn dies nicht der Fall ist, wird es gestützt auf eine Vertragsklausel, wonach geänderte Umstände neue Verhandlungen notwendig machen (sogenannte Härteklauseln). Neue Vertragsverhandlungen können zum anderen durch das Gericht oder durch einen Schiedsrichter verlangt werden, entweder in ausdrücklicher oder stillschweigender Weise. Das letztgenannte Phänomen ist eine neuere Entwicklung im Fallrecht verschiedener Länder. Beispiele finden sich in [440] diesem Beitrag zum niederländischen, amerikanischen und französischen Recht. Dieser Trend wird eine große Bedeutung für die juristische Praxis erlangen; er kann das Verhalten der Parteien in Härtefällen beeinflussen und als Anreiz zu Neuverhandlungen für eine Partei, die Zufallsgewinne erzielt, dienen.

Dies unterstreicht einmal den gegenseitigen Einfluß zwischen juristischer Praxis und dem Fallrecht auf dem Gebiet des Vertragsrechts. Ein scharfer Blick in die juristische Praxis setzt einen Einblick in das bestehende Recht voraus. Daher geht zuerst ein Blick in das Recht, speziell in das Fallrecht der Niederlande, das zu einem großen Teil für viele Rechtsordnungen mit Gesetzes- und ungeschriebenen Recht repräsentativ ist (siehe *Bijenkorf II*-Case 1982). Dem folgt eine Diskussion über Änderungsklauseln, die auf einer empirischen Studie des Verfassers beruht. Die Reaktion der Geschäftskreise im Hinblick auf die Philosophie der Gerichte hinsichtlich Vertragsanpassung, die sich in Vertragsklauseln zeigt, verdient be-

sondere Aufmerksamkeit. Nach der Präsentation maßgebender französischer und amerikanischer Entscheidungen (*Westinghouse Cases*, 1978 bis 1981; *Alcoa*, 1980; *Electricité de France vs Shell française*, 1976) gilt ein abschließender Blick den Härteklauseln und der Verpflichtung zum Neuverhandeln.

Dies ist tatsächlich ein faszinierendes Rechtsgebiet. Es kann vielleicht als Land des Mythos oder Nebels charakterisiert werden. Als Nebel deshalb, weil sehr wenig darüber bekannt ist, was die juristische Praxis macht. Es fehlen empirische Untersuchungen. Als Mythos deshalb, da in den meisten Rechtsordnungen die Meinung vorherrscht, daß Geschäftsleute und deren Anwälte am Grundsatz des 'pacta sunt servanda' festhalten sollen, daß die Parteien an den Vertrag gebunden sind. Der gegenteilige Standpunkt der Vertragsanpassung beruht auf dem Grundsatz des guten Glaubens, bona fides, und wird üblicherweise von akademischer Seite vertreten, die manchmal Gerichte und Gesetze auf ihrer Seite hat.

Wie in diesem Papier vorgetragen, ist diese Wahrnehmung das Gegenteil der Realität, die sich in den in der Praxis benutzten Klauseln durchsetzt, um mit Änderungen der Umstände fertigzuwerden. Der Gebrauch von unbestimmten Begriff en wie "angemessen", "gerecht", "im guten Glauben" und andere Begriffe ist bemerkenswert. Obgleich die Praxis in den Niederlanden Gegerstand unserer Untersuchung ist, scheint das Ergebnis auf andere Länder ebenso zuzutreffen.

Das alte Mythos des "pacta sunt servanda" wird ersetzt durch Richterrecht und vertragliche Rechtsschöpfung. Dies findet seinen Ausdruck in Vertragsentwürfen, die eine angemessene Anpassung des Vertrages ermöglichen, und die durch beide Parteien ausgehandelt sind. Das Gericht, der Schiedsrichter, [441] der Schlichter oder der Nebenintervenient können den Parteien Hilfe leisten. Schlechte Ergebnisse wegen fehlender Neuverhandlungen können durch Gerichte oder den Schiedsrichter korrigiert werden mit einer aufgezwungenen Anpassung des Vertrages nach gutem Glauben.

Wenn die Parteien einen Langzeit-Vertrag geschlossen haben, verfolgen sie eine gemeinsame Unternehmung. Das Verhältnis zwischen ihnen gleicht eher einer Partnerschaft, der die Grundsätze des guten Glaubens und ein Verhalten des Geben und Nehmens zwischen den Parteien erfordert. Ein interessanter Punkt für weitere Untersuchungen wäre eine ökonomische Analyse der Problemlösungen durch Vertragsanpassung. Es würde den Autor nicht überraschen, wenn eine vernünftige Lösung von Härtefallen Ausdruck wirtschaftlichen Handelns wäre: Auf längere Sicht wollen die Parteien wieder Geschäfte machen, und auf kürzere Sicht werden Prozeßkosten, Zeitverluste und ähnliches vermieden. Es ist vernünftig, vernünftig zu sein.