Contractual revision of contracts in Dutch law*

Introduction

In this paper the outline of issues of the General Reporter will be followed. Therefore, first the revision of contracts will be dealt with, on which the parties have come to an agreement after negotiations (paragraph I). To bring some depth into this matter, and into the subject as such, the legal situation of contract adaptation by the Dutch courts is briefly discussed. It may be assumed, that the role of the courts, and I may add, arbitrators, will be of influence in regard to the positions taken by the parties in the case of changed circumstances. It will be understood, that a change of circumstances of whatever nature is the cause of the need for contract modification felt by at least one of the parties.

In paragraph II attention is given to the legal practice of contract revision; the data discussed are drawn from a questionnaire, an empirical escapade of the author, which sheds some light on this part of the law in action.

In paragraph II.2 specific revision clauses are being analyzed.

I. 'Renegotiating in the shadow of the law'. Revision by Negotiation

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 of the business relations may be [76] 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 II. 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

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* In: P.H.M. Gerver e.a. (Eds.), *Netherlands Reports to the twelfth International Congress of Comparative Law*, The Hague (T.M.C. Asser Instituut) 1987, p. 75-96.

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 reported cases most lower courts did not follow this precedent (in Dutch law there is not 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 [77] 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 early 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, is not too awkward; one may think differently of another term, which is

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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 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).

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 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 doctor, which contained no termination clause. The legal question was, whether the foundation [78] 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

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[5] MvA 1976, 228, Gewijzigd Ontwerp (Amended Draft). For a criticism on 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.

foundation could lawfully terminate the contract, even in the case that the fraudulent acts of the doctor 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 (*f* 590,000.- and *f* 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'.

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 [79] the case, in consequence could not be tested by the Hoge Raad (which as 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

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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 for 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.

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 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 [80] 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, 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

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[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.

[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.

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 pace-setter for the whole area. Bijenkorf alleges that the standpoint of 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 black-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 proceeding, 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.

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

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[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.

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.

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 interest 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 point 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 tot 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 mal-functioning indexation clause, not covering a 500% increase of costs.

[82] 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 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

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[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 ALCOA, *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*, 1981, 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, Ed.s, 1985, at 132.

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

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 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 renegotiating in the event of changed circumstances. As the cases discussed [83] 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

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[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).

[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.

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.

II. Built-in revision of contracts (revision clauses)

1A. An empirical study

1. Presentation of results

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 companies of which 186 responded.[23] I would like to present the results here, followed by a brief discussion.[24]

Question 1 is of a general character: whether the respondent company in her practice had come across the phenomenon of adaptation or revision of contract during its execution. The outcome was the following:

Never	16.7
Hardly never	17.2
Rarely	29.6
Regularly	32.3
Often	3.8
Always	0.5
	100

Question 2 deals with the legal basis for contract revision. In giving the results, I will put the figures of the group as a whole first (N=155), to be split out next into Commercial contracts (N=117) and Construction contracts (N=35).

This branch of the law needs further study by the present author.

[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.

[24] 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.

[84]Q2. Legal basis for revision:

	All C.	Comm. C.	Constr. C.
a. required by status or arbitration	9.0	9.5	2.9
b. based on revision clause	58.1	62.1	74.3
c. agreement on new contract	71.0	72.4	80.0
d. by collateral contract	4.5	5.2	8.6
e. other	6.5	7.8	5.7

Q3. Character of revision:

a. new contract is at variance with original contract, to a greater or less extent	66.2	68.4	61.8
b. in accordance with the original contract	33.8	31.6	38.2
	100	100	100

Q4a. Motive or revision:

a. monetary changes	40.6	47.9	45.7
b. technological changes	29.0	32.5	54.3
c. market developments	28.4	31.6	28.6
d. commercial reasons	11.6	12.0	8.6
e. unforeseen circumstances	6.5	4.3	11.4
f. changes in legislation	3.9	3.4	-.-
g. other	18.1	14.5	22.9

Q4b. The revision clause is in regard to:

a. price	80.0	87.2	80.0
b. quality	21.9	24.8	25.7
c. quantity	37.4	44.8	54.3
d. delivery	36.1	39.3	54.3
e. other	6.4	3.5	2.9

Q4c. The revision clause is used in contracts concerning:

a. raw materials	33.5	43.6	45.7
b. semi-manufactured articles	22.6	29.9	37.1
c. finished articles	60.0	68.4	77.1
d. service	3.2	2.6	2.9
e. license	1.3	-.-	-.-
f. other	5.2	1.7	2.9

[85] Q5a. The revision clause is used in contracts of long term:

	All. C.	Comm. C.	Constr. C.

a. never	13.0	6.9	5.7
b. hardly never	9.1	8.6	8.6
c. rarely	19.5	20.7	8.6
d. regularly	23.4	25.9	40.0
e. often	17.5	19.0	25.7
f. always	17.5	19.0	11.4
	100	100	100

Q5b. The revision clause is used in contracts of short term:

a. never	18.2	11.2	8.2
b. hardly never	39.0	41.4	31.4
c. rarely	24.7	27.6	25.7
d. regularly	12.3	13.8	22.9
e. often	2.6	2.6	5.7
f. always	3.2	3.4	5.7
	100	100	100

Q5c. When used, the revision clause is a standard-clause in all contracts:

a. yes	59.1	46.6	42.9
b. no	40.9	53.4	57.1
	100	100	100

Q6. Origin of the revision clause:

a. own draft	71.4
b. I.C.C.-clause	7.8
c. Insurance Association	3.2
d. mother company	2.6
e. other	16.9

Q7. Type of contract in which the revision clause is used:

a. international	64.5
b. national	51.6
c. commercial	56.1
d. construction	22.6
e. insurance	3.2
f. commodities	57.4
g. offshore	7.7
h. international joint-ventures	3.2
i. license/patent	1.3
j. other	1.9

[86] Q8. Type of revision clause used:

	All. C.	Comm. C.	Constr. C.
a. index	71.0	75.2	80.0
b. hardship	28.4	35.9	42.9
c. force majeure	64.5	71.8	71.4
d. general	52.3	58.1	71.4

Q9. Special clauses:

A request was made to send revision clauses which may be of interest for our study. Response: 18.7.

2. Discussion of the questionnaire

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 practice. 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% of ten). 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 marked 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 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%.

[87] 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

[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).

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, followed by force majeure clauses as general clauses, and lastly, the hardship clauses. The last clause apparently is more widely used in construction contracts.

II. 1B. General problems. Interpretation

For the problems raised under this heading by the General Reporter, reference is made to paragraph 1. One subject still deserves some discussion though, the principles of interpretation or construction of standard clauses, like the ones examined here.

A common dichotomy in the doctrine of construction of contracts, is the question whether the object of interpretation should be the intention of the parties confining the judge to an examination of the facts of the case, or rather: the content of the contract, its legal consequences, to be established under the guidance of the principle of good faith, in which process the actual intentions of the parties are elements of the case only, al though of importance. The latter approach, described by this author in earlier work as 'normative interpretation of contract', as opposed to the 'historic-psychological interpretation', for a considerable time now is the view taken in case law, as it was also by a majority of the legal scholars.[26]

In accepting the doctrine of interpretation in good faith, or normative interpretation, the Hoge Raad quite often dealt with the construction of standard clauses. In the *Koppe* case of 1949, it was held that a standard clause of an insurance policy [88] should not be read in its literal sense ('no premium, no pay'), but should be taken, in reasonable interpretation, in the sense given to it in business circles (i.e. payment refused in exceptional cases, and only if reasonable in the given circumstances).[27] In more recent cases, standards of interpretation in good faith have been handed down, among others the contra proferentem rule (compare also Article 1385 Dutch CC). It was explicitly held by the Hoge Raad in 1981, that literal interpretation based on rules of grammar, is not allowed in the construction of contracts, in casu to consider the question whether the contract contains a gap, which needs filling up by the interpreting judge, on the ground of good faith.[28] For reasons of brevity, I cannot go deeper into this exciting subject and shall therefore refer to some recent publications of mine.[29]

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[26] Van Dunné, *Normatieve uitleg van rechtshandelingen*, diss. Leyden 1971, 236; *Verbintenissenrecht in ontwikkeling*, 1985, 91.

[27] *NJ* 1950, 72.

[28] *Haviltex*, *NJ* 1981, 635.

[29] Van Dunné, o.c. 1985, note 26, 125; *AA* 1986, 379, annotation.

II. 2A. Specific problems. Automatic variation clauses

Although automatic variation clauses like indexation clauses score highest in our questionnaire on Dutch legal practice, little is known of this kind of clauses. Literature and case law are virtually non-existent in this field.[30] Apparently problems do not abound here.

Considering the technical character of most automatic variation clauses, and the few examples obtained through our questionnaire, a brief discussion of these clauses may suffice.

In one clause studied, an exchange rate Guilder/Sterling is fixed through the variation clause; a comparison is made between the 'Basic Exchange Rate' (date of agreement) and the 'New Exchange Agreement' (every subsequent calendar quarter). Three forms of deviation are provided for, in the following way. In the case of a deviation not exceeding plus or minus 10%, this will not effect contract prices; in the case of a deviation between 10 to 20%, of such deviation 50% will be reflected in the contract prices; finally, in the case of a deviation exceeding 20%, prices will be renegotiated by the parties.

Linking with the price-index figure, as established by the Central Bureau for Statistics (a government agency) is common in a range of contracts, like rent, concession, sale of goods, etc. As regards production costs, one finds quite often the wages linked to the price-index. Also a technique is used comparable to the cited exchange rate clause, in which the change in the average hourly labour cost is expressed as the ratio between the current and the base average hourly, determined on the basis of a manning table.[31] The same is done with the costs of materials and supplies. Sometimes for the rules of determination reference is made to a foreign agency, such as the 'Fiduciaire Suisse'.[32] In delivery contracts of electricity, gas or water, quite often a link is made in determining the overhead costs, with the official interest rate of the Netherlands Bank.[33] [89]

II. 2B. Adaptation or hardship clauses

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

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[30] The subject is touched by S. Royer and F.J.W. Löwensteijn, in their Preadv. Broed. Notarissen, *Verbintenisrechtelijke aspecten van geldontwaarding*, 1967; and also: A.L. de Wolf, *Veranderde omstandigheden*, 1979. For economic and legal backgrounds of inflation, see: F.J. Ballendux, *Geldlening, inflatie en goede trouw*, diss. Tilburg 1980, reviewed by Abas, *WPNR* 5625 (1982).

[31] See the example given by De Wolf, o.c. note 30, 95.

[32] Idem, 100.

[33] Idem, 99.

parties to 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 dealt 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 to such a degree hard or disproportionately expensive, that execution of the contract could not reasonably be required'; 'substantial hardship'; [90] '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 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 *f* 5,000.-'.

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

[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.

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 contract or not foreseen'. Quite of ten one finds a different expression with a force [91] 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 give 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]

2. The duty to renegotiate

A characteristic element of the hardship clause is the duty to renegotiate, which

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[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.

[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.

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 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 authors, 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 [92] 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 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

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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*, 1882, 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.

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.

The use of mediators to reach agreement between the parties in hardship negotiations is not a common feature in Dutch practice. I have not come across 'third party intervener clauses' and the like in our empirical study.

As to the point raised by Schmitthoff, whether parties may only make use of that instrument when provided for by a clause of that nature, this author has taken the view that according to Dutch law the contrary position should be taken, on the ground of good faith.[42] Commercial practice and course of dealing may be of influence here. [93]

3. The filling of gaps in the contract

Another way of looking at contract revision under changed circumstances, is to state that parties have not provided for certain events and therefore the contract is showing a gap. According to the Dutch Civil Code, Article 1375, in that situation parties are bound to the obligations derived from statute, custom or justice, or in general, from good faith (compare also Article 1374 Dutch CC). Before World War II, several authors took this point of view as the basis for their 'gap-theory', as the solution for imprévision cases. The theory has become obsolete, a single author perhaps dissenting, due to the straightforward application of good faith in these cases by the Hoge Raad in recent times.

In some clauses, however, one finds reminiscences of this line of thought. Compare: 'If the invalidity of one or more provisions of this Agreement or any other circumstance concerning the performance of this Agreement reveals a situation not provided for in this Agreement, the Parties shall jointly seek an arrangement having a valid legal and economic effect which will be as similar as possible to the ineffective provision and will cover the scope of any missing provision in a manner reasonably directed to the purpose of this Agreement'.

And also: '… cause an unfair hardship, the effective partner may propose a supplemental respectively modified provision which is equitable according to the intention of the parties at the time of conclusion of the contract; in the absence of any expression of the intention of the parties regard shall be had to what reasonable persons in the same situation would have intended. The other party shall accept such provision, unless consent to it cannot be expected from a reasonable businessman acting in good faith'.

Meanwhile, these clauses serve as an illustration of the thesis presented in the preceding section, that in the adaptation of contract guidance should be sought from the equilibrium or risk-allocation of the original contract.

III. The right of the parties to request revision of contract

The question dealt with in this paragraph, whether a party is entitled (ex lege) to

[42] Van Dunné, o.c. note 16, 130. In the same sense, although for exceptional cases, Horn, o.c. note 39, 284.

request a contractual revision, had been discussed elsewhere, especially in paragraph I. I refer to those observations.