FROM CLAUSULA REBUS SIC STANTIBUS TO HARDSHIP: ASPECTS OF THE EVOLUTION OF THE JUDGE’S ROLE

Pascal Pichonnaz*

1 Introduction

In a mixed legal system like the South African one, it might be interesting to compare and draw a link between two doctrines dealing with change of circumstances in relation to the performance of a contract, namely:

- *Clausula rebus sic stantibus*, a well-known expression to designate a legal construction that was present in some ways in Rome, but, more importantly, that has been enlarged by the canonists of the fourteenth century; and
- “Hardship”, a term with various legal consequences depending on whether it is used in the field of international law of contract, European private law projects or in English common law.

These two doctrines have attributed different roles to the judge, based on the relationship between the judge and statutory law, on the one hand, and the judge and the contract, the so-called “statute of the parties”, on the other hand. Indeed, if a “convention legally formed is the ‘statute’ of those who have done it” according to the famous article 1134 paragraph 1 of the French Civil Code (“Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites”), this does not necessarily mean that the convention is fully applicable in case of change of circumstances. “Statutes” may well be subject to revision, gap-filling or even creative interpretation. Why would it not be the same for the law of contract? However, the issue is more complicated, since a contract is primarily a “risk-allocation device”. Georges Ripert, a famous French jurist of the nineteenth century, used to say: “To conclude a contract is to foresee; contract is a pre-emption over the future” (“contracter, c’est prévoir; le contrat est une emprise sur l’avenir”). However, parties may not foresee or

1 Ripert *La règle morale dans les obligations civiles* (1949) n 84 at 151.

* Professor, University of Fribourg (Switzerland).
may not wish to foresee every possible change of circumstances in their contract. Indeed, this is also a matter of cultural divide between common law and civil law systems, among which the South African legal system has to choose its way. How, then, should the parties – and ultimately a judge – react when the circumstances have changed unexpectedly?

In France, for instance, for a very long time, authors of doctrinal works, and especially Georges Ripert, stated that to admit revision of a contract in case of an unexpected change of circumstances would take away any utility of the contract, which is supposed to warrant a party against the unforeseeable ("admettre la révision des contrats toutes les fois que n'a pas été prévue par les parties serait enlever au contrat son utilité même, qui consiste à garantir le créancier contre l'imprévu").

However, the latest draft to reform the French Civil Code (May 2009) contains a detailed provision on changed circumstances and revision of the contract by the judge. This draft comes almost at the end of a long revision process of the French Civil Code that was initiated after the Bicentennial of the Code in 2004 and which reached its first step with the so-called Catala pre-draft of September 2005. After several further drafts, it ended with the one prepared by the French Chancery in May 2009.

Ibid.

Avant-projet Catala (2005): Art 1135-1 AP Cat (2005): "Dans les contrats à exécution successive ou échelonnée, les parties peuvent s'engager à négocier une modification de leur convention pour le cas où il adviendrait que, par l'effet des circonstances, l'équilibre initial des prestations réciproques fut perturbé au point que le contrat perde tout intérêt pour l'une d'entre elles" (In contracts with successive performance, the parties can commit themselves to negotiate a modification of their agreement if it would happen that, by the effect of circumstances, the initial balance of the mutual performances is disrupted to the point that the contract loses any interest for one of them);

Art 1135-2 AP Cat (2005): "A défaut d'une telle clause, la partie qui perd son intérêt dans le contrat peut demander au président du tribunal de grande instance d'ordonner une nouvelle négociation" (For lack of such clause, the party which loses its interest in the contract can ask the president of the county court to order a new negotiation); Art 1135-3 AP Cat (2005): "Le cas échéant, il en irait de ces négociations comme il est dit au chapitre 1° du présent titre. Leur échec, exempt de mauvaise foi, ouvrirait à chaque partie la faculté de résilier le contrat sans frais ni dommage" (In that case, it would happen with these negotiations as it is said in the first chapter of the present title. Their failure, exempt of bad faith, would give the party the faculty to terminate the contract free of charge and damages).


See Draft 2008 of the Chancery: Art 135 – Draft 2008: "Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature" (my emphasis) (Agreements oblige not only for what is expressed, but also for all consequences that equity, usage or the law provide for according to the obligation's nature); Art 136 – Draft 2008: "Si un changement de circonstances, imprévisible et insurmontable, rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation à son cocontratant mais doit continuer à exécuter ses obligations durant la renegotiation. En cas de refus ou d'échec de la renégociation, le juge peut, si les parties en sont d'accord, procéder à l'adaptation du contrat, ou à défaut y mettre fin à la date et aux conditions qu'il fixe" (If a change of circumstances, unpredictable and insuperable, makes performance excessively onerous for one party which had not agreed to assume that risk, she can ask the other party for renegotiation, but has to continue to perform her obligations during renegotiation. In case of refusal or
Between interdiction for the judge to revise the contract and liberty to do it in the most recent draft, French law has gone through a whole series of possibilities. In April 1998, the South African Law Reform Commission had envisaged introducing, by means of statutory provisions, a right for a judge to revise the contract in certain situations,\(^5\) with reference to what was accepted in some European projects (Report Project 47, Annexure A, art 4 1 f). The proposed draft did not come into force, and the matter has not yet been settled.

To place the issue in context, I will first examine the origin of clausula rebus sic stantibus and thereupon compare it with the role of the judge in “hardship”, as understood by the recent European projects on law of contract. This discussion will be followed by a conclusion.

2 The origin of clausula rebus sic stantibus

After having examined the role of the judge in the case of changed circumstances in Roman law, I will focus on the legal construction of the clausula and the role of the judge in the Middle Ages. Finally, I will briefly discuss the impact of later jurists on this doctrine.

2.1 The role of the judge in the case of changed circumstances in Roman law

In Rome, as elsewhere, circumstances existing at the time of the conclusion of a contract did not necessarily stay the same. New circumstances vis à vis what existed or was envisaged at the time of conclusion may have caused additional difficulties for the debtor to perform his obligations. This is the working hypothesis for the rest of this section of the article.

One may envisage several situations which will be briefly discussed:

2.1.1 Impossibility

The most frequent legal construction in case of changed circumstances was impossibility to perform. However, terms like impossibilitas or impossibilium were basically used for initial impossibility to perform. In these situations, the contract did not produce any effects in the absence of an object.\(^6\) One may recall the case of a stipulatio presented by Celsus and generalised in the Justinian Digest (50 17 185): "Impossibilium nulla obligatio failure of renegotiation, the judge can, if so agreed by the parties, adapt the contract or, if not possible, terminate it on a date and on the conditions which he may determine).\(^5\)


Without any object, the obligation made no sense. Thus, the only question that remained was to determine whether the creditor in spe could ask for damages because he had been wilfully induced to think that the object of the contract was in existence or valid and that the invalidity may have rendered induced expenses worthless. This is the famous hypothesis of culpa or rather dolus in contrahendo, which will, however, not be discussed here.

"Supervening impossibility of performance" indicates those cases in which performance only became impossible after conclusion of the contract. In these cases Roman jurists did not speak about impossibilitas. They would usually associate these cases with the notion of periculum. Indeed, the risk to be borne by one or the other contracting party was the result of vis maior or the destruction of res certa by casus fortuitus. In these situations, the role of the judge was not different from his usual activity: he had to determine which party had to bear the additional risk by applying the periculum-rule applicable to the specific contract. Was the price still owed (eg periculum emporitis) or not (eg periculum venditoris)?


8 D 11 7 8 1, Ulpianus libro vicensimo quinto ad edictum: "Si locus religiosus pro puro xx venisse dicetur, praetor in factum actionem in eum dat ei ad quem ea res pertinet: quae actio et in heredem competit, cum quasi ex empto actionem continet" (If a religious place is sold as if it were an ordinary property, the praetor grants the party to which it comes an actio in factum against the seller. This action is also valid against an heir, even if it virtually includes an action on sale). On this text, see Rodeghiero (n 7) 120ff.

9 For a recent analysis, see Kuonen La responsabilité précontractuelle, Analyse historique, Etude de la phase précontractuelle et des instruments précontractuels, Théorie générale du droit suisse (Thesis, University of Fribourg, 2007) nn 117 and 121; see also Rodeghiero (n 7) 61ff (sale of a free man as a slave), 117ff (sale of a thing extra commercium as a private thing).

10 Cf, eg, D 18 1 34 6, Paulus libro trigensimo tertio ad edictum, where Paul, dealing with a sale with alternative obligation, states as follows: "sed uno mortui, qui superos, dandum et ideo prioris periculum ad venditorem, posterioris ad emptorem respicit ..." (Should one [slave] die, however, the other must be given, so that the risk of the first is on the vendor, of the second on the purchaser).

11 Cf, for a list of events classified as vis maior, D 13 6 l8pr, Gaius libro nono ad edictum provincial; D 44 7 14, Gaius libro secundo aureorum; D 50 17 23, Ulpianus libro vicensimo nono ad Sabinum; see also Ernst "Wandlungen des ‘vis maior’-Begriffes in der Entwicklung der römischen Rechtswissenschaft" 1934 (22) Index 293ff.

12 On the regime, cf in particular Pichonnaz (n 6) n 86f and the quoted references.
212 The so-called “difficultas dandi”

One can, however, also imagine a situation in which it was, although not impossible, difficult to perform as a result of *vis maior*. The object of performance was, for instance, not fully destroyed or it was too onerous to perform *hic et nunc* (here and now). In such a case, Venuleius spoke about a *difficultas dandi*, difficulty to perform,\(^1\) in a well-known text, namely *D 45 1 137 4:*\(^1\)

Ille inspiciendum est, an qui centum dari promisit confestim teneatur, an vero cesset obligatio, donec pecuniam conferre possit. Quid ergo, si neque domi habet neque inveniat creditorem? Sed haec recedunt ab impedimento naturali et respiciunt ad facultatem dandi. Est autem facultas personae commodum incommodumque, non rerum quae promittuntur. Et alioquin si quis Stichum dari spoponderit, quaeremus, ubi sit Stichus: aut si non multum referre videatur Ephesi daturum se’, an, quod Ephesi sit, cum ipse Romae sit, dare spondeat: nam hoc quoque ad facultatem dandi pertinent, quia in pecunia et in Sticho illud commune est, quod promissor in praesentia dare non potest. *Et generaliter causa difficultatis ad incommodum promissoris, non ad impedimentum stipulatoris pertinet*, ne incipiat dici eum quoque dare non posse, qui alienum servum, quem dominus non vendat, dare promiserit.

It should be considered whether someone who has promised to pay hundred is bound immediately, or whether his obligation remains suspended until he can collect the money. But what if he has no money at home, and cannot find a lender? The issue concerns not a natural obstacle, but deals rather with the ability to pay (*facultas dandi*). Thus, this ability to pay relates to personal convenience or inconvenience, and not to the content of a promise. Otherwise, if someone promised that Stichus will be conveyed, we have to inquire where Stichus was. Surely, it can make little difference whether someone promises to convey at Ephesus or promises when in Rome, to convey property which is in fact at Ephesus. This too relates to the ability to give (*facultas dandi*), since both money and Stichus have in common that the promissor cannot hand them over here and now. In general, *difficulty of performance* is a burden on the promissor, and not a bar to the stipulator, otherwise we might begin to say that one who promised to convey another’s slave cannot convey him if the owner refused to sell. (my emphasis)

13 Two other passages in the Digest mention *facultas dandi*: *D 26 3 7 1*, *Hermogenianus libro secundo iuris epitomarum*: "Si quaeratur, an exquisitione recte datu sit tutor, quattuor haec consideranda sunt: an hic dederit qui dare potuit, et ille acceperit cui fuerat dandum, et is datur cuius dandi facultas erat, et pro tribunali decretum interpositum"; *D 43 8 6*, *Iulianus libro quadragesimo tertio digestorum*: "Ei, qui hoc interdicto experiertur; quid in loco publico fiat, quo damnum privato detur’, quamvis de loco publico interdictat, nihil minus procuratoris dandi facultas est”. Only one in the Theodosian Code mentions it: *CTh 15 3 1pr (Impp Valentinianus, Theodosius et Arcadius ad Senatum, a 384 Jul 25)*: “Nulli privatorum liceat holosericam vestem sub qualibet editione largiri. Illud etiam constitutione solidamus, ut exceptis consulibus ordinariis nulli prorsus alteri auream sportulum, diptycha ex ebore dandi facultas sit.”

14 My emphasis.
I will not discuss this text in detail. I have done it elsewhere with Felix Wubbe. One can, however, see that in case of difficulty of performance, that is *difficultas dandi*, Venuleius was not ready to free the debtor from his obligation; *the debtor had to bear the inconvenience (incommodum)* related to the difficulty to perform (my emphasis). The judge only intervened to sanction the non-performance of a possible obligation by awarding damages. The contract would not be revised. In the Middle Ages, Thomas Aquinas (1221/1228-1274 AD) followed another path: according to him any promise was limited to what the debtor could (subjectively) do (“*Ad secundum dicendum quod si illud quod quis votit ex quacumque causa impossibile reddatur, debet homo facere quod in se est, ut saltem habeat promptam voluntatem faciendi quod potest*” (If that over which one has promised has become impossible for whatever reason, the debtor must do whatever he can and have the will ready to do whatever is possible ...))). Thus, the debtor would be released from his obligation when he could no more perform, despite the fact that someone else would still be able to perform. This idea obviously did not solve the question of an obligation which was still possible, but more burdensome for the debtor. Aquinas’s idea had indeed some influence on modern thinking.

2.3 Revision of a pecuniary obligation

A third hypothesis was a judge’s ability to revise pecuniary obligations. This was mainly possible, first, in contracts of sale by means of the *actio quanti minoris* in case of defects of goods which justified a price reduction. Secondly, it was also possible through the so-called *remissio mercedis* in case of agricultural leases. In this latter case, the farmer could ask for partial or total remission of his rent if extraordinary circumstances had led to an extremely bad harvest. *Remissio mercedis* was applied in a typical situation of changed circumstances which led to the intervention of the judge in the contract and triggered the revision of what

---

17 See, for a recent discussion, Pichonnaz (n 15) 591ff.
was due. The basic idea was, however, that the *locator* did not only have to hand over possession of agricultural land, but that he also had to guarantee the effective perception of fruits.\(^{20}\) When this was the case, the counter-performance had to be reduced, as mentioned by Ulpian (*D 19 2 15 7*). This reduction was in principle not final, since in case of a good harvest the following year, the *locator* could request not only the full rent for the current year, but also the part that had been suppressed the previous year (Ulpian *D 19 2 15 4*).\(^{21}\)

Contrary to what has been held by some authors, it is therefore not the lack of money or the weak position of the farmer that justified this *remissio*, but actually the result of *vis maior* that affected the quantum of a harvest.\(^{22}\) One may agree with Kaser,\(^ {23}\) saying that a farmer was granted a favour when he was freed from a part of or the entire rent while facing a very bad harvest, as may be read in the passage by Servius cited by Ulpian (*D 19 2 15 2*).

In the case of *remissio mercedis*, the role of the judge might have been important since he had to reduce the rent *in proportion with the bad harvest* (my emphasis). How should he estimate it? Where should the line be drawn between a bad harvest entitling one to a *remissio* and a harvest which was unsatisfactory, but not yet sufficient to open the door for *remissio*? And above all, what was the amount of reduction? Confronted with *ali* these questions, it is not surprising that Ulpian, citing Papinian in *D 19 2 15 4*, underlined the "transactional rate" of *remissio mercedis* ("quasi non sit donatio, sed transactio").\(^{24}\)

One further has to consider the procedural context. To the landlord’s *actio ex locato* the farmer could oppose the *sterilitas*. In this *iudicium bonae fidei*, the judge was then allowed to condemn the lessee only to what was due *ex fide bona*, which imposed upon him the duty to take into account the *sterilitas*, the fact that the land had been (more or less) sterile during the specific year. Parties might then have agreed on the amount to be paid while in the presence of the praetor, or possibly in front of the judge: that is why Ulpian speaks about *transactio*.

---

20 Harke (n 19) 21; Ernst “Das Nutzungsrisiko bei der Pacht” 1988 (105) *Zeitschrift der Savigny Stiftung (Romanistische Abteilung)* 541ff, in particular at 542 (with references to the more ancient literature); Müller *Gefahrtragung bei der locatio conductio* (2002) 32; also Pichonnaz (n 19) 837; Schermaier “Plus quam fecerit facere non potuit. Überlegungen zu den Grenzen der Leistungspflicht im römischen Recht” in *Cuscione & Masi Studi in onore di Luigi Labruna* Vol 7 (2007) 508ff, in particular 509ff.

21 Capogrossi Colognesi (n 19) 77; Harke (n 19) 31; Pichonnaz (n 19) 835ff, in particular 838.


23 Kaser “Periculum locatoris” 1957 (74) *Zeitschrift der Savigny Stiftung (Romanistische Abteilung)* 155ff and in particular 170ff.

24 For a revealing analysis, see also Capogrossi Colognesi (n 19) 79.
Contrary to supervening impossibility, where the allocation of risk was predetermined on an “all-or-nothing” basis, the regime of *remissio mercedis* allowed the judge to revise the counter-performance according to the changed circumstances (my emphasis).

What was then the ground for it? The most recent opinion considers rightly that it was the consequence of *vis maior* affecting the right to obtain the fruit (*ius percipendi*), a right that was an integral part of the obligations of the *locator*. Later on, Emperor Alexander Severus (*C 4 65 8; a 231 AD*), and then the Emperors Diocletian and Maximian (*C 4 65 19; a 293 AD*) mentioned that a contractual clause or usage may derogate the regime of *remissio mercedis*, which also underlines that reduction was based on the principle of good faith and risk allocation.

As we will see, recent projects and some legal systems have also based the revision of a contract for changed circumstances on the principle of good faith. However, what is notable is that *remissio mercedis* was not the way followed in the Middle Ages to deal with the issue of changed circumstances and that modern solutions did not emanate from the idea of *remissio mercedis*, despite the fact that it is quite similar to a modern understanding of changed circumstances.

2.2 The role of the judge in the case of changed circumstances during the Middle Ages

One might have thought that similarly to what has happened with *laesio enormis*, medieval jurists might have tried to generalise the principle of *remissio mercedis* in order to solve the issue of changed circumstances. However, this was not the case; the power of the judge to adapt the contract was solved by other means, based on two well-known texts of the *Digest*: *Africanus* *D 46 3 38pr* and *Neratius D 12 4 8*. I have no concrete suggestions or explanations why the idea of *remissio mercedis* did not impose itself as a means for generalisation, but it might well be that the “transactional nature” of the device did not seem to be “technical” enough to ground a general response to the change of circumstances. Or possibly the “transactional nature” seemed inappropriate in the context of medieval procedure.

Medieval lawyers used the interesting device of *condicio tacita*, an implied condition to any promise, to ensure that the change of circumstances may be taken into account. In the Middle Ages, this implied condition was designated by the term *rebus sic se habentibus*. The promise would not necessarily be cancelled, but at least the enforceability of the obligation might be suspended. The suspension of maturation was the result of the supervening condition, expressed with the following words: “as long as circumstances are as they were at the time of the promise.” This is the result of a gradual

25 Harke (n 19) 21; Ernst (n 20) 541ff, in particular 542; Müller (n 20) 32; Pichonnaz (n 19) 835ff, in particular 836ff.


27 In this regard see Cardilli (n 7) 1ff and his discussion of Romanist literature dealing with these texts.
evolution which has been discussed in detail, especially by Robert Feenstra and Michael
Rummel.\textsuperscript{28}

This is therefore not the place to present a detailed discussion of the development.
However, one should keep in mind that the regime evolved under the influence of both
the civil and canon law.

\subsection*{2.2.1 Civil law}

In civil law, the idea to take changed circumstances into account first appeared in the
glossa \textit{potest} ad \textit{D 12 4 8 (Quod Servius)}\textsuperscript{29}

\textit{D 12 4 8} discusses the question of restitution of a dowry in the case of a marriage
concluded between two fiancés, both of whom have not yet reached the legal age for
marriage. Normally, a dowry had to be restituted to the spouse in case of divorce.\textsuperscript{30} Would
that also apply if divorce would occur before the matrimonial majority of both persons?
According to Neratius, during the quasi-matrimonial relationship of these two fiancés,
there was no right of restitution for the paid dowry. For him, \textit{there is no restitution as
long as the possibility of a valid marriage remains} ("quamdiu pervenire potest") (my
emphasis). Explaining this notion, the glossa \textit{potest} ad \textit{D 12 4 8 (Quod Servius)} states
the following:\textsuperscript{31}

\textsuperscript{28} See Rummel \textit{Die clausula rebus sic stantibus, Eine dogmengeschichtliche Untersuchung unter
Berücksichtigung der Zeit von der Rezeption im 14. Jahrhundert bis zum jüngeren Usus modernus
"Impossibilias et clausula rebus sic stantibus. Some aspects of frustration of contract in continental
legal history up to Grotius" in Watson (ed) \textit{Daube Noster, Essays in Legal History for David
Rechtsgrundsätze: Das Beispiel der clausula rebus sic stantibus” in Zimmermann (n 15) 171ff, in

\textsuperscript{29} \textit{D 12 4 8, Neratius libro segundo membranarum: “Quod Servius in libro de dotibus scribit, si inter
 eas personas, quarum altera nondum iustam aetatem habeat, nuptiae factae sint, quod dotis nomine
 interim datum sit, repeti posse, sic intellegendum est, ut, si divorium intercesserit, prius quam
 utraque persona iustam aetatem habeat, sit eius pecuniae repetitio, donec autem in eodem habitu matrimonii
 permanent, non magis id repeti possit, quam quod sponsa sponso dotis nomine dederit, donec maneat
 inter eos adfinitas: quod enim ex ea causa nondum coito matrimonio datur, cum sic detur tamquam in
dotem perventurum, quamdiu pervenire potest, repetitio eius non est” (When in this book on dowries
Servius writes that if a marriage has taken place between persons neither of whom has yet reached
the lawful age, whatever in the meantime has been given by way of dowry can be recovered; we must
understand this in that sense that if a divorce is obtained before either person has reached the lawful
age, the money may be recovered. However, so long as they remain in the state of matrimony, the
property cannot be recovered any more than when it is given as dowry by a fiancée to a fiancé while
the relationship subsists between them. Property given in this way before the marriage is entered as
given, so to say, as a potential dowry, cannot be recovered as long as it is possible that the (valid)
marriage may happen (my emphasis).

\textsuperscript{30} See, among others, Kaser (n 6) 336ff, Kaser & Knütel \textit{Römisches Privatrecht} (2008) § 59 n 19;
Pichon (n 18) 166 n 665f.

\textsuperscript{31} Glossa \textit{potest} ad \textit{D 12 4 8 (Quod Servius)} (ed Io Fehi, Lugduni 1627; repr Osnabrück 1965) (my
emphasis).
Si istud potest, extendatur (ut dialectici dicunt) quamdiu uterque vivit, etiam misso repudio non esset repetitio. Nam semper possibile est quod fiat hoc matrimonium. Sed certe nos non extendimus: Sed secundum praesens iudicamus et rebus sic se habentibus loquimur: ut [D. 45,1,137,4].

If the word “potest” is interpreted so broadly (as expressed by dialecticians) that it means “as long as both are alive”, there will be no restitution if both get apart. As a matter of fact, it is still possible that the persons engaged get married [later on]. But we certainly do not want to go so far: But we judge according to the present and we therefore say circumstances being as they were, see D 45 1 137 4 (my emphasis).

However, the idea was not to introduce an implied condition, but to determine at what moment one had to place oneself to determine whether there was still a “possibility to get married” (my emphasis). The Glossa considers that at the time of judgement, the judge has to decide rebus sic se habentibus, that is to say by taking into account the facts as they are at the time of his decision; he does not have to predict the future (my emphasis). Thus, by placing oneself at the time of decision, the judge excludes further changes, but at the same time, he accepts the idea that circumstances may have changed from the beginning until the moment of judgement. However, the glossa does not draw any general conclusions on the question of changed circumstances.

The expression appears later in Bartolus’ (1313-1357) commentary on the Digest. Dealing with the same passage, he indicates that one has to “understand” the expression quamdiu contrahi potest as meaning “as long as circumstances remain the same” (quamdiu rebus sic se habentibus). This is a first important step. Indeed, Bartolus proceeds to a dogmatic step. The Glossa used the term loquimur to introduce the expression, thus giving an essentially descriptive meaning to rebus sic se habentibus. Bartolus, on the contrary, adds a dogmatic aspect by using the word intelligi (“to be understood as”). He thus places the whole discussion on a normative level and opens the door for a generalisation of his ideas.

This generalisation was then achieved by Baldus (1319/27-1400) in a commentary on a different passage, namely on a text by Africanus (D 46 3 38pr35) dealing with a

---

32 Bartolus Opera omnia. In primam Digesti Veeris partem Commentaria (ed Turin 1574, fol 43v), ad D 12 4 [Quod Servius] n 2: “Nam ista verba: Quamdiu contrahi potest, debent intelligi, quamdiu rebus sic se habentibus, non enim debet intelligi, potest, id est, possibile est, quia iste est intellectus logicorum, ita dicit glossa” (Since these words: “as long as the contract [of marriage] can be concluded” have to be understood as meaning “as long as circumstances remain the same”; indeed one does not have to understand “potest” as [meaning] “is possible”, since this is understood by logicians, as said by the glossa).

33 In opposition to Luig (n 28) 171ff, and in particular at 177, I think that Bartolus certainly played an important role, but he was not really involved at the beginning of the generalisation of the doctrine of the clausula; see also Cardilli (n 7) 7 n 8.

34 See Pichonnaz (n 6) n 119; see also Cardilli (n 7) 7f.

35 D 46 3 38pr, Africana libro septimo questionum: “Cum quis sibi aut Titio dari stipulatus sit, magis esse ait, ut ita demum recte Titio solvi dicendum sit, si in eodem statu maneant, quo fuit, cum stipulato interponeretur: ceterum sive in adoptionem sive in exilium ierit vel aqua et igni ei interdictum vel servus factus sit, non recte ei solvi dicendum: tacite enim inesse haec convention stipulationi videtur ‘si in eadem causa maneant’” (When someone stipulates that something be given to himself or to Titius,
stipulation in which a tacit condition ("si in eodem statu maneat") was inserted. Baldus here affirms: "Ex ista lege, nota regulam quod omnis promissio intelligitur rebus sic se habentibus" (From this law, one has to draw the rule that any promise is to be understood in so far as the circumstances are as they were). Baldus also uses the word intelligitur to underline the normative component of this expression. It is no more a question of a judge having to decide in a concrete case, but a general provision that it must be kept in mind that a promise was given in the light of circumstances existing at the time it was made.

2.2.2 Canon law

Baldus affirms that one has to take into account the development of circumstances to know whether a debtor is still bound by his initial promise. He borrowed this idea from the canonists.

The origin of the reasoning goes back to the Decretum Gratiani (dated approx 1140 AD) and to the canon Ne quis (= C 22, q 2, c 14). Indeed, this canon discusses the distinction between lying and hiding the truth on the basis of a text by Augustinus (354-430 AD). Augustinus himself is inspired by a well-known passage of Cicero in his book on duties (De officiis): A sword had been given to a person who promised to give it back when requested to do so; if the sword was requested while the person who deposited it was in a status of insanity, the sword did not have to be returned since it might have been dangerous for him or others. Based on that text, the glossa furens to the Decretum

he [Julian] says that it is better that it be said that payment may lawfully be made to Titius in the given circumstances, that is, that he remains in the same position that he was when the stipulation was made: but should he have been adopted, gone into exile, been interdicted from fire and water, or become a slave, it is to be said that lawful payment may not be made to [Titius]; for there appears to be in the stipulation the tacit agreement "if he remain in the same legal position" (my emphasis).

36 Baldus Opera omnia. In Digestum Novum Commentaria (ed Venice 1577, fol 38r) ad D 46 3 38 [Cum quis].

37 [Pro temporali uita alicuius perfectus mentiri non debet.] Item Augustinus in quinto Psalmo. [ad uerisc.: "Perdes omnes, qui locuntur."] "Ne quis arbitretur perfectum et spiritualum hominem pro ista temporali uita, morte cuius sua uel alterius non occiditur anima, debere mentiri, sed quoniam aliiu est mentiri, aliiu uerum occultare; siquidem alius est falsum dicere, alius uerum tacere; ut si quis forte non uelit ad istam uisibilem mortem hominem prodere, paratus esse debet uerum occultare, non falsum dicere, ut neque prodat, neque mentiatur, nec occidat animam suam pro corpore alterius. §. 1. Duo uero sunt genera mendaciorum, in quibus non est magna culpa, sed tamen non sunt sine culpa; cum aut iocamus, aut, proximo consuendo, mentimur. Illud autem primum in iocando ideo non est perniciosum, quia non fallit. Nout enim ille, cui dicitur, iocandi causa fuisse dictum. Secundum autem ioco mitius est, quia retinet nonnullam beniuolentiam. §. 2. Illud uero, quod non habet duplex cor, nec mendacium quidem dicendum est, uerbi gratia, tamquam, si cui gladius commendetur, et promittat se redditori, cum ille, qui commendantui poposcerit; si forte gladium suum repetat furens, manifestum est, non esse reddendum, ne uel se occidat, uel alios, donec et sanitas restituirur. Hic ieco non habet duplex cor, quia ille, cui commendatus est gladius, cum promittebat, se redditori poscenti, non cogitabat furenter posse repetere. §. 3. Manifestum est non esse culpandum aliquando uerum tacere, falsum autem dicere non inuenitur concessum sanctis" (my emphasis).


39 Cicero De officiis 3 25 [95]: "Si gladium quis apud te sana mente deposuerit, repetat insaniens, reddere peccatum sit, officium non reddere" (Suppose that a person leaves his sword with you when he is in
Gratiani by Johannes Teutonicus (1180-1252 AD) summarised the idea clearly: “Ergo semper subintelligitur haec conditio, si res in eodem statu manserit.” Therefore, one must always imply this condition “if circumstances remain in the same status”; we could add “as at the time when the promise had been given”.

Thomas Aquinas (1221/1228-1274 AD) considers the same question in connection with the binding force of a promise. He concludes by saying that “potest tamen excusari... si sunt mutatae conditiones personarum et negotiorum” (The person who promised can, however, be excused if conditions of the persons or of the transactions have changed (my emphasis)).40 These explanations have influenced the way Baldus has generalised the expression “rebus sic se habentibus” some fifty years later.

During that period, however, the role of the judge was restricted. The aim of the implied condition is to allow him to expand the traditional consequences of supervening impossibility (suspension or termination of the obligation) to cases of changed circumstances. The creative intervention of the judge is restricted to read an implied condition into the agreement; he does not revisit the equilibrium between performance and counter-performance. Indirectly though, the judge has an impact on this balance since he has to decide whether “conditiones personarum et negotiorum” have changed in a given situation.

This solution of an all-or-nothing approach may freeze parties in their respective positions and prevent them from (re)negotiating their agreement. The dogmatic construction and the effects of the “clausula rebus sic stantibus”-doctrine differ with regard to their results from those we have seen with remissio mercedis. The latter seemed to help parties in finding a transactional solution based on the principle of good faith, inherent to the actio locati sanctioning the contract of locatio conductio; the solution was therefore often directly based on the will of the parties. On the contrary, under the clausula regime, the ground for the judge’s intervention is to read an implied term into the contract, based on the principle of good faith.

2.3 The impact of later jurists on clausula

For purposes of this article, I cannot follow the rest of the development of “clausula rebus sic stantibus”, especially how the expression “rebus sic habentibus” evolved towards “rebus sic stantibus”.41 first apparently used in a legal opinion by Ludovicus Pontanus (1409-1439 AD)42 and recognised as a general rule by Philippe Decius (1454-1535 AD)43 in one of his legal opinions: “Et est regula communis, quod verba contractus et statuti intelliguntur ‘rebus sic stantibus’ ideo” (And it is a general rule that the terms of a contract and a statute are understood as circumstances being as they were (my emphasis)).44

40 Thomas Aquinas (n 16) Secunda secundae, Quoest 110 art 3.
41 See, eg, Rummel (n 28) 67.
42 Idem 48.
43 Idem 66.
44 Decius Consilia (ed Venetiis, 1575) at 367, cons 335 n 4.
Humanists like Donellus, Antonius Faber and Barnabé Brisson have continued to use the idea of an implied condition “si res in eodem statu permaneat” although Faber used the expression *clausula* in a specific passage. Grotius also used the implied condition “si res maneant quo sunt loco”, although he understood it slightly differently, that is as the “motivation” for the promise. For him, it is necessary that the stability of circumstances has been included within the motivation for a promise. Grotius therefore rejects the idea that any promise be limited by a condition referring to the stability of circumstances prevailing at the time of conclusion of the promise or the contract. Thus, for him, the stability of circumstances must have been intended by the parties and be considered part of the motivation for such promise. This restrictive application of the principle is taken over by other authors of natural law, such as Pufendorf.

Most of the natural law codifications followed this rejection of an implied condition *rebus sic stantibus* which would be part of any promise. After a last reminiscence in the Codex Maximilianeaus Bavarius Civilis (CMBC) of 1756, providing for a general rule on the *clausula*, the Prussian Code of 1794 has taken over the restrictive way, even if Suarez in his *revisio monitorum* again mentioned the possibility of *clausula*. The French Civil Code of 1804 and the Austrian Civil Code (ABGB) of 1811 have erased any reference to the idea of *clausula rebus sic stantibus*.

45 Rummel (n 28) 91f.
46 Faber *Coniectura* (ed Lugduni, 1602) at 57 f 17, c 14, n 1: “Siquidem ni omni mandato subintelligitur semper clausula illa, si res in eodem statu permanerit” (my emphasis).
47 Grotius *De iure belli ac pacis* (1993) at 421, l 2, c 16, § 25, n 2: “Solet et hoc disputari, an promissa in se habeant tacitam conditionem, si res maneant quo sunt loco: quod negandum est, nisi apertissime pateat, statum rerum praesentem in unica illa quam diximus ratione inclusum esse” (We are used to discuss the question whether promises encompass the tacit condition “If circumstances have remained as they were”: One has to answer negatively, unless it is completely obvious that the actual state of circumstances is included in the ratio of which we have spoken).
48 For an analysis see Rummel (n 28) 109.
49 CMBC IV § 12: “(Interitu vel mutatione rei) Durch den völligen Untergang (a) der Sache wird man der Obligation nur entbunden, wenn jener *citam culpam vel dolum debitoris* sich ergibt. Durch die Veränderung der Sache (b) fällt die Obligation nicht so leicht weg, dann obschon selbige *clausulam rebus sic stantibus* allzeit stillschweigend in sich hält, so legt man doch selber ausser den in Cod. Bemerkten drey requisits keine Kraft und Wirkung bey” (Freiherr von Krietmayr (ed) *Compendium Codicis Bavarii* (1768 ed repr 1990) 277).
50 ALR 15 § 377: “Ausser dem Fall einer wirklichen Unmöglichkeit, kann wegen veränderter Umstände, die Erfüllung eines Vertrags in der Regel nicht verweigert werden.”
51 Suarez *Revisio monitorum*, quoted according to RGZ (v 15 11 1879 – I 27/79), at 1ff, in part at 109f. “An und für sich hat dieselbe in der Natur der Sache ihren vollkommenen Grund und hebt die grossen Unbilligkeiten [auf], welche aus einem uneingeschränkten Bestehen auf Erfüllung der Verträge in unzähligen Fällen entstehen”, so ALR 15 § 378 allowed exceptionally not to perform a contract; see on this point Meyer-Prizl in Schmoeckel, Rückert & Zimmermann (n 7) §§ 313-314 n 5 at 1712.
52 § 1447 ABGB: “Der zufällige Untergang einer bestimmten Sache hebt alle Verbindlichkeiten, selbst die, den Wert derselben zu vergüten, auf. Dieser Grundsatz gilt auch für diejenigen Fälle, in welchen die Erfüllung der Verbindlichkeit oder die Zahlung einer Schuld durch eine Zufall unmöglich wird”; see also Meyer-Prizl (n 51) §§ 313-314 n 5f at 1711f.
Grotius’ construction consisting in recognising a judge’s right to intervene in the contract only if the ratio had included the stability of circumstances, implies a detailed analysis with a very subjective approach. Natural law therefore admitted the judge’s intervention only if the stability of circumstances was at the essence of the promise made. In that situation, however, the promise had no ground anymore (French lawyers would say no “cause”) and would therefore be invalid.\textsuperscript{53} This explains why French law, for instance, has always been very reluctant towards the idea of \textit{clausula rebus sic stantibus} or what they call \textit{imprévision}.

However, even German law remained quite sceptical for a while, as one can see from the rejection of Windscheid’s \textit{Voraussetzungslehre}.\textsuperscript{54} One had to wait for World War 2 and the extremely high inflation rate to see the introduction of the so-called \textit{Wegfall der Geschäftsgrundlage} theory as proposed by Oertmann.\textsuperscript{55} However, I do not wish to continue analysing this theory which eventually ended up with a kind of device for revision in case of changed circumstances.\textsuperscript{56}

### 3 Hardship and the role of the judge

I now wish to consider the notion of “hardship”, the other \textit{terminus technicus} often used in practice. The term “hardship” has different meanings:

- First, and in a non-technical sense, it means just “an important inconvenience” for one party.\textsuperscript{57}
- Second, the expression is to be found in famous English cases related to the notion of impossibility or what is usually called “frustration”. In \textit{Davis Contractors Ltd v Fareham Urban DC} one reads: “It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for …”\textsuperscript{58}

The construction of an implied condition, or what is usually called an implied term, has often been used in English law, for example in the well-known \textit{Taylor v Caldwell} case of 1863. The Surrey Gardens and Music Hall was partially destroyed by fire six days before it was supposed to be used for a ball party. The lease contract had been concluded for a fixed period of time. Judges considered that there was an implied condition in the contract that “the premises would continue to exist”:

\textsuperscript{53} Art 1108 CCfr: “Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract; A definite object which forms the subject-matter of the undertaking; A lawful cause in the obligation” (my emphasis).
\textsuperscript{54} Windscheid \textit{Die Lehre des römischen Rechts von der Voraussetzung} (Düsseldorf 1850).
\textsuperscript{55} Oertmann \textit{Die Geschäftsgrundlage. Ein neuer Rechtsbegriff} (1921); for all the others, see also Schermaier (n 7) n 82 before §§ 275 BGB at 925.
\textsuperscript{56} For a discussion, see, eg, Schermaier (n 7) n 82 before §§ 275 BGB at 925; Meyer-Prizl (n 51) §§ 313-314 n 9f at 1714ff.
\textsuperscript{57} Pichonnaz (n 6) especially 170ff.
\textsuperscript{58} \textit{Davis Contractors v Fareham Urban DC} [1956] AC 696 at 729; [1956] 3 WLR 37 (H L).
The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.  

That construction of impossibility has been abandoned in English law. Judges no longer read in an implied provision. They have gone a step further, accepting that impossibility renders the object of the contract radically different from what was undertaken by the contract.

Hardship also designates the doctrine dealing with consequences of changed circumstances in European private law and international commercial contracts. In a way, this is quite surprising, since English law does not give way to revision of the contract in case of “hardship” in the form of changed circumstances. In English law, either the change of circumstances is so important that one has to consider that the contract is so fundamentally altered that performance has become impossible (this is “frustration”), or it is not so important and parties remain bound to their promise unless they have contractually provided for a solution. This solution is very close to Grotius’ perspective.

The English term “hardship” is also used in French law, in international principles and in European principles on the use of contract law. This is certainly linked to the use of contractual hardship clauses in international contracts which are usually written in English.

What is the role provided for the judge by the Unidroit Principles on International Commercial Contracts (PICC) in case of hardship? Although not mandatory, these Principles are often cited or used by arbitrators. Recently, the Belgian Supreme Court (Cour de cassation) used the PICC hardship provision to fill the gap of article 79 CISG:  

59 Taylor v Caldwell (1863) 122 ER 309, 32 LJ (QB), 164 (also 3 B & S 826); this judgment is also discussed in great detail in Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] QB 679 (CA).

60 Davis Contractors v Fareham Urban DC [1956] AC 696 at 729; [1956] 3 WLR 37 (H L).


64 Art 79 CISG states: “(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) If the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. (3) The exemption provided by this article has effect for the period during which the impediment exists. (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the
since this provision does not deal with hardship. It is therefore interesting to see what role has been allocated to the judge by the PICC in case of changed circumstances.

After having recalled that contracts have to be observed (art 6 2 1 PICC), the Unidroit Principles define “hardship” in the following way (art 6 2 2 PICC):

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

Thus, one important reason to accept the idea of hardship is the reasonable unpredictability of the inconvenience (my emphasis). This is, however, a difficult point to determine. Research has shown that a judge appreciating ex post the predictability of occurrence of an event will systematically overestimate it. This is called the “hindsight bias”, which might have led Winston Churchill (and many others) to make the following bon mot, namely “it is difficult to make predictions, especially on the future”. Therefore, it may be said that in practice the condition of predictability may be applied in a (too) restrictive way, despite the openness of the condition at first sight.

However, what we are more interested in is the exact role given to the judge by these new models. Article 6 2 3 par 1 PICC wants to promote parties’ renegotiation in case of hardship. It ends up promoting the same as the remissio mercedis-concept in Roman times:

In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.”

In the absence of any agreement as a result of this negotiation or in the absence of true negotiation, a party may ask the judge to revise the contract (art 6 2 3 par 3 PICC). He party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt. (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.”

65 Art 6 2 1 (Contract to be observed): “Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.”


68 Art 6 2 3 (Effects of hardship): “(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on
might either terminate the contract or restore the (subjective) equilibrium of the contract (art 6 2 3 par 4 lit b PICC). This role is, however, new and the result of a long practice in international commercial contracts with the so-called "hardship" clauses.

The regime is therefore based neither on an implied condition, nor on the idea that the ratio (as envisaged by Grotius) has been affected, but on the central idea that it is no more compatible with good faith to insist on performance if the equilibrium has been disrupted seriously (my emphasis). From the absence of cause or the idea of frustration, one reaches the idea of equality in exchange (my emphasis). What matters is to ensure that the subjective equality in exchange is not affected in a way that parties did not envisage. The predictability test therefore exists in order to set limits to the right to have the contract revised. It would be contrary to good faith to insist on restoration of the equilibrium if parties could have provided for the situation that occurred and then did not, either purposely or negligently.

One can return to Davis Contractors Ltd v Fareham Urban DC [1956] where Lord Radcliffe abandoned the idea of implied terms by saying that it is difficult to admit implied terms when parties simply did not envisage such a situation:

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.70

According to this view it is fundamental that the judge does not immediately intervene in the contract. Parties should first try to find a transactional solution. They usually know better what they want and what their initial aim was. In their negotiations, they do, however, know that the judge might step in if they do not agree on a solution. This Damocles sword hanging over their contract will motivate them to act in good faith. Experience tells that parties usually think that a judge might not find a better solution than they themselves will.

It might seem surprising, but one has to recognise that the system put up by the Unidroit Principles seems the most flexible and the most appropriate one to maintain contracts that may still be economically sensible. This idea of contractual equity was present in the case of remissio mercedis, a path that was not followed by medieval lawyers. However, this idea of equality in exchange grounded on the contract itself, is

which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium.”

69 For an analysis of what is at stake, see, among others, Gordley (n 26) 1587.
70 See n 60 supra.
inherent in both the solution of the Unidroit Principles and the Draft Common Frame of Reference solution, the new draft for a potential European Civil Code.

In the Draft Common Frame of Reference of February 2009, the drafters grounded the revision of the contract on “contractual justice” (what we would call equality in exchange or in Aristotelian terms iustitia communativa). Indeed, Article III-1:110 paragraph 2 DCFR requires for any judicial intervention into the contract, that “it would be manifestly unjust to hold the debtor to the obligation” (my emphasis). So, there is no longer any reference to an implied condition or a will theory, but merely to contractual justice.

The judicial revision is also restricted by the fact that parties must first “attempt, reasonably, and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation” (Art III-1:110 par 3, lit d DCFR). Again, the judge shall intervene only to keep contractual justice alive. That is also why he has to “vary” the obligation “in order to make it reasonable and equitable in the new circumstances” (Art III-1:110 par 2, lit a DCFR), whatever this may mean.

4 Concluding remarks

In 1998, the South African Law Reform Commission envisaged a statutory provision in line with the Unidroit Principles (PICC) and/or the European Principles on Contract Law (so-called Lando Principles). In my opinion, this is a proper way to get rid of the reluctance towards revision of contract that dates back to the time of Grotius in the seventeenth century. By basing revision of the contract on good faith and contractual fairness or even equity, one recognises the necessary flexibility needed to keep afloat contracts that are still economically viable.

It makes sense to expect parties primarily to keep the (subjective) fixed contractual justice alive despite a change of circumstances. It is also in line with the idea that the

71 South African Law Commission, Report: Project 47, Unreasonable Stipulations in Contracts and the Rectification of Contracts April 1998, Annex A, in which the Commission proposes the following clause: “4.(1) In the application of this Act the circumstances which existed at the time of the conclusion of the contract shall be taken into account and a party is bound to fulfil his or her obligations under the contract even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance he or she receives has diminished. 4.(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract, or has already occurred at that time but was not and could not reasonably have been known to the parties; and (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract; and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear. 4.(3) If the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances; and (c) in either case, award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith”.


judicial revision of the contract should try to keep up with the initial equilibrium and allocation of risk that had been made.

However, such a rule should not make it possible to revisit the initial contract under the false argument of hardship. This is why the predictability test is so important to the whole mechanism. However, due to the "hindsight bias"-principle judges might end up being too restrictive in applying such rule based on equity, since they will overestimate the predictability of the change of circumstances and therefore prevent any modification of the contract.

One should, however, see no contradiction between the obligation to respect one’s word and the hardship mechanism. On the contrary, imposing the duty to renegotiate on the contractual parties is in some way a device to ensure that the initial risk allocation and contractual justice are maintained despite the change of circumstances. Therefore, one can only encourage the South African Law Reform Commission to reconsider, once again, the idea of introducing a device for modification of the contract in case of changed circumstances. As our historical survey shows, this is also in line with the modern understanding of contract.

Abstract

Conclusion of a contract is a way to enable one to predict the future (Pascal: is this correct? We are not quite sure what you meant here). However, assumptions made by the parties at the time of conclusion may prove to be inaccurate. When unforeseen circumstances evolve after conclusion, one speaks of a change of circumstances. If these are due to events that could not have been foreseen or dealt with by the parties, principles of international contract law speak of hardship and allow a judge to adapt the contract under certain conditions. This intervention is nowadays largely based on the principle of good faith and fair dealings amongst parties. Despite the English term, it did not originate in English law which is very restrictive on this issue. It is the result of a long evolution of various schemes (Pascal: “schemes” sounds somewhat strange. Perhaps some other word would convey the meaning better?). This article focuses on various ways to deal with changed circumstances in Roman law, especially periculum and remissio mercedis. In the Middle Ages the influence of canon law led commentators, and especially Baldus, to introduce the idea of an implied condition (clausula rebus sic stantibus) into each obligation. The main steps of that evolution are presented. It was only in the twentieth century that the idea of an implied condition was largely abandoned in favour of a more flexible understanding which grants a judge the right to adapt the contract. The history of clausula rebus sic stantibus therefore also reflects the evolution of the role of the judge in the law of contract.