

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

FUNDAMENTAL CHANGE OF CIRCUMSTANCES IN CONTRACT LAW

ANDREW HUTCHISON

Thesis Presented for the Degree of

DOCTOR OF PHILOSOPHY

in the Department of Private Law

UNIVERSITY OF CAPE TOWN

March 2010

Supervisors: Professor Tjakie Naudé & Associate Professor Jaco Barnard-Naudé

Acknowledgements

The biggest thank you for help in completing this task must go to my supervisors, Professor Tjakie Naudé and Associate Professor Jaco Barnard-Naudé. Their assistance in reading and rereading drafts of this thesis was invaluable, as were the many discussions we had on the subject. Thanks also to Professor Margaret Hewett for her input on the historical chapter and to Tobias Schönwetter for helping me with the German texts. The assistance of Pamela Snyman and the library staff in finding books, articles and cases was also vital to the completion of this task.

A separate big thank you to my parents for their support: to my father, Professor Dale Hutchison for helpful comments here and there and to my mother, Jill, for always being there for me.

Finally thanks to the University of Cape Town Law Faculty for making it possible for me to attend two conferences, one at York University in Toronto and one at Nelson Mandela Metropolitan University, Port Elizabeth, which helped shape the ideas contained herein.

Plagiarism Declaration

1. I declare that this thesis is my own work and that there is no plagiarism present herein.
2. I have used the footnote convention for citation and referencing. Each significant contribution to, and quotation in, this thesis from the work, or works of other people has been attributed and has been cited and referenced.

Signed:

(Andrew Hutchison)

Date: 26 March 2010

Abstract

Parties to a contract base their consensus on the facts known to them at the time of contracting – should there be an unforeseen change in these circumstances, it may no longer be just for one party to enforce the agreement against the other. Because the losses and gains consequent upon a change in circumstances occur by chance, it is not fair to place the resultant burden on one party alone.

Already in Roman times, moral philosophers wrote of the circumstances under which a promise would no longer bind. Over the centuries this was extended into the realm of legally binding contracts under the banner of the *clausula rebus sic stantibus*, but this doctrine was vague and lax and it did not survive past the nineteenth century. With the rise of considerations of fairness in contracting, however, solutions to the problem of changed circumstances were once again deemed necessary. This occurred in the civil law world, in countries such as Germany and the Netherlands as well as in the common law world, through the export of the English doctrine of frustration. Today most Western legal systems recognise some form of rules to deal with changed circumstances, although the availability of this defence and the types of redress available vary from country to country. Perhaps the best available solutions are to be found in the supranational model rules, such as the Unidroit PICC, the PECL and the DCFR.

South Africa allows discharge in situations of objective supervening impossibility, but not for supervening change of circumstances. Comparatively, this leaves a gap in our contract law. The latest developments in constitutional law suggest that fairness in contracting has become an important limitation on the value of contractual certainty. With regard to comparative law, the argument can thus validly be made that fairness in contracting demands that the problem of changed circumstances be addressed. This should best be done through the inclusion of a common law rule, based on the equivalent hardship provisions of the PICC, read with the PECL and the DCFR. Renegotiation by the parties themselves would be the ideal outcome after a fundamental change of circumstances, alternatively a court should modify or discharge the contract itself.

Contents

	<i>Page</i>
Title Page	i
Acknowledgements	ii
Plagiarism Declaration	iii
Abstract	iv
Contents	v
Chapter 1: Introduction	1
1.1 The nature of the problem	1
1.2 The treatment of this problem in other legal systems	3
1.3 The problem in South Africa	4
1.4 The nature and methodology of this inquiry	5
Chapter 2: South Africa	8
2.1 Introduction	8
2.2 Supervening impossibility	10
2.2.1 Requirements for the doctrine of supervening impossibility	10
2.2.2 The influence of the doctrine of frustration	15
2.2.2.1 Frustration v supervening impossibility: essential differences	15
2.2.2.2 Frustration of purpose in the South African case law	17
2.2.2.2.1 Cases in favour of the doctrine of frustration	17
2.2.2.2.2 Cases opposing the incorporation of frustration into South African law	28
2.2.3 Commercial impossibility	33
2.3. Other concepts relevant to changed circumstances: suppositions and tacit terms	35
2.3.1 The theoretical nature of tacit terms and suppositions and their application to the problem at hand	36

2.3.1.1 Tacit terms	36
2.3.1.2 Suppositions	38
2.4 Change of circumstances in the context of specific performance	45
2.5 Legislation on change of circumstances?	47
2.5.1 South African Law Commission	47
2.5.2 National Credit Act	49
2.6 Conclusion	51
Chapter 3: Historical perspective – the <i>clausula rebus sic stantibus</i>	53
3.1 Origins and development of the <i>clausula</i> idea	53
3.1.1 Origins in classical Roman literature	54
3.1.2 Appearance in religious doctrine and canon law	58
3.1.3 Appearance in the civil law	60
3.2 The refinement of the idea into an established doctrine	63
3.2.1 Earlier medieval authors	65
3.2.2 Late scholastic authority	67
3.2.3 Northern natural law school	71
3.2.4 Later German authority	79
3.3 The <i>clausula rebus sic stantibus</i> in the age of codification	80
3.3.1 The eighteenth century natural law codes	80
3.3.2 The French experience	83
3.3.3 The German experience	84
3.4 Conclusion	87
Chapter 4: The position in common law jurisdictions	89
4.1 Introduction	89
4.2 English law	89
4.2.1 Introduction	89
4.2.2 Early case history	91
4.2.3 The theoretical basis of frustration	94

4.2.4 Which eventualities give rise to discharge by frustration?	96
4.2.4.1 Impossibility	96
4.2.4.2 Frustration of purpose	97
4.2.4.3 Impracticability	100
4.2.4.4 Supervening illegality	103
4.2.5 Allocation of risk: limitations on the application of frustration	104
4.2.5.1 The wording of the contract: force majeure clauses	104
4.2.5.2 Foreseeability	107
4.2.5.3 Self-induced frustration	110
4.2.5.4 Fault	112
4.2.6 Effect on a contract	114
4.2.6.1 The general rule	114
4.2.6.2 Adjustment for payments made under the contract	114
4.2.6.3 Adjustment for performance not sounding in money	116
4.2.7 The difference between frustration and common mistake	116
4.2.8 Conclusion	118
4.3 US Law	119
4.3.1 Introduction	119
4.3.2 Impracticability	121
4.3.3 Frustration of purpose	124
4.3.4 The allocation of risk	126
4.3.5 Law and economics	127
4.3.6 Effect of a finding of impracticability or frustration	130
4.4 Conclusion	131
Chapter 5: The position in civil law jurisdictions	134
5.1 Introduction	134

5.2 German law	135
5.2.1 The present position under § 313 BGB	135
5.2.2 The original position after promulgation of the BGB	138
5.2.3 The 1920s	140
5.2.4 World War Two and its aftermath	144
5.2.5 Specific issues in the application of the doctrine	146
5.2.5.1 Adjustment of contracts	146
5.2.5.2 Frustration of purpose	148
5.2.5.3 Common mistake	150
5.2.5.4 Theoretical basis	151
5.2.6 Conclusion on German law	152
5.3 Dutch law	153
5.3.1 Codification in the Netherlands	153
5.3.2 The problem of changed circumstances	154
5.3.3 Conclusion on Dutch law	157
5.4 Conclusion	158
Chapter 6: International model rules and the UN Convention on Contracts for the International Sale of Goods	160
6.1 Introduction	160
6.2 A note on terminology	162
6.3 The UN Convention on Contracts for the International Sale of Goods	162
6.4 The Unidroit Principles of International Commercial Contracts	165
6.5 The Principles of European Contract Law	170
6.6 The Draft Common Frame of Reference	173
6.7 Relevance of the above model laws to South African law	175
6.8 Conclusion	178

Chapter 7: Good faith and public policy as a basis for development	179
7.1 Introduction	179
7.2 Good faith in other countries	183
7.2.1 Civil law examples	183
7.2.2 Common law examples	185
7.3 Good faith in South Africa	190
7.3.1 Exceptio doli generalis	191
7.3.2 Bona fides	193
7.3.3 Public policy	201
7.3.4 Legislation	209
7.4 The problem of changed circumstances in contract law	212
7.5 Conclusion	215
Chapter 8: The Way Forward	217
8.1 What has been learnt from the comparative studies	217
8.2 What is different about South Africa?	217
8.3 Basis for change: fairness in contracting	221
8.4 A doctrine to deal with changed circumstances in South African contract law	223
8.4.1 Frustration of purpose	224
8.4.2 Impracticability	232
8.5 Consequences of a finding of frustration of purpose or impracticability	237
8.6 Enrichment issues following a termination of a contract due to a supervening change of circumstances	241
8.7 Hardship clauses	243
8.8 Conclusion	243
Bibliography	246

Chapter 1: Introduction

1.1 The nature of the problem

It is a fundamental tenet of any system of contract law that agreements which have been validly concluded should be enforceable at the instance of the parties to those agreements.¹ Hardship may result, however, if a change of circumstances intervenes in the factual matrix of the contract. In some legal systems the legal response to such a calamity would be that agreements must be upheld and that non-performance will result in an action for breach of contract.² What this type of approach fails to take account of, however, is that a party's offer or acceptance is usually based on certain motivating factors, which may or may not be disclosed. Should there be a change in circumstances following the conclusion of the contract, the new situation which prevails may be so different to that under which the contract was concluded that had the relevant party known the change would occur, he would never have contracted, or at least not on the terms he did.

This raises the normative question of whether it is just for a party to still be held bound to the contract following such a change of circumstances. To allow discharge of a promise too easily would attack the certainty of contracts, which is not in the commercial interests of a country's legal system. To enforce the promise regardless of the change would often, however, be too harsh, since this would place the burden of an unforeseen occurrence on one party alone. Quite apart from this it may be that performance is objectively no longer possible.

Clearly some sort of balance must be struck between these competing concerns, sometimes referred to by the Latin phrases *pacta sunt servanda* (agreements must be observed) and *clausula rebus sic stantibus* (an implied condition that circumstances remain unchanged).³ Individual bodies of rules which deal with this problem thus usually place certain limits on the circumstances under which discharge will be permitted, which will be investigated in the comparative studies

¹ Konrad Zweigert & Hein Kötz *Introduction to Comparative Law* (1998) at 486 – 515.

² *Ibid.*

³ Cf RH Christie *The Law of Contract in South Africa* (2006) at 473.

which follow in later chapters. The rules which have resulted to deal with this issue vary from country to country and can be traced back through the ages into antiquity.

Consider the following example: Party A contracts with party B that A will hire B's rooms overlooking a coronation procession in London.⁴ The rooms are to be used only during the day of the procession and the rental is suitably enhanced because of the occurrence of this event. Two days before the envisaged date, the king falls ill and a decision is taken to operate on him. As a result the procession is cancelled. Party A refuses to continue with the lease agreement and party B sues on the contract for the promised rental.

The change of circumstances may also affect the supplier of goods or services, however. Consider a further example: Several months after the nationalisation of the Suez Canal, and during the crisis resulting from this political upheaval, party A contracts to carry a cargo of party B's wheat from Texas in the United States to Iran in the Middle East for a flat rate. The contract does not specify the route to be taken, but conventionally A would make the voyage via the Suez Canal, a journey of 16 000 kilometres. A month later and several days after the ship has sailed from Texas, the Suez Canal is closed. The voyage must now follow the longer 21 000 kilometre route around the Cape of Good Hope. A refuses to complete the voyage unless B pays an increased fee for its services.⁵

Any contract law casebook will provide further examples of changes in circumstances which have had dire consequences for the affected agreement. Typically these examples represent the major upheavals or calamities of human life, such as war, hyper-inflation or change in political regime. A country such as Germany, which has a highly developed set of laws to deal with changed circumstances, has experienced all three of the above in the last century, which demonstrates that a country's legal development often mirrors its history. Clearly this is a well-documented problem requiring some sort of response.

⁴ This illustration is based on *Krell v Henry* [1903] 2 KB 740. See also Second Restatement of Contracts § 265, Illustration 1.

⁵ Second Restatement of Contracts § 261, Illustration 9. This illustration is based on *Transatlantic Financing Corp v United States* 363 F 2d 312 (DC Cir 1966).

1.2 The treatment of this problem in other legal systems

Of course the balance struck between *pacta sunt servanda* and discharge for changed circumstances will vary from legal system to legal system. Some systems come down firmly on the side of contractual certainty. In South Africa, discharge is allowed only for objective impossibility of performance. Any change which does not result in impossibility does not lead to discharge.⁶ Other systems are more permissive, however.

In medieval times a doctrine was developed to deal with changed circumstances, which goes by the name alluded to above: *clausula rebus sic stantibus*.⁷ The origins of this doctrine lay largely in canon law and hence the concern was originally as to the morality of breaking a promise.⁸ The general idea was that a promise, later even a contractual undertaking, could be repudiated if circumstances had changed to the point where you would not have promised had you had the benefit of hindsight.⁹ Of course the constraints of daily life were different in medieval times, and the subsequent demise of this rule in the nineteenth century needs to be investigated.¹⁰ Parallels between this antiquated law and the laws prevalent in many modern states bear inquiry, however. This will be attempted in chapters four and five below.

As stated above modern Germany has an advanced set of rules to deal with changed circumstances. Although the framers of the German Civil Code (BGB) had rejected the concept of discharge for changed circumstances at the time of promulgation, the subsequent history of the country nevertheless required the development of such a doctrine. The adoption of the theory of *Wegfall der Geschäftsgrundlage* relied on the good faith provision in the BGB¹¹ and stands as an

⁶ *Hersman v Shapiro* 1926 TPD 367 at 375 – 377; *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at [28].

⁷ See generally on this doctrine Robert Feenstra “*Impossibilitas and clausula rebus sic stantibus*” in Alan Watson (ed) *Daube Noster* (1974) at 77.

⁸ *Ibid* and see below at chapter 3.

⁹ *Ibid*.

¹⁰ Zweigert & Kötz *op cit* note 1 at 519; James Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) at 185 – 186. This will be attempted in chapter 3 below.

¹¹ § 242 of the BGB, which reads as follows: “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.” Translation found at the

example of a proactive approach to changed circumstances. Other modern civil law countries, such as the Netherlands, likewise recognise a doctrine of changed circumstances.¹²

In a largely parallel development, the English common law has also incorporated a doctrine of changed circumstances, which goes by the name of frustration (first formulated in 1863¹³). This doctrine has stood the test of time and has been exported to many leading common law countries around the world, including the United States and Australia.

A further notable comparative development in this regard is the inclusion of doctrines dealing with changed circumstances, or “hardship”, in several leading systems of international model rules, namely Unidroit’s Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL). Even the Draft Common Frame of Reference (DCFR), which is intended to pave the way for a future unified civil law in Europe (a Common Frame of Reference)¹⁴ contains rules on hardship. While these supra-national laws are currently binding by agreement only, they have been developed through careful study of leading international legal systems and thus merit attention in an examination of the problem of changed circumstances.

1.3 The problem in South Africa

In South Africa, as noted above and as will be shown more fully in the next chapter, a change of circumstances will only discharge a contract if the change results in actual impossibility of performance. Any change with lesser effect will not affect the enforceability of the contract. There is no indication at present that South African courts are willing to recognise discharge on these grounds. The picture is thus bleak for South African contract law: should a major calamity, such as war, strike our

website for the Bundesministerium der Justiz: www.gesetze-im-internet.de/englisch_bgb. (Last accessed 12 January 2010.)

¹² Art 6:258 of the BW.

¹³ *Taylor v Caldwell* (1863) B&S 826.

¹⁴ Christian von Bar, Eric Clive & Hans Schulte-Nölke *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference* (2009) at Introduction 1.

economy, it will have no device to deal with it. One need only look across our Northern border to Zimbabwe to see how hyper-inflation can negatively impact upon a country and upset contractual bargains. Extreme pessimism aside, however, lesser calamities occur frequently and it is entirely foreseeable that a fundamental and unforeseen change of circumstances could strike a contract in this country. The fact that we have no doctrine to deal with changed circumstances could thus be seen as a shortcoming in our law.

If South Africa is to develop a doctrine of changed circumstances then the question is as to what form it would take. Would the courts develop the common law to the point where there was a new doctrine, or a residual term in all contracts, which enabled discharge following a fundamental change of circumstances? Or would this be a sufficiently drastic move to require legislative enactment to bring it about? If the common law route is to be followed, what would be the doctrinal basis on which the new rule would be incorporated? Some sort of peg on which to hang the doctrine would arguably be required by the South African courts, comparable to the good faith provision in the German BGB. Furthermore what form would the new doctrine take? While an indigenous solution may be preferable, there are a myriad of foreign models on which to draw as exemplified by those mentioned in the previous section.

1.4 The nature and methodology of this inquiry

The aim of this thesis is to elucidate the problem of changed circumstances with reference to the lacuna in this regard in South African law. A central goal is to propose a way forward in dealing with this problem in our country. Thus from the outset there will be a focus on South African law. The first substantive chapter of this work, chapter two, will consider the status of the defence of changed circumstances in South African law and it will continue to identify possible existing rules which could be used to develop an indigenous solution to the problem. Before anything concrete can be put forward, however, it will be necessary to set the scene both historically and comparatively. Chapter three will therefore address the historical doctrine of the *clausula rebus sic stantibus*. This will provide the backdrop

against which the development of the modern doctrines of changed circumstances can play out.

Given South Africa's close legal ties historically with English law, it is apt that chapter four focuses on the doctrine of frustration and the legal developments which it has spawned, such as the doctrines of impracticability and frustration in US law. This chapter will establish categories of cases into which instances of hardship can be divided. There is evidence of the English doctrine of frustration in the South African case law – which will have been explored in chapter two. This means that knowledge of the English system is vital to the analysis of our own law. Given the importance of the English common law worldwide, it is also natural to investigate this doctrine in other common law countries, such as the USA.

Chapter five will look at two examples of civil law systems, namely German law and Dutch law. These are codified systems, but they retain ties with the old *ius commune* and hence the *clausula* doctrine. These systems will also provide an interesting study on the role which good faith can play in this regard. The final investigation will be into some of the leading examples of supranational model rules which deal with changed circumstances. The PECL and PICC systems mentioned above will for example be examined in this light. Since these systems are the culmination of legal developments in Europe and the rest of the world at large, they provide an interesting model, unconstrained by history or precedent, as to how to deal with the problem at hand. These will be examined in chapter six.

Chapter seven will consider good faith and issues of fairness in contracting – again with reference to leading international legal systems, but particularly within South Africa. Since good faith has played such an important role with regard to change of circumstances in Germany and the Netherlands, it is necessary to examine this possibility in South Africa as well. The introduction of the Constitution in South Africa has also infused our law with new values and ideals and this could provide a normative basis for the incorporation of a doctrine of changed circumstances.

The final substantive chapter, chapter eight, will set out and evaluate the developments of the preceding chapters. This will shed some light on ways in which South Africa can develop a doctrine of changed circumstances. Thus the overall aim of this thesis is to undertake a historical and comparative analysis of the problem of changed circumstances in contract law and to suggest the best way forward for South Africa to address the lacuna in our own law in this regard.

Chapter 2: South Africa

2.1 Introduction

The aim of this chapter is to set out the existing position in South African law on change of circumstances. This investigation will necessitate an examination of all the existing rules in contract law which deal with this issue. Reformist arguments that a change in circumstances can be dealt with by an equitable intervention, based on good faith, public policy or the Constitution will not be considered here. These will be dealt with in chapter seven.

A change in circumstances subsequent to the conclusion of a contract is primarily dealt with in South African law by the doctrine of supervening impossibility of performance.¹ If the change results in objective impossibility, the contract will be discharged.² A supposition, in the sense of a common assumption between the parties, may also terminate a contract, but only if the state of affairs assumed related to events past or present at the time of conclusion of the contract.³ For the purposes of this inquiry, it is the supposition in futuro which is most relevant, since this is where the parties to a contract make their agreement contingent upon the occurrence of a future state of affairs. Should circumstances change, so that what was assumed does not eventuate, then should discharge be permitted under the supposition in futuro? A further consideration is whether there may be a tacit term in a contract that it would cease to bind should circumstances change. Supervening impossibility will be considered in section 2 of this chapter and suppositions and tacit terms, which to a certain extent overlap, in section 3.

Section 2 will deal not only with our common law rules on impossibility, but also the pervasive influence of the English doctrine of frustration in this area. Given the close

¹ *Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427 at 434; *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at [28]; Schalk van der Merwe et al *Contract – General Principles* (2007) at 541; RH Christie *The Law of Contract in South Africa* (2006) at 472.

² *Hersman v Shapiro* 1926 TPD 367 at 375 - 377; *Snow Crystal* supra note 1 at [28]; Van der Merwe et al op cit note 1 at 542; Christie op cit note 1 at 93, 472.

³ *Fourie v CDMO Homes (Pty) Ltd* 1982 (1) SA 21 (A) at 26 – 27; Van der Merwe et al op cit note 1 at 285; Christie op cit note 1 at 327.

connection between the English and South African legal systems due to our history as a British colony, as well as to the past tendency of many local judges to look to English law for guidance,⁴ it is not surprising that there is evidence of the doctrine of frustration in the South African case law. It will be seen that there are dicta in favour of adopting the English doctrine, or at least drawing on its substance, which raises the question of the suitability of employing frustration in a South African context. Section 2 will attempt an analysis of past attempts to incorporate the doctrine of frustration into South African law, in order to facilitate a discussion of the deeper question of whether the English model of frustration is a good solution to the problem of changed circumstances in South Africa. This will be attempted in chapter eight, after the English model has been discussed in detail in chapter four.

The investigation of suppositions and tacit terms in section 3 will explore the overlap between these two concepts. Finally the continuing relevance of the supposition in futuro will be considered. This much maligned concept is analogous to the English notion of frustration of purpose, providing a possible indigenous means of dealing with the failure of a common foundation of a contract. The evaluation in this section will thus focus on the role which the supposition in futuro, or an appropriately adapted concept of a tacit condition, could play to address the problem of changed circumstances.

Change of circumstances is recognised in the limited context of specific performance in South African law, in that hardship to the defendant may influence a court to exercise its discretion to deny an award of specific performance as a remedy for breach of contract.⁵ For the sake of completeness, this notion needs to be discussed as well.

A final development requiring consideration is the draft Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms, issued by the South African Law Commission (as it then was), as the outcome of the

⁴ Compare the argument of Philip J Thomas "Bona fides, Roman values and legal science" (2004) *Fundamina* 188 at 189 – 190.

⁵ *Haynes v King William's Town Municipality* 1951 (2) SA 371 (A) at 381B-E; *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 (4) SA 650 (D) at 654H – 655H; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 (4) SA 615 (T) at 627A – 628I.

1998 Report on Project 47.⁶ This Bill will be considered in section 5, since it contains specific rules on how courts should approach the problem of changed circumstances.

The overall aim of this chapter is thus to evaluate existing South African law on changed circumstances and to lay a foundation for an inquiry into possible means of expansion to accommodate such a doctrine within our contract law.

2.2 Supervening impossibility

2.2.1 Requirements for the doctrine of supervening impossibility

In a recent pronouncement on the requirements for supervening impossibility to operate as a defence to a claim for performance, the Supreme Court of Appeal stated as follows:

“As a general rule impossibility of performance brought about by *vis maior* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary to ‘look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied’. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault.”⁷

As authority for this synopsis, the SCA referred in particular to *Hersman v Shapiro*,⁸ from which the quoted insert in the above passage is drawn. The *Hersman* case is undoubtedly seminal in the South African law of impossibility of performance, and will be analysed presently. The exceptions to this doctrine, namely self-created (or subjective) impossibility and impossibility due to the fault of the defendant (which is actually a form of breach and is also known as “prevention of performance”)⁹ are not central to the present inquiry and will not be considered here. As stated in the introduction, the focus of this examination of supervening impossibility is on the definitional requirements of impossibility, since this will inform an inquiry into which

⁶ Unreasonable Stipulations in Contracts and the Rectification of Contracts

⁷ *Snow Crystal* supra note 1 at [28] (footnotes omitted).

⁸ Supra note 2.

⁹ Van der Merwe et al op cit note 1 at 366.

types of change of circumstances excuse performance. In a contract struck by supervening impossibility the general rule is that the reciprocal obligations are discharged.¹⁰ The position is the same as if performance under the contract had been impossible from the beginning and hence the contract is retrospectively invalid (*e tunc*) and performance can only be reclaimed via the law of unjustified enrichment.¹¹ In a continuous contract such as employment, where performance is due from month to month, however, upon discharge a party may not reclaim past performance.¹² This type of contract is thus discharged prospectively (*e nunc*).¹³

Although *Peters, Flamman and Co v Kokstad Municipality*¹⁴ is not mentioned in the extract from the *Snow Crystal* case above, a historical examination of impossibility in contract should really start with this case. *Peters, Flamman* marks the turning point in this country with regard to the impossibility defence: before this case, South African courts had tended to follow the English approach of absolute contracts, as laid down in that country in *Paradine v Jane*.¹⁵ Solomon ACJ, however, began his discussion of the law on impossibility in *Peters, Flamman* with the simple pronouncement:

“By the Civil Law a contract is void if at the time of its inception its performance is impossible: *impossibilium nulla obligatio* (D. 50.17.185). So also where a contract has become impossible of performance after it had been entered into the general rule was that the position is then the same as if it had been impossible from the beginning...”¹⁶

The Acting Chief Justice added:

¹⁰ D. 50.17.185, cited in *Peters, Flamman* supra note 1 at 434.

¹¹ Daniel Visser *Unjustified Enrichment* (2008) at 481; Christie op cit note 1 at 472. For a discussion of the enrichment aspects of supervening impossibility see chapter 8 at 8.6.

¹² Visser op cit note 11 at 481.

¹³ Ibid.

¹⁴ Supra note 1.

¹⁵ 1647 Aley 26. The concept of “absolute contracts” is defined in chapter 4. A contract is absolute if discharge will not be permitted for any reason, including impossibility of performance. For earlier South African decisions following this case see *Hay v The Divisional Council of King William’s Town* (1880) 1 EDC 97; *Morgan & Ramsey v Cornelius & Hollis* (1910) 31 NLR 447; *Algoa Milling Co v Arkell & Douglas* 1918 AD 145.

¹⁶ *Peters, Flamman* supra note 1 at 434. The quotation from the Digest means “impossibility gives rise to no obligation”.

“Unfortunately the rules of the Civil Law appear to have been ignored in several cases on this subject which have come before our Courts, which have been guided entirely by the decisions of the English Courts.”¹⁷

In casu, the defendants had contracted to light the streets of Kokstad for a period of 20 years from 1907.¹⁸ During the First World War the defendants (who were described in the judgment as “enemy subjects”) were imprisoned and were hence unable to perform their obligation.¹⁹ The plaintiff municipality sued for compensation, but the Appellate Division held in line with the above statements of law that performance by the defendants had been rendered impossible and that the contract was hence terminated.²⁰

This was a contract for personal services, however: the imprisonment of the defendants could not but render performance under such a contract impossible. In *Hersman v Shapiro*, the contract called for the delivery of a certain quantity of white corn.²¹ Heavy rains during the growing season which continued through the harvesting period resulted in a failure of the corn crop, however: the corn which was produced was discoloured and of an inferior quality.²² As a result there was a shortage of the required type of corn in the Transvaal area and the defendant pleaded impossibility to the plaintiff’s claim for performance.²³ The court, however, considered the nature of the impossibility requirement and concluded that performance in this case had not been rendered impossible, but merely more difficult and expensive.²⁴ The defendant had not looked to surrounding provinces and countries and had not offered “fanciful” prices: evidence led had established that “white corn” was not unavailable, but merely scarce.²⁵

¹⁷ Ibid at 435.

¹⁸ Ibid at 432.

¹⁹ Ibid at 434.

²⁰ Ibid at 437.

²¹ *Hersman* supra note 2 at 369.

²² Ibid at 370.

²³ Ibid at 371.

²⁴ *Hersman* supra note 2 at 375 – 377.

²⁵ Ibid.

In the course of reaching his decision, Stratford J discussed the finding in *Peters, Flamman* as well as comparing English and South African law on impossibility.²⁶ His conclusion was as follows:

“Therefore, the rule that I propose to apply in the present case is the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and that we must look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether that general rule ought, in the particular circumstances of the case, to be applied.”²⁷

This extract, part of which was repeated in the *Snow Crystal* case (as cited above), can now be seen in context. The repetition of this passage indicates acceptance by the Supreme Court of Appeal of the view that the impossibility in question must be absolute. Of course what is impossible is a question of fact and depends on factors such as what the state of technology is at the time for performance.²⁸ In 1962 the American textbook author, Corbin, wrote that it was absolutely impossible to go to the moon.²⁹ Ramsden cites the example of a boat carrying a ring over the ocean to an exhibition in which it is to be the central attraction.³⁰ If the ship sinks and the ring is thereby lost, it may be possible by modern means of salvage and at vast expense to recover it, but practical sense should dictate that this is impossible.

In the *Snow Crystal* case the appellant, Transnet, had failed to make a dry dock available for a ship (called the MV *Snow Crystal*) despite this dock having been booked six months in advance.³¹ The respondent had instituted action for breach of contract, against which Transnet raised several defences, one of which was that performance had been impossible since another ship was in the dry dock at that

²⁶ Ibid at 371 – 373.

²⁷ Ibid at 373.

²⁸ Cf William Arthur Ramsden *Supervening Impossibility of Performance in the South African Law of Contract* (1985) at 64.

²⁹ Arthur Corbin *Contracts* (1962) at para 1325. Cited in Guenter Treitel *Frustration and Force Majeure* (2004) at 262.

³⁰ Ramsden op cit note 28 at 64. This example appears in the writing of other authors, such as JC De Wet and AH Van Wyk *Kontraktereg* (1992) at 85 – 86. Treitel op cit note 29 at 265 cites the English case of *Moss v Smith* (1859) 9 CB 94 at 103 where a similar example is given and notes the inclusion of such an example in Karl Larenz *Schuldrecht* 14th ed (1987) Vol I at 99.

³¹ *Snow Crystal* supra note 1 at [29].

time.³² The SCA held that since a further dry dock was available for the obstructing ship and the dock master could have been forced (by Transnet) to effect the necessary transfer under the relevant regulations, impossibility was not present.³³

In this brief excursus of supervening impossibility it remains only to deal with the nature of events which can give rise to impossibility and the resultant forms which the impossibility can take. South Africa's Roman-Dutch common law refers to *vis maior* (higher power) and *casus fortuitus* (an event occurring by chance) as being the necessary causes of impossibility.³⁴ Innes CJ discussed the meaning of *casus fortuitus* in *New Heriot Gold Mining Co Ltd v Union Government*.³⁵

“*Casus fortuitus*, which is a species of *vis maior*, is a term well understood and needing no formal definition. It includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against. The doctrine that the operation of such visitations excludes civil liability overlies the fields both of contract and of tort.”³⁶

Thus the impossibility must be caused by an unforeseen event. This may result in physical impossibility if performance can in no way be carried out, such as (for instance) if the subject matter of the contract is destroyed.³⁷ Alternatively the *vis maior* may take the form of a legislative enactment, making performance not physically but legally impossible. In *Bayley v Harwood*,³⁸ premises had been used as a health and pleasure resort by the respondent owner.³⁹ The premises were then leased to the appellant who intended to use them for the same purpose.⁴⁰ A licence was required for this purpose, however, and during the currency of the lease the licensing authority had refused to renew the licence unless structural alterations were made to the premises.⁴¹ The lessor refused to make such alterations.⁴² The lessee therefore vacated the premises, tendering payment of rent up until the date

³² *Ibid.*

³³ *Ibid* at [28] – [30].

³⁴ See Ramsden op cit note 28 at 49n44 for a list of old authorities on the meaning of these terms.

³⁵ 1916 AD 415.

³⁶ *Ibid* at 433.

³⁷ For a general discussion of physical, as well as legal impossibility see Ramsden op cit note 28 at 59 – 61.

³⁸ 1954 (3) SA 498 (A)

³⁹ *Ibid* at 508.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid* at 504.

on which he had moved out.⁴³ The Appellate Division held that this legislative prohibition on the lessee's trade constituted *vis maior*⁴⁴ and that in consequence he was entitled to a remission of rent from the date on which he had vacated the premises.⁴⁵

The brief sketch of the law on supervening impossibility outlined above will indicate that this doctrine is not really compatible with any concept of discharge for changed circumstances. The threshold required for supervening impossibility to discharge performance is objective impossibility, which is construed strictly by the courts.⁴⁶ No lesser tests such as increase in difficulty or expense will suffice, although some SA writers do suggest that the standard of impossibility is a pragmatic one (a "verkeersmaatstaf") with the concomitant view that a measure of flexibility exists due to the circumstances of the case.⁴⁷ Thus while a change in circumstances may be unforeseen, unless it actually renders performance impossible, there will be no discharge on the grounds of supervening impossibility in South African contract law. The further possibility does exist, however, that the parties may include an express hardship clause in their agreement, which would make provision for changes in circumstances falling short of impossibility, and thereby alleviate the harshness of South African law.

2.2.2 The influence of the doctrine of frustration

2.2.2.1 Frustration v supervening impossibility: essential differences

The nature of the doctrine of frustration in English law will be dealt with below in chapter four. The comparable doctrine of supervening impossibility in South African law was discussed under the previous heading. The different titles given to these two doctrines belie the fact that both perform essentially the same function in their legal system of origin, namely governing the impact of change of circumstances on a

⁴³ *Ibid* at 509.

⁴⁴ *Ibid* at 503G.

⁴⁵ *Ibid* at 505A, 508B, 511A.

⁴⁶ *Hersman supra* note 2 at 375 – 377; *Snow Crystal supra* note 1 at [28].

⁴⁷ De Wet & Van Wyk *op cit* note 30 at 85 – 86; Van der Merwe *et al op cit* note 1 at 188. See section 2.2.3 below for further discussion.

contract. As Howie JA stated in the recent case of *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG*:

“While the English law of frustration differs from the South African law of impossibility of performance in certain respects, there is also a strong degree of similarity....”⁴⁸

In South Africa, as we have seen, a change of circumstances must result in absolute impossibility of performance in order for discharge to occur. This rule originates in the civil law, dating back to Roman times. The English legal theory is slightly different: frustration occurs where there has been a radical change in the nature of the contractual obligation due to a change in circumstances.⁴⁹ Should such a change in circumstances supervene, the contract comes to an end forthwith.⁵⁰ This doctrine developed gradually in the common law, although the seminal case on frustration cites civil law authority for its finding that impossibility terminated a contract.⁵¹ Although frustration initially covered only impossibility, the doctrine in its modern form has a wider sphere of application and encompasses in addition legal impossibility⁵² and the notion of frustration of purpose.⁵³

Legal impossibility is a recognised ground of discharge in South Africa just as in English law, illustrating once again the overlap between frustration and our local notion of impossibility, but the concept of frustration of purpose is alien to South Africa’s Roman-Dutch common law. The essential idea behind frustration of purpose is that when the “foundation” of a contract falls away, the contract falls away with it.⁵⁴ This means that performance need not have become impossible, but merely that a common assumption of the contracting parties – on which the contract was based – has proved false.⁵⁵ In order to bring this notion under the umbrella of South African law, there have been attempts in the past to apply the English doctrine of frustration of purpose as a legal transplant. This is evidenced by discussions of frustration of purpose in the South African case law, to which we shall turn presently.

⁴⁸ 1996 (4) SA 1190 (A) at 1214C.

⁴⁹ Compare *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729, discussed in Chapter 4.

⁵⁰ *J Lauritzen AS v Wijsmuller BV* (“The Super Servant Two”) [1990] 1 Lloyd’s Rep 1 at [8].

⁵¹ *Taylor v Caldwell* 3 B&S 826 at 833 – 834.

⁵² *Denny, Mott & Dickson Ltd v Fraser (James B) & Co Ltd* [1944] AC 265.

⁵³ *Krell v Henry* [1903] 2 KB 740.

⁵⁴ Cf *Krell v Henry* supra note 53 at 754.

⁵⁵ See the discussion of the supposition in SA law below at section 2.3.

2.2.2.2 Frustration of purpose in the South African case law

English law has had an insidious and pervasive influence on South Africa in the area of changed circumstances, as the above discussion of supervening impossibility shows. Although the doctrine of absolute contracts was thrown out in *Peters, Flamman*, references to the doctrine of frustration remain in the South African case law. As noted above, this is natural, given the history of British colonisation in South Africa and the fact that in many respects the doctrines of frustration and impossibility overlap. Frustration of purpose, however, as a specific instance of the broader doctrine of frustration, is a more controversial issue. Although frustration of purpose is given a very restricted role to play in English law,⁵⁶ it has the potential, if unchecked, to undermine the South African protection of the binding force of contracts.⁵⁷ An attempt will be made here to trace references to the doctrine of frustration in the South African law of impossibility and in particular to highlight instances of frustration of purpose.

2.2.2.2.1 Cases in favour of the doctrine of frustration

Aside from the discussion of English law in *Peters, Flamman*⁵⁸ mentioned above, the typical starting point in this type of inquiry is with the following statement of De Villiers JA in *African Realty Trust Ltd v Holmes*:

“There is authority for the proposition that when the basis of a contract falls away the contract falls away with it.”⁵⁹

The authority to which the Judge of Appeal was referring was first and foremost the Coronation cases in Britain, of which *Krell v Henry*⁶⁰ was cited in particular. As will be seen in chapter four, this case is the locus classicus on frustration of purpose. De Villiers JA cited not only English authority, however. He also cited various passages

⁵⁶ See chapter 4 section 4.2.4.2.

⁵⁷ This is not to say, however, that discharge should never be granted in a situation of frustration of purpose. Under appropriate circumstances and provided a significant threshold test is met, this thesis is in favour of discharge or contract modification due to frustration of purpose in South African law. See chapter 8.

⁵⁸ Supra note 1.

⁵⁹ 1922 AD 389 at 400.

⁶⁰ *Krell v Henry* supra note 53.

from the Digest and the theories of certain continental authors, including Windscheid's doctrine of *Voraussetzung*.⁶¹

The basic facts of *African Realty Trust* were that the defendant (the appellant in this case) was purchasing agricultural land from the plaintiff and the contract between them provided that the agreement would lapse if certain works were not carried out by the Irrigation Board.⁶² One of these works was to construct a rock-fill dam on the Sundays River above the lands the defendant was purchasing.⁶³ The director of the Irrigation Board was then replaced and a decision was taken to instead build a concrete dam, at nearly twice the price.⁶⁴ This would greatly increase the cost of water on the land being purchased and the defendant sought to resile from the agreement.⁶⁵ The court held (Solomon JA dissenting) that the contract allowed for a change in the nature of works done by the Irrigation Board and that the terms of the agreement made provision for a change of circumstances.⁶⁶ The defendant was therefore held bound to the purchase of the land in question.⁶⁷

This rendered the whole discussion of frustration of purpose obiter. De Villiers JA had hinted at this immediately after his discussion of the English doctrine with the following telling qualification:

“But, as a Court, we are after all not concerned with the motives which actuated the parties in entering into the contract, except in so far as they were expressly made part and parcel of the contract or are part of the contract by clear implication.”⁶⁸

The Appellate Division again had reason to consider the defence that the purpose of a contractual venture had been frustrated in *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd*.⁶⁹ In that case MacDuff & Co had been involved in the import and export of coal in South Africa and was to have been

⁶¹ See the discussion by De Villiers JA of this proposition at 400 – 402. Windscheid's doctrine of the *Voraussetzung* dealt with the problem of changed circumstances using the device of a supposition (see chapter 5). Suppositions are discussed below in section 2.3.

⁶² *African Realty Trust* supra note 59 at 391 – 392.

⁶³ Ibid at 390.

⁶⁴ Ibid at 392.

⁶⁵ Ibid at 393.

⁶⁶ Ibid at 403.

⁶⁷ Ibid at 398, 404.

⁶⁸ Ibid.

⁶⁹ 1924 AD 573.

taken over by the defendant company.⁷⁰ In an agreement concluded in November 1920, the plaintiff was liquidated and its business transferred to the defendant.⁷¹ Taking over the business of the plaintiff proved not to be to the advantage of the defendant, however, due to a subsequent slump in the coal market.⁷² Indeed, honouring its obligation would have led to significant losses. The defendant therefore purchased the shares of all the shareholders in the plaintiff company in an attempt to make the problem go away.⁷³ An action for breach of contract was brought by the liquidator of the plaintiff company against the defendant.

One of the defences raised by the defendant company was that it became impossible for it to fulfil the agreement of November 1920. In argument, this plea was extended along the lines that the agreement had been made on the basis that a particular state of affairs would continue to exist, and that since this state of affairs had come to an end, the purpose of the contract had been upset.⁷⁴ Having found that the defendant had failed to establish impossibility, Solomon JA then turned to consider the defence of frustration of purpose.⁷⁵ In support of the defendant's contention he quoted the oft-cited passage from *Tamplin Steamship Co v Anglo-American Petroleum Co*⁷⁶ to the effect that in an instance of frustration a Court should examine the contract to see whether the parties implied that the contract should come to an end under those circumstances.⁷⁷ This is the classic pronouncement of the implied term approach to frustration in English law.⁷⁸ Solomon JA cited it as authority for the proposition that a contract may come to an end if the state of affairs on which it rests ceases to exist. The Judge of Appeal noted that there was scant authority for this finding in South African law, outside of

⁷⁰ Ibid at 583.

⁷¹ Ibid at 584.

⁷² Ibid at 584.

⁷³ Ibid at 584 – 585.

⁷⁴ See the discussion of this defence at 600 – 607.

⁷⁵ Ibid at 602. Solomon JA had earlier pronounced in *Peters, Flamman* supra note 1 at 435 that South African courts had too willingly followed English law on impossibility in the past. This meant that impossibility discharged a contract and ended the doctrine of absolute contracts. Here Solomon JA is discussing a separate defence of frustration of purpose, which he seems to distinguish from the doctrine of impossibility. His authority is English and he seems to ignore his own injunction to rather follow Civil law authorities in this area.

⁷⁶ [1916] 2 AC 397.

⁷⁷ The cited passage appears at p 403 of the *Tamplin* case supra note 76. The extract appears at 603 in the *MacDuff* case supra note 69.

⁷⁸ See the discussion thereof in chapter 4.

the finding of the Cape Provincial Division in *Schlegemann v Meyer Bridgens & Co.*⁷⁹ Solomon JA assumed this finding to be good law.⁸⁰

In line with his assumption, Solomon JA examined the relevant change of circumstance, namely the decline in profitability of the coal trade. He came to the conclusion that there would have been heavy losses for the defendant had it observed the contract, but that this did not amount to anything more than “commercial impossibility”, which was not a ground of discharge in English or South African law.⁸¹ The judge stated that the defendant company was aware the price might fluctuate and could have provided against this in its contract.⁸²

The *MacDuff* case thus provides only weak support for frustration of purpose doctrine: while Solomon JA assumed this was part of South African law, this finding did not avail the defendant, since the relevant change of circumstances was held to have been foreseeable. This case and *African Realty Trust* are, however, the major Appellate Division pronouncements upon frustration of purpose in South Africa. This illustrates the dearth of authority in support of this concept. It is telling that this doctrine was never unequivocally adopted by the Appellate Division, even in the period in which the civil law notion of impossibility was relatively young as a defence and the influence of English law was still felt in this area.

References to frustration continued to crop up in the provincial divisions, however. The first of these cases has already been referred to above and was cited in the *MacDuff* case: *Schlegemann v Meyer, Bridgens and Co.*⁸³ The change of circumstances in that case was that the plaintiff, an erstwhile director in the defendant company, had been kept under house arrest for the duration of World War One.⁸⁴ This prevented him from performing his duties as a director and he was removed from this office by the remaining directors. As a founding member of the company, Schlegemann sued for reinstatement as soon as the war time restrictions

⁷⁹ 1920 CPD 494. This case will be discussed below.

⁸⁰ *MacDuff* supra note 69 at 603.

⁸¹ *Ibid* at 606.

⁸² *Ibid* at 607.

⁸³ *Supra* note 79.

⁸⁴ *Ibid* at 500.

on his freedom were removed.⁸⁵ The defendant argued that the contract on which Schlengemann relied for reinstatement had come to an end due to impossibility of performance.⁸⁶ (The contract stated that the three founding members of the company should serve as its directors and set out their duties in this regard.)

In reaching his decision in this case, Gardiner J distinguished impossibility of performance from suspension of performance, stating that the English authorities had to be relied on in the latter scenario, since these principles were “at the root of any contract”.⁸⁷ Gardiner J cited the same passage from the *Tamplin Steamship* case, which had been echoed in *MacDuff*: where a state of affairs on which a contract rests comes to an end, the contract terminates due to an implied term to this effect. The judge held that the contract was based on the status quo whereby it would continue to be lawful for all the directors to serve in that capacity, when this state of affairs came to an end the contract was terminated.⁸⁸ Gardiner J added that the facts totally negated the suggestion that the contract was only suspended: a state of war is presumed to be of a permanent character.⁸⁹

The ultimate reason given for this decision was thus “impossibility of performance”.⁹⁰ The reliance by Gardiner J on frustration thus seems, with respect, unnecessary, since the internment of Schlengemann seems to constitute *casus fortuitus*, as did the internment of the German subjects in *Peters, Flamman*. The case does, however, demonstrate a tendency of South African courts to be influenced by the English doctrine of frustration.

In the 1940s Herbstein J of the Cape Provincial Division relied on the same passage from another English frustration case, *Hirji Mulji v Cheong Yue Steamship Co Ltd*,⁹¹ to decide two separate cases before him. The quoted extract was to the effect that if an unforeseen event frustrates the common object of two contracting parties, the

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 500 – 501.

⁸⁸ *Ibid* at 502.

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at 504.

⁹¹ [1926] AC 497.

contract must come to an end. This is because to nevertheless hold a party bound under changed circumstances would be to hold him to a contract he never made.⁹²

In the first case, *Benjamin v Myers*,⁹³ the plaintiff sued the defendant for eviction due to the breach of an agreement of lease.⁹⁴ The premises were let for the purpose of running a garage business and one of the terms of the lease was that the defendant should maintain supplies of petrol.⁹⁵ During the currency of the lease, however, the defendant had been convicted of contravening War Measure 53 of 1943 by illegally attempting to obtain a larger supply of petrol than what was permitted.⁹⁶ As a result the defendant was prevented from obtaining any petrol at all and hence was in breach of the lease agreement.⁹⁷ He attempted to argue that his performance of the lease agreement had been rendered impossible by his conviction, but Herbstein J held that this impossibility was self-induced and hence that the defendant's performance was not discharged.⁹⁸

As a separate ground for this decision Herbstein J argued that since the defendant wanted only to find the obligation to maintain a supply of petrol discharged, but otherwise to keep the lease agreement intact, this was an attempt to hold the plaintiff to a new agreement following a change of circumstances.⁹⁹ Herbstein J declined to assent with the defendant's argument: his judgment seems to suggest that a finding that impossibility was present would require the whole agreement to be discharged and not merely one term of it. Since the defendant was attempting to uphold part of the agreement, but discharge the rest, his argument was bad in law.

The second invocation of the doctrine of frustration by Herbstein J is also slightly unusual, but for a different reason. In *Rossouw v Haumann* both parties owned

⁹² This is my paraphrased summary of the extract, which appears in *Hirji Mulji* supra note 91 at 507. Herbstein J cites this passage first in *Benjamin v Myers* 1946 CPD 655 at 662 – 663 and then again in *Rossouw v Haumann* 1949 (4) SA 796 (C) at 799 – 800.

⁹³ Supra note 92.

⁹⁴ Ibid at 657.

⁹⁵ Ibid.

⁹⁶ Ibid at 659.

⁹⁷ Ibid at 660.

⁹⁸ Ibid at 662.

⁹⁹ Ibid at 663.

farms contiguous on the Berg River near Paarl.¹⁰⁰ The parties had agreed not to undertake any works on the river except by means of the employ of a particular firm of engineers.¹⁰¹ The contract contained a term as to the maximum amount such works should cost, however.¹⁰² As it turned out, the quoted price of the proposed works by the engineers far exceeded the amount stipulated as the maximum in the contract.¹⁰³ Both parties therefore agreed that the contract had become impossible of performance.¹⁰⁴ The defendant therefore commenced work on the river, arguing that the agreement was at an end.¹⁰⁵ Herbstein J confirmed that the agreement had terminated due to impossibility and therefore denied the plaintiff the interdict he was seeking to prevent the defendant from undertaking such works.¹⁰⁶

The unusual nature of the invocation of the frustration doctrine in this case is that Herbstein J relied on the extract from *Hirji Mulji* to set out the consequences of his finding that the agreement terminated due to impossibility. While the judge could have invoked South African authority, such as the *Peters, Flamman* case, to this effect, he chose to cite an English case, which evidenced a doctrine which did not have the Appellate Division's stamp of approval. The only authority Herbstein J relied on for this invocation of the doctrine of frustration was his own previous decision in *Benjamin v Myers*. This must also render this case of little value as a precedent.

A more recent case in which the ultimate decision was partly based on the doctrine of frustration is *Bischofberger v Van Eyk*.¹⁰⁷ This case concerned a sale of a property situated in Johannesburg. The contract of sale provided that the purchase price would be paid in part by a loan secured by a mortgage bond of R35 000 and in part by a cession of R30 000 to the seller by a third party company, Hyperfin Ltd.¹⁰⁸ The money for the cession was to be raised by the sale of a farm owned by the company.

¹⁰⁰ Supra note 92 at 797.

¹⁰¹ Ibid at 797 – 798.

¹⁰² Ibid.

¹⁰³ Ibid at 798 – 799.

¹⁰⁴ Ibid at 798.

¹⁰⁵ Ibid at 799.

¹⁰⁶ Ibid at 802.

¹⁰⁷ 1981 (2) SA 607 (W)

¹⁰⁸ Ibid at 608 – 609.

The capital secured by a mortgage bond was paid to the seller and the purchaser moved in.¹⁰⁹ The sale of the farm fell through, however, and the seller never received the balance of the purchase price.¹¹⁰ Upon a demand by the seller for the money, the purchaser availed himself of stalling tactics, promising the money would be forthcoming.¹¹¹ The seller then brought an action arguing for ejectment of the purchaser and cancellation of the agreement.¹¹²

Boshoff JP held that when the source for the R30 000 fell away, the basis of this as part of the payment of the purchase price in terms of the agreement fell away too.¹¹³ This finding suggests that a supposition or common assumption material to the contract had proved false and that hence the contract had terminated. Such a supposition would have been one as to a future state of affairs, however, which is a controversial construction.¹¹⁴ The Judge President did not base his decision on this ground, however: he rather sought a basis in impossibility. Having set out the uncontroversial rule that impossibility terminates a contract (citing *Hersman v Shapiro and Peters, Flamman*), Boshoff JP went on to state that English law did not seem to be at variance with South African law.¹¹⁵ Boshoff JP cited in this regard *Morgan v Manser*¹¹⁶ to the effect that an unforeseen, fundamental change of circumstances renders a contract at an end. In applying this dictum, the Judge President reasoned as follows:

“On the facts of the instant case the parties contracted on the basis that the money in respect of the sale of the Hyperfin Ltd properties was available to the respondent and would be ceded to the applicant within a reasonable time. When that sale fell through and the guarantee was withdrawn there was a change of circumstances which was not within the contemplation of neither [sic] the applicant nor the respondent which made performance in terms of the agreement impossible. In the circumstances the obligations under the agreement fell away and the agreement ceased to exist.”¹¹⁷

¹⁰⁹ Ibid.

¹¹⁰ Ibid at 609 – 610.

¹¹¹ Ibid.

¹¹² Ibid at 610.

¹¹³ Ibid at 610G.

¹¹⁴ See below at section 2.3.

¹¹⁵ *Bischofberger* supra note 107 at 610H – 611F.

¹¹⁶ (1947) 2 All ER 666. The quoted extract appears at 670.

¹¹⁷ *Bischofberger* supra note 107 at 611F-G.

The seller was therefore granted his desired order of ejectment. An alternative basis for the judgment was also offered, namely that the seller had validly placed the buyer in *mora* due to his failure to pay on time and consequently that the contract had been cancelled for breach. With respect, payment by the purchaser was not objectively impossible: the impossibility lay in his own subjective failure to raise the necessary funds. This renders the rule in *Peters, Flamman* inapplicable. Hence no doubt the reliance on a broader doctrine of change of circumstances as found in the English doctrine of frustration. It would have been more in tune with South African contract law to argue for a failed common assumption, since this more accurately reflects the facts of the case. As pointed out above, however, this would have been controversial as the assumption related to a future event. Once again there are flaws in the reasoning of this judgment employing the doctrine of frustration and no clear authority is cited for its invocation.

The final case favouring incorporation of frustration is the much criticised *Kok v Osborne*.¹¹⁸ The facts involve a fairly complicated series of frauds committed by a certain Hobson-Jones. Kok, the plaintiff, was involved in business as an estate agent and a money lender.¹¹⁹ She had lent Hobson-Jones money in the past which he had repaid.¹²⁰ The latest debt of R50 000 remained outstanding, however.¹²¹ In the meantime, Hobson-Jones had entered into an agreement to purchase immovable property from Osborne at a price of R47 000.¹²² This amount was to be paid by means of three post-dated cheques.¹²³ Kok came to learn of the purchase by Hobson-Jones of the property in question and demanded that the property be transferred to her, since she believed that he had bought it with money advanced by her.¹²⁴ Hobson-Jones liased with Osborne to the effect that Kok and himself were going to buy the property together, but that only Kok's name should appear on the

¹¹⁸ 1993 (4) SA 788 (SECLD). This judgment is criticised *inter alia* by C-J Pretorius and TB Floyd "Mistake and supervening impossibility of performance" (1994) 57 *THRHR* 325 and by WA Ramsden "Could performance have been impossible in *Kok v Osborne & Another*" (1994) 6 *SA Merc LJ* 340.

¹¹⁹ *Kok* supra note 118 at 791.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

contract of sale.¹²⁵ The contract was duly signed, without Kok and Osborne at any stage meeting.¹²⁶ Osborne believed he was selling to a joint venture, Kok that she was receiving title in settlement of Hobson-Jones's debt to her.¹²⁷

Hobson-Jones knew, however, that he had no funds to meet the payment of the post-dated cheques and he subsequently met with Osborne and they agreed to cancel the contract.¹²⁸ Kok was not party to this agreement.¹²⁹ Osborne then resold the property to another purchaser.¹³⁰ When the error emerged, the plaintiff tried to interdict transfer to this second purchaser, based on her belief that she was entitled to ownership thereof because of the payment which she believed Hobson-Jones had already made for this property.¹³¹ Plaintiff relied on the contract between her and the defendant; the defendant's major argument in reply was that the contract was invalid due to lack of consensus.¹³²

Jones J held as to the defence of mistake that there was no consensus between the parties and that the contract was consequently void.¹³³ Jones J went on to hold that there was a second ground on which the contract failed, however, namely a failed assumption that Hobson-Jones had made payment to Osborne (the defendant).¹³⁴ If Jones J had reached this conclusion based on the law relating to suppositions, he would have run into the difficulty that it was Kok's assumption alone that Hobson-Jones had paid Osborne: Osborne did not share in this delusion. Osborne's assumption was that Kok would be providing capital along with Hobson-Jones. There is thus no common assumption (as Ramsden points out)¹³⁵ so this conclusion is based on false premises and must fail.

¹²⁵ Ibid at 791 – 792.

¹²⁶ Ibid at 792.

¹²⁷ Ibid.

¹²⁸ Ibid at 793.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid at 795.

¹³² Ibid at 797.

¹³³ Ibid at 801D.

¹³⁴ Ibid at 801E-H.

¹³⁵ Ramsden op cit note 118 at 341 – 342.

Jones J did not take this approach, however: his reasoning was that the problem of the false assumption could be solved by an application of “the rule in *Peters, Flamman...* and *African Realty Trust...*”¹³⁶ The judge took the wording of this rule from Kerr’s textbook *Principles of the Law of Contract* (fourth edition) where it is formulated as follows:

“The basic rule is that if during the currency of a contract the conditions necessary for its operation cease to exist, the change not being due to the fault of either party or to a factor for which either party bears the risk, the contract ceases to exist.”¹³⁷

Jones J goes on to state:

“The law recognises that the realities of the world of business demand that provision be made for a situation where unforeseen contingencies prevent the attainment of the commercial purpose which the parties had in mind when they contracted. That, too, can amount to legal impossibility.”¹³⁸

The judge then cited *African Realty Trust* to the effect that when the basis of a contract falls away, the contract falls away with it.¹³⁹ He stated further that “commercial impossibility” as evidenced in *Krell v Henry* had been accepted by a number of South African Courts.¹⁴⁰ Examples of such decisions were *Bischofberger v Van Eyk*, *Williams v Evans*¹⁴¹ and *Rossouw v Haumann*. Jones J concluded that the rule as to impossibility which he had adopted was applicable to this case, in accordance with the authority which he had cited.¹⁴² He summed up as follows:

“The common object of the parties is frustrated because Hobson-Jones fraudulently induced Osborne not to present the cheques. ...The basis of the agreement, namely payment by Hobson-Jones, has accordingly failed and therefore the contract fails.”¹⁴³

¹³⁶ *Kok supra* note 118 at 801J – 802A.

¹³⁷ This passage occurs in the cited textbook at 403 and in the judgment at 802B-C. It should be noted that Kerr’s description of the impossibility defence is not the commonly held view of South African writers. See further in this regard: Gerhard Lubbe and Christina Murray *Farlam and Hathaway: Contract: cases, materials and commentary* (1988) at 773 – 774 and Christie *op cit* note 1 at 472 – 473.

¹³⁸ *Kok supra* note 118 at 802D.

¹³⁹ *Ibid* at 802E-G. This passage from *African Realty Trust supra* note 59 appears at 400 in that judgment and is discussed above.

¹⁴⁰ *Kok supra* note 118 at 802G.

¹⁴¹ 1978 (1) SA 1170 (C). In this case it was accepted that a failed common assumption as to a future state of affairs could terminate a contract. This decision had already been overruled in *Hare’s Brickfields Ltd v Cape Town City Council* 1985 (1) SA 769 (C), a fact which Jones J notes, but ignores at 804A. The law on suppositions will be discussed below in section 2.3.

¹⁴² *Kok supra* note 118 at 804H.

¹⁴³ *Ibid* at 804H-I.

The criticism which has been levelled against this judgment is justified. The theoretical basis of Jones J's reasoning is flawed: not only is the supposition, which is said to terminate the contract not a commonly held one, but the impossibility is not absolute in the sense required for supervening impossibility to operate. Neither of these grounds which are recognised in South African law was followed, however, no doubt because neither could terminate the contract on the facts. The wording of the judgment suggests instead the acceptance of the doctrine of frustration of purpose, as Jones J's use of *African Realty Trust* and *Krell v Henry* as authority implies. While this is a reported judgment and must stand as an instance of frustration of purpose in South African law, the errors in reasoning and lack of indisputable authority render this case (once more) weak authority for the doctrine of frustration being part of South African law.

2.2.2.2.2 Cases opposing the incorporation of frustration into South African law
 Considerable space has been consumed in demonstrating that South African courts have in the past invoked the doctrine of frustration in deciding cases. It was seen, however, that there has been no clear acceptance of this doctrine by the Appellate Division and that most of the provincial decisions which refer to frustration in consequence lack clear authority for their findings. A discussion of this topic, however, would be incomplete without citation of several further cases, which contain clear dicta against the incorporation of frustration into South African law.

The first of these is *Bayley v Harwood*.¹⁴⁴ This is an interesting case, since it seems to be a clear instance where the purpose of the contract was frustrated. The facts were that the respondent provided certain premises to the appellant in a contract of lease.¹⁴⁵ The premises were in use as a health and pleasure resort, a business which the lessee intended to continue.¹⁴⁶ It was thus expressly provided in the agreement that the respondent lessor would provide all trading licenses in respect of the premises to the lessee, who would return them at the expiration of the lease.¹⁴⁷

¹⁴⁴ 1953 (3) SA 239 (T). Reversed on appeal: 1954 (3) SA 498 (A).

¹⁴⁵ *Ibid* at 241.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

During the currency of the lease, the lessee applied for the licences to be renewed, but permission was refused by the relevant authority unless certain structural alterations were made to the premises.¹⁴⁸ The lessor refused to make these alterations, so the lessee vacated the property, cancelling the contract.¹⁴⁹

The lessor then challenged the termination of the lease agreement, against which the lessee argued (inter alia) that the lease agreement had been “frustrated”. De Wet J held in the Transvaal Provincial Division as follows on this point:

“...[I]t is clear from the judgment in [*Peters, Flamman*] that the English law doctrine of frustration does not form part of our law. Under our law a person can only escape liability when he can prove that a contract has been discharged by impossibility of performance.”¹⁵⁰

De Wet J had already held that this was not an instance of impossibility since it was not the act of leasing itself which had become impossible, but merely the purpose for which the leased premises were to be used.¹⁵¹ This aspect of the decision was reversed on appeal to the Appellate Division. Greenberg JA held that the legislative prohibition of the use of the premises for a health and pleasure resort constituted *vis maior* and hence that impossibility terminated the contract.¹⁵² This finding was based on the reasoning that if the premises had been damaged by physical means, the lease agreement would have terminated due to impossibility. The legislative restriction on the use of the property was analogous and hence impossibility was likewise here present.¹⁵³ The judges in the Appellate Division, however, omitted any reference to the argument as to frustration.

Another interesting case where a frustration of the purpose of the contract occurred was *Grobbelaar NO v Bosch*.¹⁵⁴ The respondent, Bosch, had been the partner of Grobbelaar in certain business ventures in the Eastern Cape.¹⁵⁵ Grobbelaar had died and the executrix of his estate claimed certain assets of the partnership from

¹⁴⁸ Ibid.

¹⁴⁹ Ibid at 242.

¹⁵⁰ Supra note 144 at 244C-D.

¹⁵¹ Ibid at 243F-G.

¹⁵² Supra note 144 at 503G.

¹⁵³ See the discussion at 502H – 503G.

¹⁵⁴ 1964 (3) SA 687 (E).

¹⁵⁵ Ibid at 688.

the respondent.¹⁵⁶ In terms of a contract between the partners a life insurance policy had been taken out: the proceeds of the policy were to go to the family of the first of them to die, while the shares of such deceased were to be transferred to the remaining partner.¹⁵⁷ No further payments were to be made, regardless of the relative values of the policy and the shares at the time of payment. Then an unforeseen change of circumstances intervened, frustrating the purpose of the contract: Grobbelaar died, but Sanlam (the insurance company in question) refused to pay out on the life insurance policy.¹⁵⁸ A far smaller amount was eventually recovered from Sanlam in settlement.¹⁵⁹ Counsel for the appellant argued that the payment of the life insurance policy by Sanlam to the estate of the first-dying partner was the basis of the contract and the falling away of this basis discharged the contract.¹⁶⁰

O'Hagan J had the following to say to this argument:

“The present case would appear to be concerned with what is generally known as the doctrine of impossibility of performance of a contract. [The judge proceeded to quote the dictum from *Peters, Flamman* to the effect that supervening impossibility discharges a contract.] Later decisions of the South African Courts have done relatively little to exemplify the application of this rule to cases falling outside common categories such as impossibility created by war or act of the Legislature. The wealth of English judicial authority on the subject has not failed to influence the law of South Africa – see, e.g. *Hersman v Shapiro & Co* ... – but as the Appellate Division has not, as far as I am aware, adopted the trend of development in the English cases, I think this Court should be chary of looking for a solution of the present problem in the many dicta of the English judgments which would not be without relevance to the matter.”¹⁶¹

O'Hagan J went on to find that although destruction of the subject matter of a contract is a well known instance of impossibility, the comparable loss of the subject matter in this case was caused by the deliberate or negligent non-disclosure of relevant facts to Sanlam and hence the impossibility was self-created.¹⁶² This

¹⁵⁶ Ibid at 690.

¹⁵⁷ Ibid at 688 – 689.

¹⁵⁸ Ibid at 689 – 690.

¹⁵⁹ Ibid at 690.

¹⁶⁰ Ibid.

¹⁶¹ Ibid at 690H – 691B.

¹⁶² Ibid at 691C-F.

involved some interesting leaps in reasoning by the judge, since performance was not impossible: it was merely the purpose of the contract which had been frustrated. The overall decision seems sound, however: even in English law this would probably have been held to be a case of self-induced frustration.

The final case to be discussed here, *Techni-Pak Sales (Pty) Ltd v Hall*,¹⁶³ contains a fairly detailed finding on the doctrine of frustration in South Africa. In the case the plaintiff company brought an action against the defendant for the repayment of a loan of R7 200.¹⁶⁴ The defendant and a partner had patented a method of packaging and founded two companies to exploit his invention.¹⁶⁵ One of these was the plaintiff, the other Techni-Pak (Pty) Ltd.¹⁶⁶ The defendant and his partner needed funding to exploit the invention, however.¹⁶⁷ Thus two independent companies were granted shares in the plaintiff and provided financing in addition.¹⁶⁸ Ultimately these companies came to control the plaintiff company and to control the exploitation of the patent in South Africa.¹⁶⁹ Royalties in respect of the use of this patent would be payable to Techni-Pak, however, should the plaintiff ever make a profit.¹⁷⁰ In the meantime the defendant had a loan account with the plaintiff on which he ran up a debt.¹⁷¹ This account would only have to be repaid, however, out of royalties, should the plaintiff ever make a profit.¹⁷² When it started to look likely that the exploitation of the patent would prove profitable, the plaintiff sought to escape from its liability to pay royalties to Techni-Pak.¹⁷³ One of the financing companies behind the plaintiff had lent money to Techni-Pak and it used this leverage to cancel the payment of royalties.¹⁷⁴ The suggestion made by an accountant associated with the plaintiff to the defendant was that the extinction of the

¹⁶³ 1968 (3) SA 231 (W).

¹⁶⁴ Ibid at 231.

¹⁶⁵ Ibid at 232.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid at 232 – 235.

¹⁷⁰ Ibid at 233 – 234.

¹⁷¹ Ibid at 233.

¹⁷² Ibid at 233 – 234.

¹⁷³ Ibid at 234.

¹⁷⁴ Ibid at 234 – 235.

obligation to pay royalties would extinguish his obligation to pay his own outstanding loan account, provided the plaintiff remained solvent.¹⁷⁵

Some time after this agreement the defendant was starting to become successful in a separate business and the plaintiff instituted action for the outstanding loan, arguing that it was an implied term of the agreement that in the event of the plaintiff's right to royalties falling away, the defendant would have to repay his outstanding loan account.¹⁷⁶ Colman J held that no such implied term was present.¹⁷⁷

In the alternative the plaintiff argued that its contract, which suspended the defendant's obligation to repay the loan to it, had been frustrated, since the basis of this agreement was that the defendant would receive royalties from the plaintiff, which was no longer possible. Colman J noted that there was a difference of approach in the English cases: some stated that frustration depended on an implied term in the contract, others that frustration was a broad equitable device to end a contract where justice demanded it.¹⁷⁸ The judge noted that if frustration could be invoked even where there was no implied term as to a change of circumstances, "the granite concept of sanctity of contracts will be shattered".¹⁷⁹ He summed up as follows on the status of frustration in South African law:

"In our Courts the doctrine of frustration has upon occasion been referred to by that name, but it is not clear to me that it has ever been applied to a situation which was not covered also by one or other of our more familiar rules relating to implied term [sic] or impossibility of performance. Counsel have not been able to refer me to any case in which one of our Courts has assumed the type of broad equitable jurisdiction which Courts of England are said to have in respect of frustration."¹⁸⁰

The argument as to frustration thus failed in this case as well. While this was perhaps not the best example of a case ripe for equitable intervention at the plaintiff's behest, or even an invocation of the doctrine of frustration, the position of Colman J is unequivocal. Indeed, while the cases cited as being against the doctrine of frustration are all provincial decisions, and hence of equal weight to those in

¹⁷⁵ Ibid.

¹⁷⁶ Ibid at 236.

¹⁷⁷ Ibid at 237F.

¹⁷⁸ Ibid at 238C-F.

¹⁷⁹ Ibid at 238G.

¹⁸⁰ Ibid at 238H.

favour from the point of view of precedent, they seem to be truer to the status quo of South African contract law. The overall lack of authority in favour of frustration is telling and is preyed upon by the judges in the cases against this doctrine. The conclusion of this inquiry must be that although some authority for the doctrine of frustration exists, it is not very persuasive.

This ends the investigation into what South African Courts have actually said on the matter, but does not conclude the normative inquiry as to whether frustration should be part of South African law. That question will be considered in chapter eight.

2.2.3 Commercial impossibility

As Ramsden notes, the term “commercial impossibility” is used in two senses in South African law: firstly to denote a situation of increased difficulty of performance or hardship and secondly as a synonym for frustration of purpose, that is where one or both parties’ motive for contracting is not achieved.¹⁸¹ Motives in contracting were discussed above under frustration of purpose and will be covered again below under the topic of suppositions. It is the first sense of this phrase, namely increased hardship, which will be considered here.

First and foremost it should be noted that increased difficulty in performance is not a ground of discharge in South African contract law.¹⁸² Even in English law, as will be discussed in chapter four, an increase in difficulty does not excuse performance.¹⁸³ Authority for commercial impossibility terminating a contract can, however, be found in the American doctrine of impracticability.¹⁸⁴

The doctrine of impracticability aims to protect the supplier of goods or services. Thus in a sense it is the converse of frustration of purpose, since the latter doctrine

¹⁸¹ Ramsden op cit note 28 at 74.

¹⁸² *MacDuff* supra note 69 at 606; *Hersman* supra note 2 at 375 – 377.

¹⁸³ See *British Movietonews Ltd v London and District Cinemas* [1952] AC 166 at 185; *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495 at 510. This is the general position: an exception was made in *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387. This case, however, concerned a contract of indefinite duration and an 18 fold increase in price. For further discussion of these cases, see below in chapter 4.

¹⁸⁴ See Uniform Commercial Code § 2 – 615 and the Second Restatement of Contracts at § 261, both of which are discussed below in chapter 4.

protects a buyer, or party obliged to pay under a contract: should the reason for his obligation fall away, the contract falls away too. Impracticability rather means that should it become more difficult or expensive to supply goods, then discharge may occur.¹⁸⁵

As stated at the outset, however, an increase in the expense or difficulty of performance does not discharge a contract under South African law. It will be remembered that in *MacDuff & Co Ltd v Johannesburg Consolidated Investment Co Ltd*¹⁸⁶ the defendant company had undertaken to form a new company and take over the assets and the running of MacDuff & Co Ltd. A slump in the market made performance under this agreement disadvantageous to the defendant and it reneged on its promise. The argument that it was “commercially impossible” for the defendant to uphold its contract was dismissed by the Appellate Division, referring to the English case of *Tennants (Lancashire) Ltd v CS Nelson & Co.*¹⁸⁷ Likewise in *Hersman v Shapiro*,¹⁸⁸ the defendant had failed to deliver a quantity of corn of a certain grade. His defence that there was a scarcity of such corn and that in consequence performance was impossible was rejected by the Court: he had not offered “fancy” prices for the corn he sought, nor looked in more distant markets.¹⁸⁹

A more recent dictum against commercial impossibility can be found in *Unibank Savings and Loans Ltd v Absa Bank Ltd*.¹⁹⁰ In that case Flemming DJP stated that:

“Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.”¹⁹¹

The position thus seems bleak for commercial impossibility in South African law. Roman-Dutch law recognised only absolute impossibility as a ground of discharge and this has been taken up into the South African case law. Even the more permissive English doctrine of frustration, which has achieved a luke-warm reception

¹⁸⁵ Treitel op cit note 29 at 309.

¹⁸⁶ *MacDuff* supra note 69.

¹⁸⁷ *Tennants (Lancashire)* supra note 161. The decision of the Appellate Division and the quotation appear at 606 in the *MacDuff* judgment.

¹⁸⁸ *Hersman* supra note 2.

¹⁸⁹ *Ibid* at 375 – 377.

¹⁹⁰ 2000 (4) SA 191 (W).

¹⁹¹ *Ibid* at 198D.

in the domestic case law, does not recognise increased difficulty as a ground of discharge. It must thus categorically be stated that commercial impossibility forms no part of South African law.

The fact that authority does exist for this concept in other jurisdictions should not go unnoticed, however. As will be shown in later chapters, in several civil law codes as well as in the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law, discharge for impracticability is permitted.¹⁹² A review of the cases mentioned above suggests that impracticability does not form part of South African law at present. Academic opinion seems to be less severe in this regard, however. Certain commentators see an opening in this edifice through their belief that the standard of impossibility required to invite discharge is at least slightly flexible. Consider the example mentioned earlier of a ship carrying a ring which sinks to the ocean floor. Indeed De Wet and Van Wyk and others go so far as to suggest that the standard of impossibility required is a “verkeersmaatstaf” (or a “pragmatic”) one.¹⁹³ If there is an element of practical commercial reality present in determining what is impossible and what is not, then in extreme cases of impracticability a case could be made that performance has indeed become impossible. The law in this area may be less settled than appears at first glance and “commercial impossibility” may not be as much of a dead end in the South African law of contract as the cases considered above suggest.

2.3 Other concepts relevant to changed circumstances: suppositions and tacit terms.

A consideration of doctrines which deal with changed circumstances in South African contract law must of necessity cast the net wider than mere impossibility. Given that our system does not currently allow for a broad doctrine specifically tasked with dealing with changed circumstances, the various disparate concepts which can have

¹⁹² See below in chapters 5 and 6.

¹⁹³ De Wet & Van Wyk op cit note 30 at 85 – 86. Van der Merwe et al op cit note 1 translate “verkeersmaatstaf” as a “pragmatic standard” at 188. Ramsden op cit note 28 at 64 states that there can be no absolute or exact standard of impossibility. Whether or not performance is impossible depends on the surrounding circumstances, including the state of present technology and the terms of the contract itself.

an influence in this area must all be considered if we are to evaluate the approach of our domestic law to this issue. A contract can be terminated by a failed common assumption (or supposition) or by a tacit resolutive condition. If one were to state that the common assumption was that an existing state of affairs remain unchanged, then we would be precisely within the realm of change of circumstances. Similarly if the continuation of a given set of circumstances is to be seen as a tacit condition of a contract, the contract could fall away should there be a fundamental shift in the status quo. Arguably these two contractual concepts could be said to overlap – a possibility which will be explored below.

It has been argued in section two of this chapter that the South African notion of impossibility does not encompass the viewpoint that when “the basis of a contract falls away the contract falls away with it”.¹⁹⁴ This touches on the motives on which a contracting party bases his or her consent to a contract and these are generally not viewed as good grounds for discharge.¹⁹⁵ Under certain circumstances, however, a party’s motives can form part of the contract – a view which will presently be defended. This section three will argue for the position that the oft-quoted proposition from *African Realty Trust* – that when the basis of a contract falls away, the contract falls away with it – is not inconceivable. Perhaps in this manner a version of frustration of purpose can be introduced into South African law, to at least allow some scope for dealing with changed circumstances.

2.3.1 The theoretical nature of tacit terms and suppositions and their application to the problem at hand

2.3.1.1 Tacit terms

Here we are concerned with the issue of whether there can be a tacit term to the effect that should the circumstances on which a contract is based change, the contract will come to an end. This would be a term implied by the facts of the case.¹⁹⁶ The test for whether a tacit term exists in a contract is well established in

¹⁹⁴ *African Realty Trust* supra note 59 at 400.

¹⁹⁵ Ibid at 403. *Van Reenen Steel (Pty) Ltd v Smith NO 2002 (4) SA 264 (SCA)* at 269A.

¹⁹⁶ Van der Merwe et al op cit note 1 at 279.

South African law and was originally accepted by the Appellate Division in the following terms:

"You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated some one had said to the parties 'what will happen in such a case?', they would have replied 'of course, so and so.' We did not trouble to say that it is too clear."¹⁹⁷

Perhaps the leading modern case on this topic is *Wilkins v Voges*.¹⁹⁸ This case turned on whether or not a tacit term could be proved in the contract under dispute and the Appellate Division set out a particularly useful statement on the topic.¹⁹⁹ According to the court in that case a tacit term can be actual or imputed, depending on whether the parties to the contract thought about the matter or not. Even if the parties did not consider the matter at hand, a tacit term may still be imputed into their contract.²⁰⁰ Furthermore the content of the tacit term is a matter of inference to be derived from the express terms and the surrounding circumstances.²⁰¹ The tests to be used for determining its existence are (as stated above) the bystander and the business efficacy tests.²⁰²

In *Lanificio Varam SA v Masurel Fils (Pty) Ltd*,²⁰³ a contract for the sale of wool by a South African company to a Brazilian company was brought to an end due to a tacit term. In terms of the contract, the appellant, (the Brazilian company) was to apply for an import licence, so that the respondent could ship the wool to Brazil.²⁰⁴ The contract was silent about the time frame within which this was to occur. The wool was purchased on 19 October 1949.²⁰⁵ On 15 December that year, the respondent repudiated the contract as the requisite import licence had not yet been obtained.²⁰⁶ The repudiation was not acknowledged by the appellant and on 11 February 1950

¹⁹⁷ *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25. Here the Appellate Division accepted the above test as set out verbatim in the English case of *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 at 605 per Scrutton LJ. This test has been confirmed many times by the Appellate Division and subsequently the Supreme Court of Appeal since then. See Christie op cit note 1 at 169n78.

¹⁹⁸ 1994 (3) SA 130 (A).

¹⁹⁹ *Wilkins v Voges* supra note 198 at 136 – 137.

²⁰⁰ Ibid at 136.

²⁰¹ Ibid at 136 – 137.

²⁰² Ibid at 137.

²⁰³ 1952 (4) SA 655 (A).

²⁰⁴ Ibid at 659.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

the licence was tendered to respondent.²⁰⁷ The respondent refused to ship the wool, claiming that the contract had been discharged since the licence had not been provided within a reasonable time.²⁰⁸ The Appellate Division accepted this argument: due to the fluctuating price of wool it could not be expected that the respondent would wait indefinitely to deliver the *merx*.²⁰⁹

While it may be argued that price fluctuations within the wool market over time do not represent an unforeseen (or certainly not unforeseeable) change in circumstances, the *Lanificio Varam* case does, however, illustrate the point that a tacit term can bring a contract to an end subsequent to its conclusion. This would probably be conceptualised as a tacit resolutive condition. For an implied term to operate within a contractual setting it is not, however, necessary that the parties should have foreseen the necessity for that term at the time of contracting. It is possible that a Court may read in a tacit term even if the parties never contemplated the circumstances to which it relates.²¹⁰ This is referred to as an “imputed” tacit term.²¹¹ Thus it is possible that a contract may contain a tacit resolutive condition that it would come to an end should a certain eventuality occur, whether or not the parties to that contract contemplated such an eventuality. Clearly here we have a device capable of terminating a contract for changed circumstances.

2.3.1.2 Suppositions

A party to a contract will often enter that agreement with certain fundamental assumptions in mind. These assumptions will often inform his consent and provide the motivation for why he entered into the contract in the first place. Should such an assumption exist in the mind of that contracting party alone and never be expressed by him, it will be of no force or effect. If the assumption proves false subsequent to the conclusion of the contract, the law would state that that party acted under an error in motive, which is a non-material form of mistake.²¹² Should the assumption be common to both parties the position is different: the contract will come to an end

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid at 660G – 661A.

²¹⁰ *Van den Berg v Tenner* 1975 (2) SA 268 (A) at 277.

²¹¹ *Wilkins* supra note 198 at 136 – 137.

²¹² *African Realty Trust* supra note 59 at 403.

should that assumption prove false, provided it is sufficiently fundamental.²¹³ De Wet and Van Wyk give the following example: A is the owner of a property in a coastal village; B wants to buy this property, but only if it has a sea view. A is not sure whether it has a sea view and therefore does not want to guarantee this fact. Therefore A and B enter into an agreement for the sale of the property on the common assumption that the property does have a sea view.²¹⁴ The learned authors explain that this is not a conditional sale, in that the transaction does not depend on an uncertain future event. The obligation to buy is either binding or not binding at the time of entering into the agreement, depending on whether or not the common assumption is true.²¹⁵ This type of common assumption which is fundamental to the transaction concerned, is also referred to as a supposition.

De Wet and Van Wyk's example illustrates the classic conception of the supposition: a contract is based on a common assumption about a state of affairs, where the uncertainty in the minds of the contracting parties about that state of affairs prevents a full-blown warranty as to the existence of such circumstances.²¹⁶ The example is closely related to the facts of *Fourie v CDMO Homes (Pty) Ltd*:²¹⁷ the appellant had sold land to the respondent, who had developed that land at considerable cost.²¹⁸ Although the appellant seller had never guaranteed the right to pump water from an adjacent river attached to the property, it was the common assumption of the parties that such a right existed.²¹⁹ When the assumption proved false, the buyer was released from its obligation to purchase and the contract was held to have been terminated.²²⁰ As spelt out by Holmes JA in that case (with reference to the above quoted passage from De Wet and Yeats), the common assumption relates to the present and is thus not a condition.²²¹ Thus although the parties in that case had

²¹³ *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A); *Fourie v CDMO Homes (Pty) Ltd* 1982 (1) SA 21 (A).

²¹⁴ De Wet and Van Wyk op cit note 30 at 154.

²¹⁵ Ibid. This argument and example received the Appellate Division's stamp of approval in *Fourie* supra note 213 where the original passage (taken from an earlier edition of this work) was reproduced at 27E-H.

²¹⁶ Compare further the formulation in Van der Merwe et al op cit note 1 at 285.

²¹⁷ *Fourie* supra note 213.

²¹⁸ Ibid at 25.

²¹⁹ Ibid.

²²⁰ Ibid at 28B-F.

²²¹ Ibid.

used the word “condition”, it was in fact a supposition and the failure of the supposition to materialise rendered the contract at an end.

A slightly different type of supposition occurred in *Dickinson Motors (Pty) Ltd v Oberholzer*.²²² Again the contract failed due to a common assumption relating to the present proving false, but this time there was no uncertainty in the minds of the parties as to the truth of their assumption. When the supposition proved false, the Appellate Division held that the contract was terminated on the grounds of common mistake.²²³ The facts of the case were that the appellant had sold a Plymouth motor car (“Plymouth A”) to the son of the respondent under a hire purchase agreement.²²⁴ The son had in addition purchased an identical Plymouth (“Plymouth B”) from another car dealership, also under hire purchase.²²⁵ The son then exchanged Plymouth B for his father’s car and sold both this car and Plymouth A.²²⁶ The appellant then sought to attach Plymouth A and was told (untruthfully) by the son that it was on his father’s (the respondent’s) farm.²²⁷ This car (Plymouth B) was then duly attached, both appellant and respondent believing (incorrectly) that it was Plymouth A.²²⁸ The respondent then found himself without a car and agreed with the appellant to pay the outstanding balance owed by his son in respect of Plymouth A to recover the vehicle.²²⁹ This car was, however, Plymouth B and it was then attached again, this time by the second car dealership, who were the true owners of this vehicle.²³⁰ The identity of the car having been proved, it became apparent that the respondent had paid the outstanding balance based on a common mistake and he sought to recover from the appellant.

The Appellate Division held (as explained above) that Oberholzer was indeed entitled to recover the sum which he had paid to Dickinson Motors, since the

²²² *Dickinson Motors* supra note 213.

²²³ *Ibid* at 450C-F.

²²⁴ *Ibid* at 445.

²²⁵ *Ibid* at 446.

²²⁶ *Ibid*.

²²⁷ *Ibid*.

²²⁸ *Ibid*.

²²⁹ *Ibid* at 447.

²³⁰ *Ibid*.

agreement between them was terminated by a mistake.²³¹ The reason for the failure of the contract was the false common belief between its parties. Both were certain that the car was Plymouth A and when this proved false the basis of the transaction fell away. Clearly this is a failed common supposition as to a present fact. The Appellate Division chose to refer to this defect as a “common mistake”, however, and it is thus under this heading that this second type of supposition is categorised.²³²

Suppositions may thus relate to a present or past fact and should the supposition prove false, the contract will be terminated either due to a failed common assumption (where there is uncertainty in the minds of the contracting parties as to the truth of their assumption) or due to common mistake (where there is no uncertainty in the minds of parties as to the truth of their assumption).

A third category of supposition is also found in the case law, although this final construction is far more contentious.²³³ It was held in *Williams v Evans*²³⁴ that:

“[T]here is authoritative support for [the] contention that where a contract is entered into on the basis of a common assumption as to a future state of affairs, it may fail if the assumption or supposition fails and it is established that the parties would not have entered into the agreement had they known that their expectations would not materialize.”²³⁵

It is this third construction which is particularly relevant to a discussion of changed circumstances, since this is the only form of supposition which could take account of an unforeseen change of circumstances occurring subsequent to the conclusion of the contract. Williams had entered into an agreement with Evans in terms of which Evans would purchase a dairy from Williams’s son and would undertake liability for a debt to her (Williams) of R20 000.²³⁶ To run the dairy and meet his financial obligations, Evans would need an overdraft facility from a bank, and as part of the contract Williams agreed to furnish security in order to enable him to obtain such a

²³¹ Ibid at 450.

²³² Ibid.

²³³ Christie is vehemently opposed to the supposition in futuro, as appears from Christie op cit note 1 at 328. Van der Merwe et al op cit note 1 at 285 – 286 is far more circumspect, noting a divergence in opinion without really favouring either side.

²³⁴ *Williams v Evans* supra note 141.

²³⁵ Ibid at 1174G-H.

²³⁶ Ibid at 1171.

facility.²³⁷ Thus a supposition on which the contract containing Evans's indebtedness to Williams rested was that if Williams furnished the necessary security, Evans would be able to obtain an overdraft facility.²³⁸ After the conclusion of the contract the bank refused to grant this facility to Evans.²³⁹ Evans then sought discharge of the contract. Broeksma J in the Cape Provincial Division found that Evans's defence that the failure of a supposition in futuro was fatal to the contract was a good one and refused to grant Williams a declaratory order against the respondent.²⁴⁰

Suppositions relating to the past and present are of no aid to a discussion of change of circumstances, since they are unable to take account of an unforeseen change of circumstances occurring after the conclusion of the contract. It is thus the supposition in futuro which this inquiry will investigate and the possibility that it could be used to discharge a contract, where the common motivating foundation of the parties has fallen away. The authority which Broeksma J referred to, however, was – it is submitted – limited. The shortcomings of this authority were highlighted by Van den Heever J in the subsequent case of *Hare's Brickfields Ltd v Cape Town City Council*,²⁴¹ where *Williams v Evans* was expressly overruled.²⁴² Van den Heever J found that such a supposition must be either a term of the contract or a condition in order to have any effect.²⁴³ The major authorities cited by Broeksma J dealt with suppositions relating to past or present facts, rather than to the future, as pointed out by Van den Heever J in his criticism of the *Williams* judgment.²⁴⁴ This means that the only real support for the construction argued for came in the form of academic opinion where the concept was discussed in an article dealing largely with enrichment.²⁴⁵

²³⁷ Ibid at 1172.

²³⁸ Ibid at 1173.

²³⁹ Ibid at 1172.

²⁴⁰ Ibid at 1175.

²⁴¹ *Hare's Brickfields* supra note 141.

²⁴² *Williams v Evans* is overruled at 781A-B. The shortcomings of the authorities cited in *Williams* are highlighted at 781B-E.

²⁴³ *Hare's Brickfields* supra note 141 at 781G.

²⁴⁴ The major authorities cited in *Williams v Evans* were *Dickinson Motors (Pty) Ltd v Oberholzer* supra note 191; *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C) and *Fienberg v Jardine* 1915 NPD 439. The opinion of De Vos contained in Wouter de Vos "Solutio indebiti en eiendomsorgang" (1976) TSAR 79 was also cited.

²⁴⁵ De Vos op cit note 244 at 82.

Despite the finding in *Williams* having been overruled by two judges of the Cape Provincial Division soon after it was made,²⁴⁶ support for the supposition in futuro remained. In *Osman v Standard Bank National Credit Corporation Ltd* Friedman J stated that:

“[i]f a contract is entered into on the basis of a common assumption as to a past, present or future state of affairs, and that assumption turns out to be unfounded, the contract will be void. See *Williams v Evans*...”²⁴⁷

Van der Merwe and Van Huyssteen also argued for this construction in a case note on *Hare’s Brickfields*.²⁴⁸ They distinguish a supposition in futuro from a condition, since by definition a condition entails uncertainty, whereas parties labouring under this type of supposition are sure of the continuation of the assumed state of affairs.²⁴⁹

In the Natal Provincial Division a full bench had occasion to consider an argument for the termination of an agreement due to a supposition in futuro in *Sonarep (SA) (Pty) Ltd v Motorcraft (Pty) Ltd*.²⁵⁰ Kumleben J held in that case that a supposition in futuro was indistinguishable from a tacit condition.²⁵¹ The argument for the existence of a supposition in futuro failed on this basis, since the alleged tacit condition was at variance with the express terms of the contract in question and in any event did not meet the requisite test necessary to be implied into the contract.²⁵² The judge expressly stated that an error in motive does not affect the validity of a contract and that despite a change in circumstances the express terms of the agreement should stand.²⁵³

For many years that was where it stood: the supposition in futuro had certain limited academic support, but *Williams v Evans* had been overruled within the Cape

²⁴⁶ *Hare’s Brickfields* supra note 141 at 781A-B.

²⁴⁷ 1985 (2) SA 378 (C) at 386C.

²⁴⁸ Schalk van der Merwe & LF van Huyssteen (1985) *THRHR* 469.

²⁴⁹ *Ibid* at 471.

²⁵⁰ 1981 (1) SA 889 (N).

²⁵¹ *Ibid* at 902F.

²⁵² *Ibid* at 902G-H.

²⁵³ *Ibid* at 901G.

Provincial Division and the Natal Provincial Division had also rejected the supposition in futuro. Then in *Van Reenen Steel (Pty) Ltd v Smith NO* the Supreme Court of Appeal finally pronounced on the matter.²⁵⁴ In that case a business had been purchased by the appellants, based on a due diligence conducted by them which reflected the business to have potential.²⁵⁵ The true position, however, was that the business was not as profitable as the due diligence stated and was fast approaching insolvency.²⁵⁶ When this fact came to light, the appellants sought to escape the contract, arguing that their purchase had been based on a common fundamental assumption that the business was viable.²⁵⁷ As pointed out by Harms JA, this supposition related to “an existing or past fact”.²⁵⁸ Harms JA went on to find that there was no common supposition at all, but rather a unilateral error in motive on the part of the appellants, which had no bearing on the case.²⁵⁹

In the process of reaching his decision on this point, however, Harms JA pronounced on the status of suppositions as to a future state of affairs, quoting from the *Sonarep* case:

“Assumptions or suppositions can have many forms and have different effects depending upon the circumstances. An assumption relating to a future state of affairs

‘relates to an agreement which is in operation and its recognition would have a direct bearing upon one of the terms of the agreement. Such a supposition is indistinguishable from a condition,’

usually a resolutive condition, perhaps also a condition precedent or an ordinary term of the contract. The use of the word ‘supposition’ or ‘assumption’ instead of ‘condition’ in this context is not conducive to clear thinking.”²⁶⁰

In a footnote to this paragraph, the learned judge also stated that “*Williams v Evans* ... is consequently wrong.”²⁶¹ It is submitted that this statement was obiter, since the case turned on a supposition as to a present or past fact, yet it remains highly authoritative. Further support for this view of Harms JA was set out in *Transnet Ltd v*

²⁵⁴ Supra note 195.

²⁵⁵ Ibid at 267.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid at [1].

²⁵⁹ Ibid at [9] – [13].

²⁶⁰ Ibid at [8]. The extract within the quote comes from the *Sonarep* case supra note 250 at 902F.

²⁶¹ Ibid at [8] n2. References omitted.

Rubenstein.²⁶² In that case Cloete JA, in a separate concurring judgment cited the above quoted extract from *Van Reenen Steel* with approval.²⁶³ Cloete JA summed up as follows:

“A supposition, to have legal effect, must translate into a mistake, a misrepresentation, a term or a condition (and the term or condition may be express or tacit).”²⁶⁴

The position of the Supreme Court of Appeal on the status of the supposition in futuro thus seems to be clear: the only way in which such a reservation may have an impact on an agreement is if it is framed as a resolute condition and is included in this form in the contract. What this means for the problem of changed circumstances is that the parties to an agreement will not be able to argue for discharge on the basis of a common material assumption that the status quo would remain constant. If circumstances have changed and a party wishes to escape the contract, he will have to show that there was a resolute condition that the contract would end given such change. There is, however, hope for a party seeking discharge for an unforeseen change of circumstances: the resolute condition may be implied. Thus in the absence of a hardship clause (or some similar provision) a contracting party may still escape due to the failure of a common assumption as to the future, provided that he can frame it as a tacit resolute condition. This is a possibility to be considered in future chapters, since it may provide a solution to the problem of changed circumstances.

2.4 Change of circumstances in the context of specific performance

One area of South African contract law where hardship resulting from changed circumstances is recognised is in the context of specific performance.²⁶⁵ Specific performance is a remedy for breach of contract in South African law which enforces performance of the letter of the contract against the defendant. In principle a party has a right to an order of specific performance in an instance of breach, but this is a

²⁶² 2006 (1) SA 591 (SCA).

²⁶³ *Ibid* at [29].

²⁶⁴ *Ibid*.

²⁶⁵ *Haynes* supra note 5 at 381B-E; *Barclays National Bank* supra note 5 at 654H – 655H; *Dithaba Platinum* supra note 5 at 627A – 628I; *Van der Merwe et al* op cit note 1 at 383; *Christie* op cit note 1 at 526.

discretionary remedy and may be refused by a court.²⁶⁶ Since *Benson v SA Mutual Life Assurance Society*²⁶⁷ it is clear that while a refusal may be made on the ground of hardship (for instance) this remains merely a factor relevant to the exercise of the discretion and not a concrete rule preventing an award of specific performance.²⁶⁸

In *Haynes v King William's Town Municipality*²⁶⁹ the respondent municipality had built a dam on the Buffalo River near King William's Town in 1911.²⁷⁰ The appellant's farm was situated downstream from this dam and in terms of an agreement concluded in 1911, the respondent had agreed to release a daily quantity of 250 000 gallons of water from the dam into the Buffalo River.²⁷¹ This agreement was honoured until 1949, when there was a drought in the region.²⁷² The municipality refused to release the contractual amount of water at this time, due to the necessity of maintaining a water supply for King William's Town.²⁷³ The appellant sought specific performance of the agreement, but the Appellate Division held that due to the change in circumstances and the resultant hardship to the respondent specific performance would not be awarded.²⁷⁴

The relevance of this rule to the present discussion is that while a South African court may not discharge a contract on the grounds of hardship alone, there is a concession made to the circumstances of the debtor through the above mentioned limitation on the doctrine of specific performance. As the *Haynes* case demonstrates this does grant at least partial relief to the position of a debtor for whom performance has become more onerous due to a change in circumstances. This may explain how the South African legal system is able to operate without a doctrine of contractual hardship, although this partial relief still does not adequately allocate risk amongst contracting parties, due to the remaining possibility of a damages claim which can be

²⁶⁶ *Farmer's Co-operative Society v Berry* 1912 AD 343, *Haynes* supra note 5.

²⁶⁷ 1986 (1) SA 776 (A).

²⁶⁸ *Ibid* at 785F-G.

²⁶⁹ *Supra* note 5.

²⁷⁰ *Ibid* at 375.

²⁷¹ *Ibid*.

²⁷² *Ibid*.

²⁷³ *Ibid* at 375 – 376.

²⁷⁴ *Ibid* at 381B-E. Further reasons given for not awarding specific performance were a positive danger to the health of the community and a possible disruption of the life of the town.

brought against the debtor for non-performance. This means that the costs of a unforeseen event could still potentially fall on one party alone.

2.5 Legislation on change of circumstances?

2.5.1 South African Law Commission

In 1998 the South African Law Commission proposed a draft Bill to address the problem of unfairness in contracting.²⁷⁵ This Bill was to provide legislative impetus for the good faith movement, giving concrete enactment to the notion of fairness in contract. This Bill was never enacted, however, and has today largely been superseded by developments in the specific area of consumer law, namely the promulgation of the Consumer Protection Act.²⁷⁶ The feature of the draft Bill which makes it highly relevant to the present discussion is its inclusion at clause 4 of detailed rules to deal with changed circumstances.

Clause 4 sets out almost verbatim the same rules as those contained in the Principles of European Contract Law on change of circumstances.²⁷⁷ While these provisions provide a valuable solution to the problem of changed circumstances, which will be discussed below, it should be noted that the report does not motivate for the choice of this particular set of rules, rather than any of the other comparative models available.²⁷⁸ Why the PECL rules should be included to the exclusion of, for example, those contained in the Unidroit PICC is not explained. Nevertheless the attempt to address this problem in some way is laudable.

At clause 4(1) the draft Bill begins by setting out the default position of *pacta sunt servanda*, namely that “a party is bound to fulfil his or her obligations under the contract even if performance has become more onerous...”

²⁷⁵ *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts*, South African Law Commission, Project 47, April 1998 at 208.

²⁷⁶ Act 68 of 2008. This Act will be considered in chapter 7.

²⁷⁷ Change of circumstances is dealt with in the PECL at art 6:111. See Ole Lando & Hugh Beale *Principles of European Contract Law (Parts I and II)* (2000) at 322. These PECL provisions will be dealt with in more detail in chapter 6.

²⁷⁸ *Report op cit* note 256 at 188 – 191.

In clause 4(2) the threshold for relief is set as when performance has become “excessively onerous because of a change in circumstances”. If this position eventuates, the parties are bound to enter into negotiations with a view to adaptation or termination of the contract, provided certain further tests are met. These are that the change must have occurred after the time of the conclusion of the contract, or if it had already occurred at the time of conclusion, then it was of such a nature that it could not reasonably have been known to the parties.²⁷⁹ Thus relief will be granted not only in true instances of frustration, but also in cases of common mistake.²⁸⁰ Further requirements are that the change of circumstances could not reasonably have been taken into account at the time of conclusion of the contract²⁸¹ and that the risk of change of circumstances had not been allocated by the contract.²⁸²

If a court should find that the threshold for relief is met, it may terminate the contract at a date and on terms to be determined by the court, or it may adapt the contract to distribute the losses and gains between the parties in an equitable manner.²⁸³ Finally the obligation to renegotiate prior to court intervention is given teeth by the inclusion of clause 4(3)(c), which allows a court to award damages for a refusal to renegotiate or breaking off negotiations in bad faith.

Thus the draft Bill would have provided a solution to the problem of changed circumstances. If enacted, the Bill would not only permit discharge for frustration of purpose and impracticability, it would also go beyond the all-or-nothing approach of English law and grant a broad discretion to courts as to how to address the problem of changed circumstances. Although this would present a limitation of the concept of *pacta sunt servanda*, it would remain the default position as clause 4(1) demonstrates and in any event a person seeking to rely on clause 4 would bear the burden of proving that the threshold of “unreasonableness, unconscionableness or oppressiveness” was met.²⁸⁴ Although the Bill was not enacted, its provisions

²⁷⁹ Cl 4(2)(a). This is a major difference from the PECL which do not allow release for changed circumstances in a situation of common mistake.

²⁸⁰ This is the same as the position under the German and Dutch codes. See chapter 5.

²⁸¹ Cl 4(2)(c). In other words the change must not have been reasonably foreseeable.

²⁸² Cl 4(2)(d).

²⁸³ Cl 4(3).

²⁸⁴ Cf Jan L Neels “Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg” (1999) *TSAR* 684 at 703.

nevertheless provide an indication that the problem of changed circumstances has been identified as an issue of concern by the South African Law Commission (as it then was) and hence is ripe for address.

2.5.2 National Credit Act²⁸⁵

Perhaps the only true example of contract revision due to changed circumstances occurs in the context of debt review under the recently promulgated National Credit Act. This statute deals with the revision of debts due to over-indebtedness of the debtor and/or the prior extension of reckless credit by a credit provider at chapter four part D. In terms of this part of the Act, debt counsellors facilitate restructuring of debt and Magistrates' Courts are empowered to rearrange the contractual obligations of consumer debtors should the threshold tests of over-indebtedness and/or reckless credit be met.²⁸⁶

In terms of the application of these provisions, this part of the Act states at the outset that it only applies to consumers who are natural persons.²⁸⁷ Further thresholds are established by the definitions of over-indebtedness and reckless credit.²⁸⁸ Over-indebtedness exists when the "preponderance of available information at the time a determination is made" indicates the consumer will not be able "to satisfy in a timely manner all the obligations under all the credit agreements" to which he or she is party.²⁸⁹ In order to initiate debt review proceedings a court may refer a consumer to a debt counsellor or itself declare that he or she is over-indebted,²⁹⁰ alternatively the consumer may himself apply for debt review.²⁹¹ If the consumer makes an application for debt review himself under s 86, he will be required to provide an in-depth account of his financial affairs in terms of the regulations to the Act.²⁹²

As part of the debt review process, in addition to finding that a consumer is over-indebted a debt review counsellor may also find that a particular credit agreement is

²⁸⁵ Act 34 of 2005.

²⁸⁶ The specific empowering sections are discussed in more detail below.

²⁸⁷ Section 78(1).

²⁸⁸ Section 79 & 80.

²⁸⁹ Section 79 (1).

²⁹⁰ Section 85.

²⁹¹ Section 86(1).

²⁹² Regulation 24.

reckless.²⁹³ A credit agreement will be reckless if the credit provider failed to do the necessary background check into the debtor's financial status at the time of granting credit, or having done so, ignored signs that the consumer did not appreciate the extent of his obligations or would be rendered over-indebted.²⁹⁴ A court may set aside or suspend any reckless credit agreement.²⁹⁵ If it does so it must then consider whether a consumer is over-indebted and hence stands to have his or her debt restructured.²⁹⁶ If a court does consider a consumer to be over-indebted, it may then refer the consumer to a debt counsellor or restructure the debt itself.²⁹⁷

After an assessment in terms of s 86(6) as to whether a consumer is over-indebted and/or reckless credit has been granted, the debt counsellor may reject the consumer's application, recommend voluntary negotiation between the consumer and his or her credit providers or find that over-indebtedness is present and make a recommendation to the Magistrates' Court having jurisdiction.²⁹⁸ This recommendation can be that there should be a finding that reckless credit is present and/or that one or more of the consumer's obligations be rearranged.²⁹⁹

Once a consumer has applied for debt review he or she may not enter into any new credit agreements, or be extended further credit under a credit facility such as a credit card, until the application has been rejected or all debts paid in terms of the rearranged payment plan.³⁰⁰ Enforcement proceedings by creditors are stayed during the review process, unless the consumer defaults on his or her rearranged debts.³⁰¹

One of the purposes of this Act is to promote "responsibility in the credit market".³⁰² It is in this vein that the Act has introduced the concepts of "over-indebtedness" and

²⁹³ Section 86(6).

²⁹⁴ Section 80. The background check to prevent reckless credit is mandatory in terms of s 81 (2).

²⁹⁵ Section 83(2).

²⁹⁶ Section 83(3).

²⁹⁷ Section 85.

²⁹⁸ Section 86(7).

²⁹⁹ Section 86(7)(c).

³⁰⁰ Section 88(1).

³⁰¹ Section 88(3) read with s 86(10).

³⁰² Section 3(c). Compare Robert Sharrock *Business Transactions Law* (2007) at 351.

“reckless credit”.³⁰³ Rather than force sequestration upon a debtor, the new measures take account of subjective circumstances and allow for review due to economic hardship.³⁰⁴ This form of contract revision is closely supervised by qualified debt counsellors³⁰⁵ and is conducted under the auspices of the Magistrates’ Courts. This provides a clear instance where a contract can be revised (inter alia) on the ground of the changed circumstances of the consumer and allows for a supervised form of renegotiation or termination of the contract in question. Thus, although the sphere of application of this provision is carefully limited, it represents a movement by the Legislature in the direction of recognising a remedy for changed circumstances.

2.6 Conclusion

The conclusion which should first and foremost be drawn from this brief analysis is that the South African common law has no common law doctrine to deal with changed circumstances in contract law. Our notion of impossibility is severe: anything short of absolute impossibility will not suffice to excuse a party from performance in accordance with the terms of the contract. The case law seems to be against arguing for an expansion of the concept of impossibility to include impracticability: both English and South African law are clear that increased difficulty or expense will not excuse performance. Both systems adhere closely to a policy of *pacta sunt servanda* in this regard. South African writers have argued that the standard of impossibility is a pragmatic one, depending on the factual circumstances of the case, however, and while there is little case authority to support this contention it seems to be based in sound logic. In addition, if the increase in difficulty were sufficiently severe, it is possible that demanding performance could become unconscionable and hence be against public policy, but such an argument is beyond the scope of this chapter.

³⁰³ Ibid. See also C van Heerden “Over-indebtedness and reckless credit” in JW Scholtz et al *Guide to the National Credit Act* (loose leaf binder) (2009) who states at 11-1 that these concepts add a “new dimension” to credit regulation.

³⁰⁴ JM Otto & R-L Otto *The National Credit Act Explained* (2010) at 58 describe this process as a “second chance” for debtors.

³⁰⁵ The qualifications of a debt counsellor are established in the Act and its regulations and include requirements as to education, experience and competence. See Van Heerden in Scholtz op cit note 303 at 11-8.

The same is true of the converse of impracticability, frustration of purpose. It is this feature of the English doctrine of frustration which means that although it overlaps in part with the South African law of impossibility, it remains an alien concept. This type of accommodation of changed circumstances is at odds with the indigenous Roman-Dutch common law, and some development in this area would be required to introduce provisions in this regard.

The supposition in futuro is a concept capable of dealing with an unforeseen change in circumstances subsequent to the conclusion of a contract and is arguably analogous to frustration of purpose in English law. This construction is not acceptable in South African law, however: in order to have an effect on a contract, such a commonly held assumption must form part of the contract as a term of it. There is no reason, however, why a resolute condition could not be implied into a contract to the effect that should the status quo change the contract will come to an end. This is a possible means of dealing with changed circumstances, although the test for a tacit term would have to be satisfied in order for it to operate. This type of argument, however, remains to be tested in our courts.

Thus the emergent picture is bleak: there are no accepted technical doctrines capable of dealing with changed circumstances in South African law. Although general legislation has been mooted to address the problem, it has never progressed beyond the stage of being a draft Bill. The only permissible instance of review for changed circumstances appears to be in the limited context of debt review under the National Credit Act. Given that South African law is at least partly based on European continental roots through our Roman-Dutch law heritage, there needs to be a study of the historical authority in the *ius commune* for a doctrine to deal with changed circumstances. This will be undertaken in the following chapter.

Chapter Three: Historical perspective – the *clausula rebus sic stantibus**

3.1 Origins and development of the *clausula* idea

The idea of going back on one's word has troubled the conscience of writers since antiquity.¹ Large tracts have been written by those with a philosophical bent on promises and the importance of keeping them. The more perceptive of these writers have recognised that qualifications may exist to the general rule of conscience that a promise should not be broken. One such qualification is the problem of change of circumstances. If circumstances change after one has promised, then it may no longer be just to hold the promisor to his word. This qualification has been recognised since antiquity. The authors of classical Rome mentioned this limitation in their writings on promises² and this idea was taken up by writers in later times to the extent that it eventually became the basis of what was known from about the fifteenth century as the *clausula rebus sic stantibus*.³

“*Clausula rebus sic stantibus*” refers to a tacit condition in a contract that circumstances remain unchanged.⁴ What immediately becomes apparent is that a conceptual leap has been made here. We started off dealing with promises in general and have now refined the concept to legally binding promises: contracts. This leap did not occur quickly. From the writers of ancient Rome, the problem of changed circumstances was taken up both in the writings of Christian philosophers and in the works of the early writers on the European *ius commune*. It was over centuries of development that the limitation on promises was extended into legal application and came to serve as a restriction on the binding force of contracts. In

* Substantial translation was required in order to complete this chapter. I would like to express my thanks to Associate Professor Margaret Hewett for her assistance with the Latin texts and to Tobias Schönwetter for his assistance with the German codes. Some translations are published works (which I have cited), but much of the rest is my own work, however, and any errors therein are for my own account.

¹ For examples see Cicero *De Officiis* I, x; III xxiv – xxv; Seneca *De Beneficiis* IV, 35 & 39; Thomas Aquinas *Summa Theologiae* Q 10, art 3, v.

² Cicero op cit note 1; Seneca op cit note 1.

³ For examples see Sylvester *Summa Summarum* Iuramentum, III, num 3; Molina *De Iure et Iustitia*, Vol II, Disputatio 272; Lessius *De Iustitia et Iure* Book II, Chap 18, Dubitatio x.

⁴ My translation.

other words, the *clausula rebus sic stantibus* became the antithesis of the opposing concept: *pacta sunt servanda* (agreements must be upheld).

This chapter will examine the roots of the *clausula* doctrine in the classical Roman writers and trace its development in both the religious sphere and in the early civil law writers up to its culmination as a fully fledged legal doctrine in the later writers of the sixteenth and seventeenth centuries. The focus will then turn to the subsequent demise of the doctrine in the age of codification in the eighteenth and nineteenth centuries. This enquiry will set the scene for the rest of the comparative studies which follow in later chapters.

3.1.1 Origins in classical Roman literature

Ancient Rome had a well developed social infrastructure, which is well documented today, given the transmission of so many texts from the time. The senate, which was the ruling body during Rome's years as a republic, was made up of the upper classes.⁵ There were then various stratifications from the less wealthy citizens to freed men to slaves. Roman society was thus hierarchical in nature and social responsibilities were placed upon members of each class which ensured the efficient functioning of society and indeed the state. It is this concept of social responsibilities, or duties, with which Cicero was concerned when he wrote *De Officiis* in 44 BC. This work was philosophical in nature and came at a time when the Roman republic was crumbling: Caesar had been murdered on 15 March 44 BC and the resultant upheaval which resulted in the principate of Augustus was in full swing.⁶ Perhaps it was thus a little ironic for a statesman to be philosophising on social responsibility at this time, indeed one author has described it as "fiddling while Rome burned".⁷ This work nevertheless stands as the musings of an influential Roman thinker on various topics wound up with maintaining social order.

Promises and maintaining good faith were an important part of the everyday duties of a Roman citizen. Particularly given the system of patronage, whereby a wealthy man looked out for the interests of his more humble supporters, keeping one's

⁵ Klaus Bringmann *A History of the Roman Republic* (2007) at 8.

⁶ *Ibid* at 276.

⁷ Paul MacKendrick *The Philosophical Books of Cicero* (1989) at 249.

promises to others was fundamental to social infrastructure and formed a vital part of being an honourable man.⁸ It is at this juncture that the problem of changed circumstances cropped up. Would it ever be honourable, or indeed socially acceptable, not to honour one's promise? An important philosophical issue indeed, particularly to a man such as Cicero who was concerned with justice and the greater public good.

Cicero deals with the effect of changed circumstance on a promise at two places in *De Officiis*. Cicero notes at the outset in this section that there may be circumstances where there may not be a duty to fulfil a promise. This is based on two fundamental principles of justice: first, that no harm be done to anyone, and second that common interests be conserved.⁹ This statement is followed by the crux of the argument: promises should not be kept if keeping them will prove harmful to those to whom they have been made.¹⁰ Similarly if keeping a promise will do more harm to you than good to the person to whom it has been made, it should also not be kept. The example Cicero gives is of an advocate who has made a promise to defend someone in court. If subsequently the advocate's son should fall gravely ill, it is no breach of a moral duty not to keep his promise.

In Book Three of *De Officiis* Cicero again picks up on this thread.¹¹ He specifies at the outset that he is talking about promises obtained not by duress or fraud, but legitimately.¹² He goes on to give the example of a man who is given a cure for a dangerous illness on the promise that he will never make use of the cure again should he recover. What if he does recover, but subsequently contracts the disease again? Since the apothecary is unfeeling in refusing his request for a cure and no harm will be done to the apothecary if the man does use the cure, he is justified in breaking his faith. Another example follows: what if a wise man has been given a large inheritance on the promise that he will dance in the Forum before adiating.¹³ It

⁸ Fritz Schultz *Principles of Roman Law* (1936) at 231 – 232.

⁹ *De Officiis* I, x (31). I used the Loeb edition (1913).

¹⁰ *De Officiis* I, x (32).

¹¹ *De Officiis* III, xxiv – xxv.

¹² *De Officiis* III, xxiv (92).

¹³ *De Officiis* III, xxiv (93).

is morally wrong for him to dance in the Forum and better that he break his promise and refuse the inheritance.

After a few more examples from mythology, Cicero moves to the conclusion that promises are sometimes not to be kept and that things left in your care are not always to be restored.¹⁴ He then cites the classic example, which was reiterated throughout the following ages in discussions of changed circumstance: what if a man has left a sword with you in right mind and then later demands it back in a fit of madness?¹⁵ It would be criminal to restore it to him; it is your duty not to restore it to him, is Cicero's answer.

The discussion in Book III of *De Officiis* seems to echo that of Book I, leaving us with further examples to illustrate Cicero's central arguments that promises are binding unless their fulfilment would do harm to those to whom they are made, or if fulfilling a promise will do more harm to you than good for the person to whom the promise was made. It thus emerges that in the context of duties and social responsibilities, one is only bound by one's word where this is expedient. Also one has a duty towards others, to ensure they do not ask for what will harm them: perhaps slightly paternalistic, but to be read within the context of the patron-client type relationships with which Cicero was concerned.

Writing about 100 years later, between AD 56 and 64, Seneca devoted a philosophical treatise specifically to the giving and receiving of favours (*De Beneficiis*). This work also needs to be read against the backdrop of the patron-client relationships, which were still the norm in Roman society. Seneca was a self-proclaimed Stoic¹⁶ and in *De Beneficiis* he turns his Stoic conceptions to the questions of liberality and gratitude, the central tenets of giving and receiving favours. Seneca argues that a patron should give generously, despite the possibility of ingratitude and that a client can be indebted with dignity: gratitude in itself repays

¹⁴ *De Officiis* III, xxv (95).

¹⁵ This example appears to have been taken from Plato (427 – 347 BC), who uses it to illustrate the point that doing right does not always consist just in truthfulness and returning anything that has been borrowed. See Plato *The Republic* Book I at para 331.

¹⁶ Brad Inwood *Reading Seneca – Stoic Philosophy at Rome* (2005) at 68-69.

the kindness.¹⁷ Again the question crops up of whether a promise need be kept if circumstances have changed. Seneca deals with this question in Book IV of *De Beneficiis*. He begins the discussion with the general statement that a benefit is promised unless something occurs to show that he ought not to give it.¹⁸ He cites a few examples, mostly of supervening legal impossibility, such as promising to a man his daughter's hand in marriage, only to discover later that that man is not a citizen. Seneca sums up with the conclusion that a promise is only binding if circumstances remain unchanged. Any change gives rise to the opportunity to revise the promise.¹⁹ He follows this with more examples, this time of the classic changed circumstances variety rather than impossibility. For example: I have promised legal assistance, but then discover that a precedent is being sought to harm my father. I have promised to make a journey, but then am informed that the road is infested with robbers.

Seneca makes a brief departure from the topic at this point in *De Beneficiis*, then returns at chapter 39 with more examples of changed circumstances: I will go out to dinner because I have promised, even if the weather is cold, but not if there is a snowstorm.²⁰ I will get up from the table to attend a betrothal because I have promised, even if I have not finished digesting my food, but not if I have a fever.²¹ Seneca then restates his argument as to a tacit condition that circumstances remain unchanged: when you seek fulfilment of a promise, see to it that everything is as it was when I promised. Then if I fail, I will be at fault.²²

As with Cicero's *De Officiis*, Seneca's work constituted philosophy of social institutions and practices. In a system where favours were granted for the sake of liberality, a promise held value both for the reputation of the benefactor and could conceivably be relied upon by the grantee. It was thus important to the functioning of society that such promises be observed. Seneca echoes Cicero in calling for the

¹⁷ Ibid at 91-92.

¹⁸ *De Beneficiis* IV, 35. I used the Loeb edition (1935).

¹⁹ *De Beneficiis* IV, 35: Tunc fidem fallam, tunc inconstantiae crimen audiam, si, cum eadem omnia sint, quae errant promittente me, non praestitero promissum; alioquin, quidquid mutatur, libertatem facit de integro consulendi et me fide liberat.

²⁰ *De Beneficiis* IV, 39.

²¹ Ibid.

²² Ibid: Subest, inquam, tacita exception: "Si potero, si debebo, si haec ita erunt." Effice, ut idem status sit, cum exigis, qui fuit, cum promitterem; destituere levitas erit.

revision of promises in a situation of changed circumstances and his examples also hark back to Cicero. We see again the impact of the illness of a son, or the necessity of breaking a promise to appear in court. It is thus possible and indeed likely that Seneca drew on Cicero when writing his own philosophical treatise: both works deal with aspects of social responsibility and the element of honour and keeping one's word is central to both. Both of these authors were to provide an important philosophical source for the writings on changed circumstance which followed.

3.1.2 Appearance in religious doctrine and canon law

The ubiquitous nature of the Roman hegemony in Europe meant that even during and after its demise Roman texts were the subject of study for learned individuals. As time passed and the influence of the church and Christian teaching grew, these learned individuals came increasingly to be men of the church. The relevance of this to a discussion of changed circumstances is that the texts of antiquity surfaced again several centuries later in the writings of theologians. Hence the next phase in the development of the *clausula* doctrine was a Christian one. The first major Christian author to comment on changed circumstances and the effect of this on a promise or an oath was St Augustine.

St Augustine lived from the mid fourth century into the fifth century AD and has been described as perhaps the most significant Christian thinker after St Paul.²³ It was in his work *Enarrationes in Psalmos*, a collection of sermons on all 150 Psalms, that St Augustine discussed change of circumstances, drawing on the examples cited by Cicero. Indeed this particular passage from St Augustine's work was later incorporated into the *Decretum* of the monk Gratian in about 1140.²⁴ This work, known in Latin as the *Decretum Gratiani*, was a collection of texts deemed to be authoritative in the law of the church (canon law) and which sought to bring harmony to that system of law in much the same way that the Digest of Justinian had done for the civil law.²⁵ The inclusion of St Augustine's writing on changed circumstances

²³ *Encyclopedia Britannica Online* "Saint Augustine" available at: www.search.eb.com (last accessed 30 November 2009).

²⁴ OF Robinson, TD Fergus & WM Gordon *European Legal History* (2000) at 5.3.

²⁵ *Ibid.*

thus gave an official air to these texts and underlined the importance of this doctrine for the canon law.

In his dealing with the question of what is a lie, a question dealt with in some detail by many of the theologians to be examined here, St Augustine deals with the issue of changed circumstances. St Augustine picks up on Cicero's example of a man who has deposited a sword with another and later seeks its return in a fit of madness.²⁶ St Augustine says that the depositor will not have a false heart, nor can he be said to have been lying when he promised to keep the sword in deposit should he thereafter refuse to return the sword to the madman. Rather his promise would be "empty words" (*verbi gratia*).

Since the *Decretum* was seen as an authoritative text, St Augustine's writing therein came to be commented upon by a series of glossators, who wrote commentaries upon the text of that work. An influential gloss for the purposes of this study was made at the beginning of the thirteenth century in the writings of the German canonist, Johannes Teutonicus. He wrote in a gloss on the word "furens" ("mad"), which was used to describe the changed state of mind of the depositor in St Augustine's above-mentioned passage, the condition: "if circumstances remain in the same state".²⁷ Although Feenstra has questioned whether this was actually an original condition by Teutonicus, or whether he took it from an earlier civilian glossator,²⁸ this does appear, in our present state of knowledge, to be the first time this concept of changed circumstances was cited as a tacit condition to a transaction.²⁹

As a parallel to this development in canon law, a similar idea arose in the theological works of St Thomas Aquinas (1224 – 1274). St Thomas, like St Augustine, was inspired by the Roman writers of antiquity. His studies also encompassed the works of rationalist thinkers from ancient Greece, such as Aristotle, as well as certain

²⁶ *Decretum Gratiani* C 22, q 2, c 14.

²⁷ "Si res in eodem statu manserit" – Gloss on the word *furens* in c. *Ne quis* (*Decretum Gratiani* C 22, q 2, c 5).

²⁸ Robert Feenstra "Impossibilitas and clausula rebus sic stantibus" in Alan Watson (ed) *Daube Noster* (1974) at 82.

²⁹ *Ibid.*

philosophers of the Arabic world.³⁰ St Thomas brought this rational, scientific method of thought to bear on his own discipline of theology, resulting in his major work, the *Summa Theologiae*. This work discusses religious ideas in a series of questions, which are then argued for and against. St Thomas deals with changed circumstances under the problem of whether every lie is a sin.³¹ He starts with the statement that although one who does not keep his promise would seem to act faithlessly, he can be excused on two accounts. The first is if the thing promised was illegal: changing his mind would then be a good act. Secondly, if there has been a change in the condition of the parties and of the transaction at hand. To back up his argument, St Thomas then cites Seneca to the effect that for a man to be held to his promise, all the circumstances must remain unchanged. If this is not the case then he is not faithless in failing to keep his promise.

The concept of changed circumstances had thus been taken up into Christian writing by the end of the thirteenth century. The origins of this idea were firmly based in the classical Roman writers, Cicero and Seneca, but it was beginning to take root as an accepted tacit condition, particularly in the canon law.³² The jump to civil law contracts had yet to be made, however.

3.1.3 Appearance in the civil law

As Feenstra notes, the civil law only came up with a *clausula* concept, in the form of a tacit condition that circumstances would not change, much later than the canon

³⁰ Denise Meyerson *Essential Jurisprudence* (2006) at 34 – 35.

³¹ *Summa Theologiae* (Eyre & Spottiswoode edition (1972)) Quaestio 110, articulus 3, ad quintum: “...ille qui aliquid promittit, si habeat animum faciendi quod promittit non mentitur, quia non loquitur contra id quod gerit in mente. Si vero non faciat quod promisit, tunc videtur infideliter agere per hoc quod animum mutat. Potest tamen excusari ex duobus. Uno modo, si promisit id quod manifeste est illicitum, quia promittendo peccavit, mutando autem propositum bene facit. Alio modo, si sunt mutatae conditiones personarum et negotiorum. Ut enim Seneca dicit in libro *De benefic.*, ad hoc quod homo teneatur facere quod promisit, requiritur quod omnia immutata permaneant. Alioquin nec fuit mendax in promittendo, quia promisit quod habebat in mente sub intellectis debitis conditionibus; nec etiam est infidelis non implendo quod promisit, quia eadem conditiones non extant.”

³² The standard text cited in the canon law as authority for a tacit condition that circumstances remain unchanged is a decretal of Pope Innocent III, generally quoted as “c. Quemadmodum”. This text deals with a promise by a man to marry a woman, which need not be performed if he later discovers that she is not a virgin. See: Feenstra op cit note 28 at 82.

law.³³ It was only in the age of the commentators, arguably at the instance of Bartolus (1314 – 1357), that this occurred.³⁴

In the civil law, the *clausula rebus sic stantibus* started out life by another name: the *clausula rebus sic se habentibus*. This phrase was used by Accursius (c1184 – c1263) in his *Glossa Ordinaria* to the Digest of Justinian.³⁵ Accursius's "Standard Gloss", although drawing heavily on the works of his predecessors, represents the pinnacle of the scholarship of the glossators and was to have great influence after his death.³⁶ Accursius used the phrase "rebus sic se habentibus" in commenting upon D.12.4.8, although this comment did not intend the same legal significance which was to be attached to that phrase in later years.³⁷ D.12.4.8 (*lex Quod Servius*) deals with the circumstances under which a dowry given for a marriage can be returned where one of the parties is below the lawful age. The text at D.12.4.8 reasons that so long as their "quasi-matrimonial" relationship exists, the money cannot be recovered: "So long as the potential remains, there is no recovery."³⁸ Accursius comments on this text that if this potential is deemed to exist while both parties are alive, then the dowry can never be reclaimed, even after a divorce.³⁹ However, he reasons, since this type of marriage does in fact occur, it must be adjudged according to the status quo for as long as matters remain unchanged (*rebus sic se habentibus*).

As stated above, the age of the commentators saw the transmission of the tacit condition approach encapsulated in the *clausula* doctrine from its roots in the canon law to the civil law. The commentators predominated the legal landscape of the *ius commune* from the fourteenth century onwards and were predominantly the products of Italian universities.⁴⁰ Like the glossators, the commentators produced commentaries on the *Corpus Iuris Civilis*, although they allowed influences from

³³ Feenstra op cit note 28 at 83.

³⁴ Ibid.

³⁵ Feenstra op cit note 28 at 83.

³⁶ Robinson et al op cit note 24 at 3.6.3.

³⁷ Feenstra op cit note 28 at 83.

³⁸ D.12.4.8. Alan Watson's translation of the Theodor Mommsen & Paul Krueger edition (1985).

³⁹ See Feenstra op cit note 28 at 83 for the text from which I have translated.

⁴⁰ Robinson et al op cit note 24 at 4.2.1.

contemporary legislation.⁴¹ In addition, the commentators are renowned for producing collections of opinions on legal questions, known as *consilia*.⁴² It is in the commentaries of certain of these writers on the Digest that we find reference to the phrase *rebus sic se habentibus* with the meaning of a tacit condition in legal acts.

Bartolus de Saxoferrato (c1313 – 1357) was the first of these commentators to formulate a tacit condition *rebus sic se habentibus*. In his comments on D.12.4.8 we find the *clausula concept*.⁴³ Bartolus begins by echoing Accursius that the phrase in D.12.4.8 which states “as long as the marriage is able to be contracted” must be understood as meaning that circumstances must remain unchanged (*rebus sic se habentibus*), with the parties to the marriage as they are at present. Bartolus then adds that the concept *rebus sic se habentibus* must be kept in mind whenever anyone waives a right (*renunciat*), even in another type of matter. This applies both to present as well as to future rights (*spes*).

In his comment on D.12.4.8, Baldus (1327 – 1400) is even more explicit and extends the *clausula concept* to *promissiones*, in the sense of legally binding promises.⁴⁴ Baldus was a canonist as well as a civilian lawyer,⁴⁵ which might explain the links between the *clausula concept* as found as a tacit condition to promises in the canon law and his excursus of it here as a tacit condition in contractual promises. Indeed in his gloss on D.12.4.8 Baldus refers to his gloss on another passage, D.19.2.54.1, where Feenstra notes that Baldus refers directly to the canon law.⁴⁶

Reference to the *clausula doctrine* is also made by a slightly later commentator, Jason de Mayno (1435 – 1519), in his comments on D.12.4.8. Having stated that with regard to this rule in the Digest the tacit condition, *rebus sic se habentibus*, must be understood, Jason goes on to add that this tacit term is also understood as being present in last testaments (*ultima voluntas*); in contracts (*contractus*); in laws in

⁴¹ Robinson et al op cit note 24 at 4.4.1.

⁴² *Ibid.*

⁴³ Feenstra op cit note 28 at 83 – 84. Feenstra cites the passage I used here in the original Latin at 84.

⁴⁴ *Ibid.*

⁴⁵ Robinson et al op cit note 24 at 4.5.7.

⁴⁶ Feenstra op cit note 28 at 84.

favour of or against an individual (*privilegium*); in oaths (*iuramentum*) and in statutes (*statutis iuratis*).⁴⁷

Thus we see that although the canon law, as well as Thomas Aquinas, had applied the concept to oaths and promises by the end of the thirteenth century, it was not until a century later that the concept really entered the civil law. The civil law at this stage was predominantly concerned with the Roman law of Justinian, so perhaps the connection was waiting for someone schooled in both spheres of jurisprudence, such as Baldus, to make. While Bartolus had also applied the *clausula* with the required legal significance, it was Baldus who would appear to be the first to have extended it to contracts. From the writings of Baldus it seems clear that he drew on the canon law in this application of the *clausula* doctrine to civil law concepts, which explains the origins of the concept. This application was further extended by Jason de Mayno, perhaps reflecting the advances which had been made in the law in the intervening century. Thus by the end of the age of the commentators, the *clausula rebus sic stantibus*, in the guise of the *clausula rebus sic se habentibus*, had already come to have much of the significance it would enjoy in the years to come.

3.2 The refinement of the idea into an established doctrine

As shown above, in the later middle ages the *clausula* doctrine, in the sense of a tacit condition, made the leap from the writings of moral philosophers first to the canon law and then from there was taken up into the civil law. As the authorities to be examined below will demonstrate, there was a close connection between church and law in medieval times, which is noticeable in the development of the *clausula* doctrine. As the doctrine reached its peak during the course of the next few centuries, it always appeared largely in the writings of Christian scholars, given the pre-eminence of the church in European society. Hence the description of the doctrine inevitably contained religious undertones, which reflected the philosophical climate of the times. The roots of the doctrine were still discussed, however, and the citation of the Roman origins of the *clausula* concept was still the basis of most of the discussions we shall examine. The examples given similarly drew on the original

⁴⁷ Ibid.

texts, but the influence of the canon law doctrine and Christian thought in general is manifest.

In what is perhaps the most useful account (in English) of the development of the *clausula rebus sic stantibus*, Feenstra traces the links between the texts of antiquity and of the earlier canon law and Grotius's writings on the subject in his *De Iure Belli ac Pacis*.⁴⁸ Given the influence of Grotius's work, particularly for the South African context, I will follow the outline of Feenstra's excursus for this portion of the *clausula's* history and examine those writers who influenced Grotius's discussion of the *clausula rebus sic stantibus*.⁴⁹

The tracing of the thread of the *clausula* concept shall begin with the writings of an Italian theologian, Cajetan. Born in 1469, Cajetan taught theology in Rome, where he wrote his most influential work, a commentary on the *Summa Theologiae* of St Thomas Aquinas. Although primarily a theologian, Cajetan was also knowledgeable in the law and it is in this commentary that we find his discussion of the *clausula rebus sic stantibus*.⁵⁰ His discussion of the *clausula* is not based on the passage of St Thomas's work which I quoted earlier,⁵¹ but on a passage further on in the *Summa Theologiae* where St Thomas again discusses the effect of lies.⁵² In his discussion of changed circumstances, St Thomas had referred to the relevant passages from Seneca. Cajetan, in his commentary, cites Cicero. Cajetan reiterates Cicero's thesis that there are two eventualities in which one is not bound by one's promise. The first is where keeping the promise is potentially harmful to the promisor, such as returning a sword to a depositor who has gone insane. The second is where keeping the promise would do more harm to the promisor than good for the person to whom the promise has been made. The example is where a promisor has undertaken to appear as an advocate on behalf of another the next

⁴⁸ Feenstra op cit note 28 at 77ff.

⁴⁹ Copies of the texts of several of the authors referred to in this section have proved to be unavailable despite extensive efforts to obtain them. The narrative here is thus largely based on secondary sources, largely comprising Feenstra's account.

⁵⁰ Feenstra op cit note 28 at 99n89.

⁵¹ *Summa Theologiae* Quaestio 110, articulus 3, ad quintum.

⁵² *Summa Theologiae* Quaestio 113, articulus 2.

day, but come the time for performance he discovers that his son is gravely ill. He is no longer bound to fulfil the promise under these changed circumstances.⁵³

Cajetan goes on to set out his own formula for changed circumstances: “it is important to consider supervening obstacles along with the subject of the promise and once the deeds have been gathered together, the honest thing to do is to be persuaded by proper opinion at the time of performance, considering the circumstances of the places, the people, the times and the transactions.”⁵⁴ As Feenstra notes, this is slightly different from the tacit condition formula employed by St Thomas, given the inference of the objective standard of what “proper opinion” requires, although the general idea remains the same.⁵⁵ Cajetan imports an objective standard into the equation, which would determine whether it was acceptable to break the faith or not, namely “proper opinion” (*recta ratio*). This objective standard brings a greater degree of protection to the promisee: it will not suffice for the promisor to simply change his mind.

3.2.1 Earlier medieval authors

Sylvester Prierias (1456 – 1523), an Italian Dominican, refers to a change of circumstances as a limitation on the binding force of a promise or an agreement in his discussion of the *pactum* in his handbook for confessors the *Summa Summarum* (or *Summa Sylvestrina*).⁵⁶ This discussion of the limitations extends to the binding force of these agreements on one’s conscience. Thus the question was whether it would be subjectively right to break a promise, rather than whether the external world would consider such a breach valid. When dealing with the scenario where the promisor has strengthened his promise by swearing an oath (*iuramentum*), Sylvester gives a full account of the *clausula* doctrine as found in canon law, as well as in the civil law writings of authors such as Bartolus.⁵⁷ Sylvester also discusses the following question (*quaestio*): “I have made an agreement with my enemy and

⁵³ This example is taken from Cicero *De Officiis* I, x, 32.

⁵⁴ Ibid: “Oportet ergo considerare impedimenta supervenientia et conferre cum re promissa, et collatione facta, quod recta tunc ratio suadet, pensatis conditionibus locorum, personarum, temporum et negotiorum, honestum exequi.”

⁵⁵ Feenstra op cit note 28 at 85.

⁵⁶ *Summa Summarum* Pactum, num 4 (as cited by Feenstra op cit note 28 at 99n92).

⁵⁷ Feenstra op cit note 28 at 85.

promised not to harm him. He is then banished and proscribed by legislation. If I kill him would I be breaking my faith?”⁵⁸ Bartolus had held that it would be acceptable to kill one’s enemy in these changed circumstances.⁵⁹ Sylvester adds the statement that there is a tacit condition that the circumstances remain unchanged, using the classic “rebus sic stantibus” formula.⁶⁰

“item quia ita videtur facta pax, id est rebus sic stantibus...”

(“Likewise although it would seem thus that peace has been made, this is while circumstances remain unchanged.”)⁶¹

Sylvester goes on to state his formula for changed circumstances as follows:

“that change of circumstances which excuses one from an oath is understood in two ways: the first is when the newly arising circumstance is such that if it had been there from the beginning, the oath would have been rash and this is obvious in itself. The second is when the newly arising circumstance is such that if it had been there from the beginning, the person swearing the oath would not have sworn...”⁶²

This idea of relaxing a promise where the promisor would not have promised had he foreseen the change of circumstances is the standard reiteration of the clausula concept as we shall see from the sources which follow.

The question of foresight of the changed circumstances is echoed in the writings of Navarrus (1493 – 1586), a Spaniard who wrote soon after Sylvester. Navarrus was known as a canonist as well as a moralist and his opinion is relevant since it deals not only with the binding force of a promise on one’s conscience (forum interius) (as per Sylvester), but also with its binding force from the objective perspective in the world at large (forum exterius). In his work, *Enchiridion sive Manuale confessariorum et poenitentium*, Navarrus notes that in certain situations a change of

⁵⁸ *Summa Summarum* Iuramentum, III, num 3. See Feenstra op cit note 28 at 99n95. The cited extract from Bartolus is taken from his comments on D.45.1.96.

⁵⁹ Feenstra op cit note 28 at 85.

⁶⁰ Feenstra notes that he has been unable to find from what source Sylvester took this formula. See Feenstra op cit note 28 at 99n97.

⁶¹ My translation.

⁶² *Summa Summarum* Iuramentum, III, num 3 (as cited in Feenstra op cit note 28 at 86): “Et ista rerum mutatio excusans a iuramento dupliciter intelligitur: primo quando casus noviter emergens est talis quod si fuisset a principio, iuramentum fuisset temerarium et hoc per se patet; secundo quando est talis quod si fuisset a principio, iurans non iurasset, secundum multos doctores...”

circumstances will release the promisor from his promise.⁶³ The examples which Navarrus cites in support of this contention are largely the tried and tested ones of antiquity and the canon law, hence we see the sword which need not be returned to an insane depositor and a promise to marry which need not be fulfilled if the woman concerned turns out not to be a virgin. Navarrus then makes the following statement with regard to the binding force of promises:

“[This tacit condition] is not understood as part of any sort of change, but about a change which if the promisor had had foresight of, he would not have promised: this man does not break his faith in the context of the conscience. ...In addition, in the context of the world at large, [the tacit condition operates] if, according to the opinion of prudent men, in the circumstances of the transaction he would never have promised if he had had foresight of that change of circumstances...”⁶⁴

Thus we see the inference of an objective standard into the equation of whether a promise is binding after a change of circumstances. It is not enough where a promise impacts on the affairs of others that one can simply revoke a promise if circumstances change. Although the decision as to whether to be bound or not remains unilateral, there is at least some standard against which such a choice can be judged. It is submitted that if a court were of the opinion that the promisor would have promised even had he foreseen the ultimate change in circumstances, his repudiation of his promise would not be valid. This legal analysis of Navarrus's doctrine appears to be justified, given the juristic nature of the examples he gives: failure to restore an item given under a loan for use (*commodatum*) and breach of a promise to marry.

3.2.2 Late scholastic authority

The next set of writers to be considered here came from a philosophical movement known as the late scholastics. One of the key features of this movement was the stress placed upon natural law.⁶⁵ Gordley notes that the rise of natural law theory in contract was part of a broader movement: the sixteenth century revival of Thomistic

⁶³ Cap 18, Num 17.

⁶⁴ *Ibid.*

⁶⁵ James Gordley “Natural law origins of the common law of contract” in John Barton (ed) *Towards a General Law of Contract* (1990) at 368.

philosophy.⁶⁶ Gordley describes the origins of this natural law theory as beginning with a rejection of the nominalist philosophy of William of Ockham in favour of that of St Thomas.⁶⁷ The adherents of this school “disliked nominalism in philosophy, Protestantism in religion and absolutism in politics”.⁶⁸ The aim of natural law was to discover an implicit law in human society, which could be reached through the moral philosophy of St Thomas. This meant that there was a moral basis to law and that it was not merely the whim of the sovereign.⁶⁹

Although the early adherents of this school were Dominicans (like St Thomas himself), the later members in the late sixteenth and early seventeenth centuries were Jesuits. It is in the writings of two of these later Jesuits, Luis de Molina (1535 – 1600) and Leonard Lessius (1554 – 1623) that we find discussions of the *clausula* concept which were to have an impact on Grotius.

Molina, a Spaniard, discussed the *clausula rebus sic stantibus* in his major work *De Jure et Justitia*.⁷⁰ The discussion is found in a text which is concerned with “under what circumstances one should be allowed not to fulfil a promise which has been made but not yet performed”.⁷¹ Molina takes as his starting point the general statement that “if someone is bound to fulfil a promise, which obligates him in some way, it is necessary that the circumstances of the parties, the surrounding facts and the transaction have not changed”.⁷² Molina cites St Thomas, as well as Seneca and Cicero as the origin of this statement, along with Cajetan, de Soto and Navarrus who are said to subscribe to the idea it contains. He immediately qualifies this statement to the effect that not every change of circumstance will result in absolution from a promise. A change would have this effect, however, under two circumstances, the first of which is where performance has become impossible, either in fact or in law. Thus if you have promised to give a particular slave or horse on a given day and come that day they have died, you are not bound to fulfil your

⁶⁶ Ibid.

⁶⁷ Ibid at 369.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ I used the edition Moguntiae (1602).

⁷¹ Disputatio 272 in volume 2 of the work at columns 82 – 85.

⁷² Vol II, col 82.

promise.⁷³ Similarly if you have promised to give a sword to someone, but before you hand it over the promisee goes mad, you will not be bound to give it to him.⁷⁴ This archetypal example of Cicero is quoted as an instance where performance is impossible in law, taking the broad natural law view that something repugnant to nature should also be against the law.

The second circumstance in which one will not be bound to fulfil a promise is the classic *clausula* type situation, where the change does not exactly result in impossibility but where:

“if the change had occurred to the promisor when he promised, he would have excluded this eventuality from his promise and, if you had asked him about it at that time, he would have replied that it was not his intention to bind himself under those circumstances.”⁷⁵

Molina gives three examples in support of this contention. The first is religious and concerns a vow made to God to fast on the sixth holiday every year.⁷⁶ If this holiday should in a particular year turn out to be Christmas, it cannot be presumed that if you had foreseen this eventuality you would have promised to abstain from meat. An objective opinion of prudent men can be sought should you fear that you might be breaking a vow without just cause: although this would appear to be an example of a promise which should only be binding on the conscience (*forum interius*) and hence only subjective justification should be required, an objective opinion could be sought as extra justification should you fear breaking a vow to God.⁷⁷

The second example is taken from the canon law⁷⁸ and is again the archetypal qualification that a man need not fulfil his promise to marry a woman if she turns out not to be a virgin.⁷⁹ In addition to this instance Molina adds that a promise to marry will also not bind if the woman turns out to be a leper, or to be paralysed, or repels the eyes or the nose. Finally if you have promised your labour to someone for the administration of his affairs (or something similar) and a grave illness should

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Vol II, cols 82 – 83.

⁷⁶ Vol II, col 83.

⁷⁷ *Ibid.*

⁷⁸ c. *Quemadmodum*.

⁷⁹ *De iure et iustitia* Vol II, col 83.

subsequently strike your son, causing you to be unable to attend to both matters, you will not be bound to fulfil your promise, since you did not intend to bind yourself under those circumstances.⁸⁰ This third example is taken from Cicero.⁸¹

Lessius was of the same philosophical school as Molina, yet he was a native of Belgium. In his principal work, “*De Iustitia et Iure caeterisque Virtutibus Cardinalibus*” he discusses the *clausula* concept under the following *dubitatio*: “under what circumstances does a promise, which has been made, but not yet performed, cease to bind”.⁸² Lessius begins his discussion with the familiar formula that a promise ceases to bind when the circumstances of the matter or of the parties have changed to such an extent that if the promisor had foreseen this change, he would not have wished to promise.⁸³ He cites Navarrus as authority for this proposition. The *dubitatio* distinguishes four scenarios in which a promise fitting the description in its title ceases to bind. Of these, only the first two are relevant to this discussion.⁸⁴ The first scenario is where the thing which has been promised becomes illegal, loses its usefulness or becomes impossible. The second is our classic *clausula* situation:

“[I]f the circumstances of the matter or of the parties are changed to such an extent, that the promisor, according to prudent opinion, does not seem to have wished to bind himself in that eventuality. This must be judged from the state of the thing which has been promised, of the promise itself and from the disposition of the promisor and other circumstances.”⁸⁵

Cajetan is cited as authority for both of these scenarios. Illegality and impossibility remain today grounds for terminating a contract in most modern legal systems. “Lack of usefulness” (*inutilis*) seems to echo the Ciceronian proviso that a promise need not be performed if it is of less advantage to the promisee than is justified by the effort required for performance by the promisor.⁸⁶ The first scenario thus seems

⁸⁰ Vol II, col 84.

⁸¹ *De Officiis* I, x (32). See the discussion above at section 3.1.1.

⁸² I used the Antwerp edition (1612). The *clausula rebus sic stantibus* is dealt with in Book II, Chap 18 at *Dubitatio* x.

⁸³ II, 18, x.

⁸⁴ The third scenario which will not be discussed here is when two men have made reciprocal promises and one of them wishes to avoid performance: the performance of the innocent party is excused. The fourth scenario is when there is an error in motive concerning performance of the promise. The example given is if you have promised something for a particular reason and that reason fails to materialise.

⁸⁵ II, 18, x.

⁸⁶ *De Officiis* I, x (32).

more or less trite. The second scenario is of interest to our discussion, although again, Lessius adds nothing to what his predecessors have said. The examples Lessius cites in support of this second scenario are also not original: we see Cicero's example (although Cajetan is cited) of a task which need not be performed if one's son falls ill subsequent to promising one's services and the canon law example of the man who need not fulfil his promise to marry if the betrothed turns out not to be a virgin.⁸⁷

3.3.3 Northern natural law school

Hugo Grotius (1583 – 1645) was a Dutch jurist and scholar. Due to the influence of his key publication *De iure belli ac pacis*,⁸⁸ Grotius has been referred to as the "father of international law".⁸⁹ Grotius was a member of what Gordley describes as the "Northern natural law school".⁹⁰ As such, Grotius's writings reflect the influence of earlier natural law thinkers, such as Molina and Lessius, of the late scholastic school.⁹¹ According to Gordley the distinguishing feature of natural lawyers such as Grotius is that they distinguished rules which were thought to be correct in theory from the rules of Roman law practised in most of Europe at the time.⁹² This distinction was referred to as being one between "natural law" and "positive law".

As a so-called "old authority" of Roman-Dutch law, Grotius's work is particularly relevant in the South African context. The *clausula rebus sic stantibus* is more likely to have influence in South Africa if it is supported by a binding source of law, such as Roman-Dutch law. Of the Roman-Dutch law authors, however, only Grotius and Van Bynkershoek (1673 – 1743) dealt with the doctrine and then only in the context of international law.⁹³ Grotius discusses the *clausula* concept in *De iure belli ac pacis* ("On the law of war and peace") in a chapter on the interpretation of treaties.⁹⁴ Van

⁸⁷ c. Quemadmodum.

⁸⁸ "On the law of war and peace" – first published in Paris in 1625.

⁸⁹ Cf *Encyclopaedia Britannica Online* "Grotius, Hugo" (Last accessed 26 January 2010).

⁹⁰ Gordley op cit note 65 at 367.

⁹¹ Ibid.

⁹² Ibid at 371.

⁹³ F Brandsma "Some remarks on Dutch private law and the *ius commune*" (2007) 11 *Electronic Journal of Comparative Law* 1 at 6-7.

⁹⁴ *De iure belli ac pacis* "De interpretatione" Bk II, Ch xvi, §22 – 27.

Bynkershoek discussed the *clausula* only very briefly in his work *Quaestiones iuris publici* (“Inquiries in public law”), which will be considered below.⁹⁵

Before turning specifically to the issue of the *clausula* concept, Grotius deals with the issue of where there is a “defect in the intent” (*defectu voluntatis*) of a promisor.⁹⁶

According to Grotius:

“A restrictive interpretation, outside of the natural meaning of the words containing the promise, is derived either from an original defect in the intent, or from the incompatibility with the intent of a case occurring. A defect inherent in the intent is recognized from the absurdity which evidently would otherwise result, or from the cessation of the reason which alone furnished the full and effective motive for the intent, or from a defect in the subject-matter.”⁹⁷

Although the nature of this passage is rather abstract, which perhaps is understandable given that it deals with interpretation in general, it seems to deal, at least in part, with the concept of an error in motive. Where the sole reason (or motive) behind the intention of the promisor falls away there is a defect present in that intention and hence a restrictive interpretation of the promise must be sought. This general statement paves the way for a more specific discussion of the *clausula* rule itself:

“The question also is commonly raised, whether promises contain in themselves the tacit condition, ‘if matters remain in their present state.’

To this question a negative answer must be given, unless it is perfectly clear that the present state of affairs was included in that sole reason of which we made mention.”⁹⁸

Thus it would seem that Grotius denies the validity of the *clausula*, except in limited circumstances. If the “sole reason” (*unica ratione*) he refers to in §25.2 is the same as the motive behind the promisor’s intention (and the phrase “of which we made mention” at the end of this passage does seem to refer back to the previous passage at §22) then we are left with some sort of doctrine of tacit suppositions, similar to that developed by the later German author Windscheid.⁹⁹ That is that a promise will cease to bind if at the time of promising, the promisor had certain reservations in his

⁹⁵ *Quaestiones iuris publicis* Lib II, Cap X.

⁹⁶ *De iure belli ac pacis* II, xvi, 22.

⁹⁷ *Ibid.* Translations throughout by Francis Kelsey *On the Law of War and Peace: Three Books* (1925).

⁹⁸ *De iure belli ac pacis* II, xvi, 25.2.

⁹⁹ See below section 3.3.3 on Windscheid.

mind of when the promise would no longer have to be honoured, and a change of circumstances was one of them.¹⁰⁰ This does not grant to the promisor the benefit of hindsight when electing to end his obligation: the reservation must have been there from the start.¹⁰¹ Hence rather than standing as a tacit condition to any promise, the continuation of the status quo must be a supposition in the mind of the contracting party.¹⁰² Should it prove false, the contract would be at an end, due, according to Grotius, to an error in motive.¹⁰³

Grotius continues, however, with the topic of unforeseen circumstances in §26. He notes that an actually occurring case may be incompatible with the intent of the promisor. This intent (*voluntas*) may be inferred from natural reason (*ex naturali ratione*) or from some other sign of intent. Grotius then states that for the purpose of an inference from natural reason, Aristotle relied on a concept of equity (*aequitas*). This sense of fairness, or equity, seems to permit the operation of a *clausula* type principle, not only in promises, but also in wills and contracts:

“Now the use of these qualities, within proper limits, ought to be made applicable to wills also, and compacts. For since all contingencies can neither be foreseen nor set forth, a degree of freedom is needed in order to make exceptions of cases which the person who has spoken would make an exception of, if he were present. Yet recourse to such a restriction of meaning should not be had rashly – that, in fact, would be to make oneself master of another’s act – but only on sufficient implications.”¹⁰⁴

Thus, although Grotius has limited the application of the *clausula* concept in §25.2, he returns to the problem here and defends its application, even in certain juristic acts, provided certain implications (*indicia*)¹⁰⁵ are present. This requirement of “implications” being present appears at first glance to be a Grotian innovation, since such a qualification did not appear in the writing of his predecessors of the late

¹⁰⁰ Basil S Markesinis, Hannes Unberath and Angus Johnston *The German Law of Contract* (2006) at 320 – 322.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *De iure belli ac pacis* II, xvi, 25.2 read with II, xvi, 22. Grotius uses the phrase “defectus voluntatis” at § 22, which Kelsey translates as “a defect inherent in the intent”, but which is perhaps more accurately translated as an “error in motive”.

¹⁰⁴ *De iure belli ac pacis* II, xvi, 26.1.

¹⁰⁵ “Implications” is the term preferred by Kelsey. A more accurate translation (it is submitted) might perhaps be “indicators” or “indications”.

scholastic school. When Grotius sets out these two implications, however, he follows closely on the writings of earlier authors:

“The most certain implication is if the literal meaning would in any case involve something unlawful, that is, at variance with the precepts of the law of nature, or of divine law.”¹⁰⁶

The examples Grotius quotes in support of this contention are all taken from earlier texts: namely that a sword need not be returned to an insane depositor (Cicero) and that an item which has been given in deposit will be returned to its rightful owner, rather than to the depositor, should such an owner emerge (D.16.3.31 is quoted in support of this second example).

The second implication is the classic *clausula* situation where a change of circumstances has made performance intolerable:

“A second implication will become manifest if, while the literal interpretation may not in itself involve something unlawful, the obligation, in the view of one who judges the matter fairly, shall appear to be burdensome and unbearable, whether the condition of human nature is considered in the abstract, or the person and matter under consideration are brought into comparison with the result of the act itself.”¹⁰⁷

Grotius gives a broad range of examples to support this argument, taken from various areas of the law. The first example is of the institution of a loan for use (*commodatum*):

“Thus a man who has lent a thing for some days will be able to demand its return within those days, if he himself is greatly in need of it; for the nature of a generous act is such that it is not to be believed that any one has wished to obligate himself to his own great disadvantage.”¹⁰⁸

The second example is from international law:

“Thus, again, one who has promised aid to an ally will be entitled to excuse in so far as he himself needs his troops as long as he is in danger at home.”¹⁰⁹

The final example is taken from public law:

¹⁰⁶ *De iure belli ac pacis* II, xvi, 26.2.

¹⁰⁷ *De iure belli ac pacis* II, xvi, 27.1.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

“Also the exemption from taxes and tribute is to be understood as covering the usual daily and yearly requirements, not requirements imposed by extreme necessity, which a state cannot do without.”¹¹⁰

Thus we find the classic statement of the *clausula* doctrine applied in quite a wide variety of cases, not just in the classic setting of contract. This is not an original development: as Feenstra shows in his discussion of Grotius’s passages on the *clausula*, all these examples are taken from earlier writers such as Molina and Lessius, as well as certain older texts from the postglossators.¹¹¹

Grotius then proceeds to criticise Cicero’s view that a promise need not be kept if keeping it is of no advantage to the promisee, or if keeping the promise is of more harm to the promisor than of advantage to the promisee.¹¹² The reason for this is that a promisor ought not to judge whether a thing will be useful to the promisee (except in the case of madness, as in the deposited sword example).¹¹³ Cicero’s example of not having to work for another when detained by the serious illness of one’s son is, however, approved by Grotius. He states that this type of harm to the promisor is an exception to his earlier statement, in view of the nature of the act (*natura actus*).¹¹⁴ Grotius then concludes his discussion with a lengthy quote from Seneca. This passage is the classic statement from *De beneficiis* that a promise will only remain binding while circumstances are unchanged.¹¹⁵ Grotius qualifies this passage with the statement that although “all things” must remain the same as when the promisor promised in order to bind him to his promise, the words “all things” must be understood in the light of his statement about the “nature of the act” mentioned previously.¹¹⁶

Thus despite Grotius’s statement at §25.2 that the *clausula* doctrine only applied in limited circumstances, he makes significant inroads into that statement in §§26 – 27,

¹¹⁰ Ibid.

¹¹¹ Feenstra op cit note 28 at 89: The first example is taken from Molina, Sylvester and Lessius, the second from the postglossator Angelus de Perusio and the third from Fernandus Vasquius, which goes back to an earlier text of Cynus.

¹¹² *De iure belli ac pacis* II, xvi, 27.2.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ *De beneficiis* IV, 35.

¹¹⁶ *De iure belli ac pacis* II, xvi, 27.3

where he sets out the basic outlines of the concept as found in earlier authors such as Molina and Lessius. Grotius uses new terms in his discussion, stressing the concepts of “implications” (*indicia*) in the interpretation of the will of the promisor (*voluntas*) and the “nature of the act” as qualifying which circumstances would allow the promisor to revise his promise. It is clear from a study of Grotius’s sources, however, that once he has set out his argument in full it does not really develop the *clausula* doctrine greatly beyond that of his predecessors. Hence we see that the “implications” are the standard statements of when a promise will cease to bind in Molina and Lessius, for example, and even the concept of the “nature of the act” is similar to that of earlier writers not examined here.¹¹⁷ The mere fact that Grotius discusses this doctrine lends weight to it, however, given the influence which Grotius’s *De iure belli ac pacis* enjoys. He provides a useful reiteration of the earlier texts and despite his careful circumscription of the doctrine at the outset, he goes on to largely approve much of what had been written before.

The other authority of the Roman-Dutch law period who mentions the *clausula rebus sic stantibus* is Cornelius Van Bynkershoek. Van Bynkershoek was President of the Supreme Court of Holland, Zeeland and West Friesland from 1724.¹¹⁸ He deals with the *clausula* doctrine very briefly in his work on international law, *Quaestiones Iuris Publici*,¹¹⁹ under the chapter heading “On the faith which must be honoured in state agreements, and whether there are any tacit exceptions to these agreements?”¹²⁰

Van Bynkershoek begins the chapter by noting that state agreements are binding because of the good faith of the parties. He proceeds to state that the first troublesome inquiry is whether state agreements have to be kept in every eventuality. Van Bynkershoek notes that there is an opinion (*sententia*) that every agreement contains a tacit condition *rebus sic stantibus*.¹²¹ He states that while some authors have rejected this doctrine, others have (somewhat shyly)

¹¹⁷ Feenstra op cit note 28 at 104n152 points to similarities between the texts of Grotius and those of Andreas Alciatus (1492 – 1550) on this point.

¹¹⁸ Robinson et al op cit note 24 at 13.4.6. See also JC De Wet *Die Ou Skrywers in Perspektief* (1988) at 160 – 162.

¹¹⁹ Lib II, Cap X.

¹²⁰ The translations of this work are my own.

¹²¹ Lib II, Cap X.

acknowledged it. Van Bynkershoek adds that he does not know whether this acknowledgement is more just. According to this doctrine, it is appropriate to withdraw from an agreement:

“i) If a new motive, which is suitable enough, intervenes; ii) If the matter should be driven back to a point from which it is not possible to begin; iii) If the reason for the agreement itself ceases; iv) If the necessity and utility of the State demand otherwise.”¹²²

Having set out the *clausula* doctrine, however, Van Bynkershoek warns against such “treacherous loopholes” (*perfidiae latebris*) which can seize the minds of Heads of State.

Van Bynkershoek’s discussion of the *clausula*, is not directly pertinent to the present topic, since he discusses it in the international law context rather than that of private contracts. Given his significance in South Africa as a Roman-Dutch authority, however, this passage is worth mentioning. The way in which Van Bynkershoek distances himself from the doctrine is particularly noticeable, along with his caution against the uncertainty which it brings to agreements.

Another famous member of the Northern natural law school was the German, Samuel Pufendorf (1632 – 1694). Pufendorf’s most influential work was titled *De Iure Naturae et Gentium*, published in 1672. This work was based on the social life of man and was firmly in the natural law tradition, following authors such as Grotius and the philosopher, Hobbes.¹²³ Pufendorf begins this work by setting out a general system of principles for social living and then applies it to private, public and international law.¹²⁴ Robinson et al note that Pufendorf relied quite heavily on Grotius for the content of his legal rules, but worked out the consequences more fully himself.¹²⁵ Hence in Pufendorf’s discussion of the *clausula rebus sic stantibus* it is not surprising that we find much of Grotius’s discussion of this topic reproduced almost verbatim, with additional comments here and there.¹²⁶

¹²² Ibid.

¹²³ Robinson et al op cit note 24 at 13.3.3 – 13.3.4.

¹²⁴ Ibid.

¹²⁵ Ibid at 13.3.6.

¹²⁶ Pufendorf *De iure naturae et gentium* Lib V, Cap XII, §§ 20 – 22.

Pufendorf deals with the *clausula* doctrine in his chapter on interpretation of agreements (as does Grotius). He begins his discussion by echoing Grotius in asking whether promises contain a tacit condition *rebus sic stantibus*.¹²⁷ Pufendorf answers (again drawing heavily on Grotius):

“Which is in general denied; for since this condition is odious, as being apt to render the act null, it ought not easily to be presumed, if it be not actually added; unless it appears plainly that the present posture of affairs was included in that one only reason which we have been talking of.”¹²⁸

Pufendorf goes on to state, however, that a general rule (along the lines of *pacta sunt servanda*) should be limited:

“Moreover, a general law ought to be restrained; if, although it be not absolutely unlawful to stick to the letter, yet upon weighing the thing in candour and prudence, it appears to be too grievous and burdensome, either in respect of the condition of human nature absolutely considered, or in regard of the person and thing in debate, compared with the end of it.”¹²⁹

In support of this contention he cites the same examples as Grotius: a man may request the return of an item loaned before the expiry of the loan, should he need it for his own use. A prince who has promised military assistance to an ally is excused, should he require his forces on the domestic front. A grant of immunity from taxes includes only ordinary taxes and not those required by the State for a special and urgent purpose.¹³⁰

Pufendorf’s views indeed seem little more than a restatement of those of Grotius: in general the application of *clausula* doctrine is denied, but this rule is to be limited where the circumstances point to great injustice of the enforcement of *pacta sunt servanda*. Again, however, Pufendorf’s failure to deny the existence of the *clausula* entirely reflects its general (albeit qualified) acceptance by the natural law school.

¹²⁷ Lib V, Cap XII, § 20. Cf Grotius *De Iure Belli ac Pacis* Lib II, Cap XVI, § 25.2.

¹²⁸ Ibid. Translation by Basil Kennett *Of the Law of Nature and Nations* (1717).

¹²⁹ Lib V, Cap XII, § 22.

¹³⁰ Ibid. Cf. Grotius *De Iure Belli ac Pacis* Lib II, Cap XVI, § 27.1.

3.2.4 Later German authority

Augustin Leyser (1683 – 1752) was a German scholar of the early Enlightenment period who supported the *clausula rebus sic stantibus*. He discusses the *clausula* concept in his major work, *Meditationes ad Pandectas*.¹³¹ Leyser begins his discussion with a general statement:

“In every agreement and every promise it must be understood that circumstances remain unchanged.”¹³²

As authority for this he cites the well-known passage from Seneca.¹³³ Leyser notes at the outset as well that this rule has been disparaged by Grotius and, following him, Pufendorf (amongst others).¹³⁴ He does, however, note that even these authors permit the *clausula* concept where the enforcement of a promise or an agreement would lead to the ruin of the promisor or another person.¹³⁵

Leyser then asks the question why then a general rule of changed circumstances should not be formulated:

“Why then should it not be permissible to formulate a general rule that an obligation will cease to bind and a promise will not be able to be exacted from a promisor, if such a great change should occur, that in consequence nothing more of the former state of affairs remains, and if the promisor had foreseen this change, he would not have promised.”¹³⁶

This statement is followed by another famous passage from antiquity, this time by Cicero.¹³⁷ As his example of changed circumstances releasing a promisor from his promise, Leyser cites a case where a man owned two houses. One house was promised to his son-in-law as a dowry, but before transfer could occur, his own house burnt down. Leyser’s opinion was that the father-in-law could not be compelled to act to his own detriment in this matter.¹³⁸

¹³¹ *Meditationes ad Pandectas* Vol I, Sp XL, §IV. I used the Halae edition (1772).

¹³² *Ibid.* “Omne pactum, omnis promissio, rebus sic stantibus, intelligenda est...”

¹³³ *De beneficiis* IV, 35.

¹³⁴ *Meditationes ad Pandectas* Vol I, Sp XL, IV.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *De officiis* I, x (31 – 32).

¹³⁸ *Meditationes ad Pandectas* Vol I, Sp XL, IV.

Leyser proves an interesting study for *clausula* purposes, due to his unequivocal support of the doctrine. Despite noting the criticism of this concept by other authors of the Northern natural law school, Leyser throws his weight behind it, citing the doctrine as a more or less unqualified rule, similar to the earlier texts of the late scholastics. This was unusual, for in the time in which he wrote, the doctrine was already beginning to decline in popularity.

3.3 The *clausula rebus sic stantibus* in the age of codification

The rise of natural law in the seventeenth century resulted in the following century in the Enlightenment. This shift in the intellectual climate in Europe saw a modernisation of thinking. In civil law, the Enlightenment saw a desire to simplify the law and make it easily accessible through a process of codification.¹³⁹ Thus from the eighteenth century onwards we see the development of various codes of civil law in European countries.

3.3.1 The eighteenth century natural law codes

The first code to be considered here was enacted in Bavaria, a southern state of Germany, under the auspices of the Elector Max Joseph III. The *Codex Maximilianeus Bavaricus civilis* was promulgated in 1756. The arrangement of the code itself followed the precedent of Justinian's *Institutiones*. Robinson et al note that the code did not adhere to any particular theory of natural law, but to a large extent simply restated the rules of the *usus modernus Pandectarum* (the contemporary application of the rules of the *Digest*).¹⁴⁰ These writers do acknowledge that there is evidence of a natural law influence, however.¹⁴¹ This influence manifests itself, for example, in the use of German in the code, although its title was in Latin. The shift towards a more understandable code was echoed in its clarity of language.

The Bavarian civil code deals with the *clausula rebus sic stantibus* in Part IV, which is concerned with the law of obligations. The discussion of the doctrine comes under

¹³⁹ Robinson et al op cit note 24 at 15.1.

¹⁴⁰ Ibid at 15.4.4.

¹⁴¹ Ibid at 15.4.5.

a general article dealing with when an obligation will be suspended.¹⁴² The article begins by describing the circumstances under which the perishing of the thing promised will extinguish the obligation and then moves to a discussion of the *clausula doctrine* proper. The article notes that the *clausula rebus sic stantibus* is a tacit condition in every transaction and hence a change in circumstances suspends the obligation, provided the following requirements are met: first, the change must not be attributable to the fault of the debtor, whether by late performance or other positive act.¹⁴³ Second, the change must not have been readily foreseeable and finally, the change must be such that had the debtor known about it beforehand, he would not have promised performance (in the impartial opinion of the competent observer).¹⁴⁴ Whether or not the obligation is entirely suspended, or merely adjusted, however, is left to the discretion of the court.¹⁴⁵

The Bavarian code thus reflects the classical statement of the *clausula doctrine* as developed in the works of writers such as Lessius and Molina and as had been endorsed a few years earlier by the German, Leyser. The only limitations on this tacit condition were that it must not have been attributable to the fault of the debtor or have been foreseeable and that it must satisfy an objective standard of intolerability before performance would be excused. Again, these conditions were nothing new and were the usual limitations cited by most previous authors. Hence despite the criticism of the *clausula doctrine* by many authors of the natural law school, the first code in the natural law tradition retained the concept.

In the north of Germany, work had begun on a new code for the state of Prussia as early as 1713, under the auspices of Friedrich Wilhelm I. His successor, Friedrich the Great ordered the production of a code which was to be “based purely on reason and on the constitution of the territory; [it] was to be in character German and in application general.”¹⁴⁶ This ruler died in 1786, and it was only under Friedrich Wilhelm II that the final code was promulgated in 1794 as the *Allgemeines Landrecht*

¹⁴² §12, IV, 15.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Robinson et al op cit note 24 at 15.5.3.

für die preussischen Staaten. The final product governed the entire sphere of legal application: private and public law, as well as canon law and feudal privileges.¹⁴⁷

The Prussian code (“ALR”) did contain a *clausula* type principle, although it did not refer to it by its Latin name as the Bavarian code had done. The relevant provisions appear under a section dealing with the cancellation of contracts.¹⁴⁸ Change of circumstances is one of the grounds on which a contract can be cancelled.¹⁴⁹ Section 377 of the ALR provides that apart from actual impossibility, a change in circumstances is no reason for refusing to perform one’s obligation. This is immediately followed by section 378, however, which provides as follows:

“If, however, an unforeseen change makes it impossible to achieve the final aim pursued by the parties as expressed in the contract or inferable from the nature of the transaction, then each of them may withdraw from the unperformed contract.”¹⁵⁰

According to section 380, if the change in circumstances resulted in impossibility for only one party, he may rescind from the contract, although section 381 thereafter provided that this withdrawing party must pay full damages to the other side if he was responsible for the change in circumstances.

The ALR thus did not include the *clausula* doctrine by name as the Bavarian code had done. Rather the provisions on change of circumstance were somewhat more circumscribed and dealt rather with something akin to frustration of purpose.¹⁵¹ The purpose in question had to be an express term of the contract or inferable from its nature, however, which moves the provision from the subjective realm of the *clausula* type reservation into that of a more objectively determinable condition.

¹⁴⁷ Ibid at 15.5.6.

¹⁴⁸ §§ 349 – 423, I, 5 ALR.

¹⁴⁹ §§ 377 – 384, I, 5 ALR.

¹⁵⁰ § 378, I, 5. Translation by Werner Lorenz “Contract modification as a result of change of circumstances” in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (1995) at 360.

¹⁵¹ Compare the analysis of Philipp Carl von Alvensleben *Fundamental change of circumstances and the principle of causa finalis* (unpublished LLM thesis, University of Stellenbosch 2001) at 58: “[t]he provisions [§§ 377 – 384, I, 5 ALR] thus confine the effect of the *clausula* to the thwarting of the contractual purpose, but not any purpose – only the purpose expressly agreed upon or which self-evidently arose from the very nature of the contract.”

3.3.2 The French experience

The first written constitution after the French revolution of 1789 envisaged a new civil code, in line with the earlier Declaration of the Rights of Man and Citizen of 1789. The French civil code of 1804 also followed Justinian's *Institutes* as a model, although it was composed in the French natural law tradition of the period. Although several individuals were influential in the process of codification, perhaps the most influential expert was Pothier (1699 – 1772). Although Pothier had died in 1772, this erstwhile Professor of law had written an extremely influential work, the *Traité des Obligations* (first published in 1761), which dealt with the entire law of obligations in the French system. Pothier followed this work with a dozen or so books on specific contracts before his death. Robinson et al note that Pothier has been called the “father of the Code” and that there is little in the French code which is in discord with Pothier's work. Indeed a lot of the code's provisions are drawn directly from his writings.¹⁵²

For an inquiry into the existence of the *clausula rebus sic stantibus* in the French tradition, it is thus particularly apt to first briefly examine Pothier's writing, before turning to consider the provisions of the code itself. In the *Traité des Obligations*, Pothier discusses impossibility of performance in contract under the chapter heading: “Of the extinction of an obligation by the extinction of the thing due; or when it ceases to be susceptible of obligation; or when it is lost, so as not to be known where it is.”¹⁵³ This chapter sets out in detail the circumstances in which impossibility will render a contract at an end, but does not at any point deal with the situation where performance is not impossible, but merely more difficult due to a change of circumstances. There is certainly no express mention of the *clausula* itself. It can thus be inferred that Pothier did not consider this doctrine to form part of the French law of his day.¹⁵⁴

¹⁵² Robinson et al op cit note 24 at 15.7.7.

¹⁵³ Pothier *A Treatise on the Law of Obligations or Contracts* Part III, Chapter 6; translation by William David Evans (1853).

¹⁵⁴ It is perhaps worth noting that the seminal English case on frustration, *Taylor v Caldwell* (1863) B&S 826, cited the chapter of Pothier discussed here in reaching a decision that the destruction of the subject matter of a contract of lease extinguished the obligation. *Taylor's* case discussed the civil law position on impossibility at 834 – 835.

It is thus perhaps not surprising that we find no mention of a *clausula type* concept in the French civil code itself. Indeed the civil code stresses the opposing concept of *pacta sunt servanda*:

“Art.1134. Contracts lawfully entered into have the force of law for those who have made them. They can only be cancelled by mutual consent or for causes allowed by the law. They must be carried out in good faith.”¹⁵⁵

This article was relied upon by the Cour de cassation (the highest court in private law matters) in 1876 in rejecting a claim that a change of circumstances could relieve a party of his obligations under a contract.¹⁵⁶ In this case an argument was rejected that the court could modify the contract based on the theory of *révision pour imprévision* (“modification on the ground of unforeseeability”). The civil courts have adhered to this position over the years,¹⁵⁷ although it is to be noted that the administrative court, the Conseil d’Etat does apply the theory of *imprévision* under certain circumstances to administrative contracts which come before it.¹⁵⁸

3.3.3 The German experience

In Germany in the late seventeenth century the popularity of the natural law school began to decline in favour of a new movement: the historical school. Law was expected to embody the spirit of the people and thus had to be firmly rooted in the context of the nation, which necessitated a knowledge of legal history. One of the leading figures of the historical school in Germany was Von Savigny (1779 – 1861), who stressed the Germanic context in the reception and development of Roman law

¹⁵⁵ Henry Cachard *The French Civil Code* (1930). French law allows discharge only in situations of force majeure. See Joern Rimke “Force majeure and hardship: application in international trade practice with specific regard to the CISG and the Unidroit Principles of International Commercial Contracts” (1999 – 2000) *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* 193 at 204 – 205.

¹⁵⁶ Civ 6 Mar 1876, *Canal de Craponne*, DP 1976.1.193 note A Giboulot.

¹⁵⁷ Reinhard Zimmermann and Simon Whittaker (eds) *Good Faith in European Contract Law* (2000) at 561n22. See generally also Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law* (1998) at 524 – 527.

¹⁵⁸ *Ibid* at 562. This distinction is criticised by Zweigert & Kötz *op cit* note 157 at 527, based on the fact that the legislature has had to intervene in the civil law to address contracts struck by hardship following both of the World Wars.

during the middle ages in Germany.¹⁵⁹ Von Savigny does not, however, even mention the *clausula* doctrine in his writing.¹⁶⁰

Following the Napoleonic wars, Germany recovered several states which had been under French rule and there was a growing sense of German nationalism and calls for a code for Germany as a whole became more pronounced.¹⁶¹ Codification as a process in individual German states continued, however. One of the states freed from French rule was Baden and it passed its own *Landrecht* in 1809. This code was essentially a translation of the French civil code,¹⁶² however, and echoed the French rejection of any sort of *clausula* doctrine with a restatement of article 1134 of the Code Civil which stressed the opposing concept of *pacta sunt servanda*.¹⁶³

The historical school in Germany was followed closely by another movement in legal scholasticism, known as the Pandectists. The Pandectists took their name from the *Pandects* (ie the *Digest*) of Justinian and were concerned about the ordering of Roman law for contemporary use.¹⁶⁴ Indeed the Pandectists began as an “off-shoot” of the historical school before developing into a philosophical school in their own right.¹⁶⁵ One of the most influential of the Pandectists was Windscheid (1817 – 1892).

The *clausula rebus sic stantibus* had declined almost entirely in popularity by Windscheid’s day. The nineteenth century was a time of freedom of contract, economic liberalism and certainty of law, all of which ran counter to the ethos behind a tacit condition that limited the validity of a contract.¹⁶⁶ While Windscheid rejected the *clausula* doctrine itself,¹⁶⁷ he nevertheless attempted to accommodate the problem of changed circumstances under his own theory of “presupposition”

¹⁵⁹ Robinson et al op cit note 24 at 16.2.4.

¹⁶⁰ Von Alvensleben op cit note 151 at 59.

¹⁶¹ Robinson et al op cit note 24 at 16.2.5.

¹⁶² Ibid.

¹⁶³ Von Alvensleben op cit note 151 at 59.

¹⁶⁴ Robinson et al op cit note 24 at 16.3.1.

¹⁶⁵ Ibid.

¹⁶⁶ Reinhard Zimmermann *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001) at 81.

¹⁶⁷ Windscheid *Lehrbuch des Pandektenrechts* Vol I § 98.

(Voraussetzung).¹⁶⁸ This theory was put forward in 1850 in a monograph titled *Die Lehre des römischen Rechts von der Voraussetzung*.¹⁶⁹ The essence of this theory was that when a contracting party makes his contractual promise, he assumes that the intended legal consequences will occur only in certain circumstances. Hence there is an assumption that the circumstances will remain unchanged, although this is not elevated to a term of the contract and thereby made an express condition. If the other party to the contract had realised that this assumption had been fundamental for the promisor, then the promisor should not be bound by the agreement if his presupposition was falsified by a change in circumstance. Thus the contract was concluded under (what is analogous to) a tacit condition that the circumstances remain unchanged, which is why Windscheid referred to the presupposition as an “inchoate condition” (unentwickelte Bedingung).

While Windscheid’s presupposition had thus to be material to the contract, it was not a term of the contract, nor even necessarily a common assumption. It was merely a unilateral motive which was known to the other party. To many in Germany this struck at the root of contractual certainty and Windscheid’s theory was subjected to much criticism.¹⁷⁰ Lenel attacked Windscheid’s doctrine on the basis that it failed to sufficiently distinguish between an assumption and a legally irrelevant motive.¹⁷¹ Windscheid remained adamant about the necessity of a doctrine to deal with changed circumstances, however. His answer to critics was the oft-quoted statement that “thrown out by the door, this problem will always re-enter through the window”.¹⁷²

In the meantime, the German Empire was formed in 1871 and in 1877 the supreme federal court at Leipzig was granted jurisdiction over all areas of law. Thus the foundations were in place for a unified German law. The drafting commission for the

¹⁶⁸ This translation of the German term “Voraussetzung” used by Windscheid is taken from Markesinis et al op cit note 100. Markesinis et al discuss Windscheid’s doctrine at 320 – 322.

¹⁶⁹ This theory is also discussed in Windscheid’s major treatise *Lehrbuch des Pandektenrechts* at §§ 97 - 100.

¹⁷⁰ Eg. Otto Lenel “Die Lehre von der Voraussetzung (in Hinblick auf den Entwurf eines bürgerlichen Gesetzbuches)” (1889) 74 *AcP* 213 & “Nochmals die Lehre von der Voraussetzung” (1892) 79 *AcP* 49.

¹⁷¹ Von Alvensleben op cit note 151 at 60.

¹⁷² Windscheid “Die Voraussetzung” (1892) 78 *AcP* 197.

German civil code had already been founded by this time and included leading practitioners and academics, such as Windscheid himself. A first draft was published for comment in 1887. At this point Windscheid left the drafting commission, however. Windscheid's concern for the problem of changed circumstances in contract also fell by the way, due to the perceived threat to legal certainty and in response to criticism by authors such as Lenel. The final draft of the German civil code (the Bürgerliches Gesetzbuch) ("BGB") was promulgated on 1 January 1900 and contained no mention of any doctrine akin to the *clausula rebus sic stantibus*.

The omission of a *clausula* doctrine from the enduring French and German codes reflected the decline into obscurity which this type of tacit condition had suffered by the nineteenth century. Already from the seventeenth century the doctrine had decreased in favour to the point where it is found only in the international law realm in Roman-Dutch writers and even there is carefully circumscribed. While it did not die out immediately due perhaps to the fundamental nature of the problem of changed circumstances, economic advance demanded contractual certainty as time progressed. As a result academics and jurists were wary of allowing a unilateral escape provision in a contract, particularly one which was so readily available as the *clausula rebus sic stantibus* of the middle ages. It is thus not surprising that legislators took a hard line on the doctrine and omitted it from the later codes. Windscheid's caution that the problem of changed circumstances in contract remained a vexing one, was to prove prophetic, however. While the *clausula* doctrine may have died out towards the end of the eighteenth century, this was not the end of the problem which it sought to address, as chapter five will show with reference to the subsequent development of German law in this area.

3.4 Conclusion

What emerges from a study of the *clausula rebus sic stantibus* is just how enduring the problem of changed circumstances is. Whenever there is a promise, one needs to bear in mind that that promise is based on certain motivating factors and the promisor may wish to resile from the contract should those factors change

drastically. We have seen this principle in the moral philosophy of ancient Rome and how it was transmitted to the canon law and then the civil law. At maturity, the doctrine of *rebus sic stantibus* stood as a qualification on the binding force of contracts. A contract would cease to bind should the promisor with be faced with a changed situation, which if he had had foresight of he never would have promised. Sometimes an objective standard of what reasonable public opinion would consider a just outcome was inferred, sometimes not. We have seen also that this doctrine waned in the age of codification and the stress fell upon the opposing concept of *pacta sunt servanda*.

The position was slightly different in the United Kingdom from that of continental Europe, and the process by which the harshness of the doctrine of *pacta sunt servanda* could be limited took a different course in the common law jurisdiction. It is thus to the doctrine of frustration that this thesis now turns.

Chapter 4: The position in common law jurisdictions

4.1 Introduction

The problem of change of circumstances is dealt with in English law under the banner of the doctrine of frustration. As we shall see below, however, frustration is a broad concept and refers to any situation where there is discharge due to a radical change in the obligation subsequent to the conclusion of the contract. This extends thus also to the impossibility defence. English contract law and along with it the doctrine of frustration have been exported to many so-called “common law” countries around the globe, including the United States, Australia, New Zealand and Canada.¹ This chapter will unfortunately not be able to investigate the doctrine of frustration in each of these jurisdictions, due to space constraints. There will, however, be a careful examination of the parent system of English law as well as a brief look at US law, where the concept of frustration has undergone considerable local development.

It should be noted at the outset that slightly different terminology is used in the US and in England. “Frustration” is a catch all term in English law, used to refer to any invocation of the defence of supervening change of circumstances. In the US “frustration” is used merely to refer to the situation where the purpose of the contract has been frustrated. Other instances of change of circumstances or impossibility are referred to as “impracticability”.

4.2 English Law

4.2.1 Introduction

In *The Super Servant Two*², Bingham LJ outlined five propositions concerning frustration, which he stated were “established by the highest authority” and were “not open to question”.³ The propositions were as follows (authorities omitted):

¹ Compare generally: Guenter Treitel *Frustration and Force Majeure* (2004). This is a very detailed and helpful examination of frustration in English law, with reference to the laws of other common law countries where appropriate.

² *J Lauritzen AS v Wijsmuller BV* (“The Super Servant Two”) [1990] 1 Lloyd’s Rep 1.

³ *Ibid* at 8 (authorities omitted). The five propositions follow this statement.

- “1. The doctrine of frustration was evolved to mitigate the rigour of the common law’s insistence on literal performance of absolute promises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.
2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.
3. Frustration brings the contract to an end forthwith, without more and automatically.
4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. A frustrating event must be some outside event or extraneous change of situation.
5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it.”

This statement constitutes a merit-worthy attempt to capture in a nutshell an unruly doctrine, which has been developed largely in an ad hoc fashion over many years.⁴ To paraphrase even further one might rely on an earlier pronouncement, which will be used below to establish a theoretical basis for the doctrine of frustration:

“[F]rustration occurs whenever the law recognizes 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.”⁵

From these extracts we see that essentially frustration occurs when there is a fundamental change of circumstances regarding a contract, which renders the required performance “radically different” from that which was promised. What follows is an attempt, in brief, to set out the English law on frustration. This account will begin with a brief history of the doctrine, followed by an examination of its

⁴ Hugh Beale et al (eds) *Cases, Materials and Text on Contract Law* (2002) at 607 notes that in instances of frustration, “[t]he system has been built up in layers and does not necessarily form a coherent whole.”

⁵ *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729.

theoretical basis. These two topics go hand in hand, since the latter has developed over time along with the doctrine. Once the theoretical basis of frustration is known, a test can be formulated for when it is present in a contractual setting. The chapter will then turn to specific instances of frustration to determine the scope of this defence. The allocation of risks under the contract itself and by operation of law is also relevant to the determination of the ambit of frustration, since this shows the limits of the doctrine. Finally the effects of frustration on a contract will be investigated, to see what the impact of the doctrine is.

Given the ad hoc nature of frustration and indeed the English common law in general, a discussion of certain leading cases is inevitable. This section does not, however, aim to be a definitive case by case account, but will rather focus on the underlying theory in an attempt to gauge a general conception of the doctrine in the abstract.

4.2.2 Early case history

Although frustration has developed into an undisputed doctrine in English law and the concept has been exported to several common law countries, the doctrine does not date back to time immemorial in the English legal system. Indeed frustration developed as an exception to the prevailing rule of absolute contracts. The rule in *Paradine v Jane*⁶ is usually cited as authority for this original position in English law. In *Paradine's* case, a tenant was sued for outstanding rent under a contract of lease. The tenant argued that he should be excused from payment on the ground that he had been prevented from occupying the leased premises for two years by an alien army which had been occupying the territory. The court found against the tenant and refused to excuse performance under the contract:

“When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he ought to repair it.”⁷

⁶ (1647) Ayleyn 26.

⁷ Ibid at 27.

There were exceptions to this doctrine, however, which were elucidated by the subsequent case law. Supervening illegality was recognised as an exception in *Brewster v Kitchell*⁸ as early as 1691. Another logical exception was for contracts requiring a personal service, which were excused by the death or incapacity of the debtor:

“If an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor’s death, has become impossible to be performed.”⁹

The beginning of a general doctrine of frustration dates from the case of *Taylor v Caldwell*,¹⁰ however. In *Taylor’s* case, the plaintiff had hired a music hall and its surrounding gardens to the defendant for the purpose of holding concerts over several specified days. Before the date of performance arrived, however, the music hall was destroyed by an accidental fire. There was no fault on the part of the plaintiff in causing this fire. When the defendant refused in consequence to pay the fee for the stipulated hire, the plaintiff sued for breach. Blackburn J, relying on civil law authority in the form of Pothier’s *Treatise on the Law of Obligations*, as well as on the various exceptions to the rule of absolute contracts mentioned above, derived a rule that an implied term existed in the contract that it would terminate should performance become impossible.¹¹

The decision of Blackburn J marked a turning point in English contract law. Once recognised, the exception to absolute contracts was soon extended beyond actual impossibility to cases where the chartering of a ship had been “frustrated” by unforeseen delay. This class of cases, referred to as “frustration of the adventure” is typified by the decision in *Jackson v Union Marine Insurance Co Ltd*.¹² A ship was chartered to carry a cargo of iron rails from Newport to San Francisco. On the way to Newport, however, the ship ran aground and it took a month to refloat it. At this point it required extensive repairs, which were effected in Liverpool. By the time the

⁸ (1691) 1 Salk 198. See also: *Atkinson v Ritchie* (1809) 10 East 530, 534 – 535.

⁹ *Taylor v Caldwell* 3 B&S 826 cites this passage at 835.

¹⁰ *Supra* note 9.

¹¹ *Ibid* at 833 – 834. This debt to the civil law was acknowledged by Vaughan Williams LJ in *Krell v Henry* [1903] 2 KB 740 at 747 – 748, where he described frustration as a “principle of the Roman law which has been adopted and acted on in many English decisions”.

¹² (1874) LR 10 CP 125.

ship was ready to sail again, about eight months had passed and the charterers had already chartered another ship to carry the cargo to San Francisco. The ship's owner (Jackson) then claimed from his insurers for the contract price which he had lost out on due to misfortune at sea. In order to prove his claim, Jackson had to demonstrate that the charterers had been justified in cancelling their contract with him. The court held that the delay in performance by Jackson's ship was such as to put an end to the venture in a commercial sense. In explanation of this decision, Bramwell B explained that this was a case of "frustration of the adventure".¹³

The next phase in the expansion of the doctrine was to extend it beyond commercial contracts, where time was of the essence, to cases where the basis of the contract, common to both parties, had fallen away. This class of cases, referred to as being instances of "frustration of purpose", date back to the "Coronation cases", the most famous of which is *Krell v Henry*.¹⁴ King Edward VII was to be crowned on 26 June 1902 and there was to be a coronation procession that day and the next through the streets of London. Henry had hired a flat in Pall Mall, which overlooked the route which the procession was to take. It was known both to Henry and to Krell, the lessor, that the viewing of the coronation was the basis on which the lease was entered into and the rent was correspondingly priced. Indeed, the hire of the premises was for the day of the procession alone and not the night, further underlining the common purpose of the transaction. On 24 June the King fell ill with appendicitis and a decision was taken to operate on him. As a result the procession had to be cancelled. Henry refused to pay the outstanding rental and Krell sued. It was held by the court that the contract was discharged due to the collapse of the "foundation" of the contract.¹⁵

Thus it can be seen that once derived in *Taylor v Caldwell*, the doctrine of frustration was taken up into the English contract law and quickly entrenched itself into the common law. Although at first, in its growth phase, there was a tendency to expand the doctrine to new types of cases, in later years the sphere of application of frustration was more carefully defined and limited. Hence we can reconcile the early

¹³ Ibid at 148.

¹⁴ Supra note 11.

¹⁵ Ibid at 754.

expansionist tendencies with the later statement in *The Super Servant Two* that “[frustration] is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended”.¹⁶ The modern approach to the allocation of risk under a contract and the effect of frustration on this balance will be discussed below.¹⁷

4.2.3 The theoretical basis of frustration

An examination of the history of frustration thus shows that the doctrine was a general principle derived from specific exceptions to the rule of absolute contracts in *Taylor v Caldwell*. From this starting point it spread on an *ad hoc* basis to other classes of cases. This lack of a strong doctrinal foundation created difficulty in the development of the doctrine when courts sought to ascribe a theoretical basis to frustration.

a) The implied term

As we have seen from the discussion of the decision in *Taylor v Caldwell*, the initial basis for frustration was the implied term. The classic statement of this theory appears in the judgment of Lord Loreburn in *FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd*:¹⁸

“[A] Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. ...Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded.”

The essence of this approach was thus that the contracting parties based their contractual agreement upon a given state of affairs. Should that state of affairs be varied to a sufficiently significant degree, a court would be able to infer that the

¹⁶ *The Super Servant Two* supra note 2 at 8.

¹⁷ See section 4.2.5.

¹⁸ [1916] 2 AC 397 at 403 - 404.

parties would not have wished to continue with their contractual obligations given the change. This theoretical approach bears marked similarities to the *clausula rebus sic stantibus*, which also rested upon an implied condition.¹⁹

The major criticisms facing the implied term approach were twofold: in the first instance an implied term was imputed to the parties in circumstances which were unforeseen and hence by definition beyond the contemplation of the parties at the time of contracting.²⁰ A second point is that, had the parties indeed foreseen the change of circumstance, their implied term would in all likelihood have been to vary the contract and somehow keep it alive, rather than to discharge it.²¹

b) Radical change in the obligation

In criticism of the implied term approach to frustration, Lord Radcliffe noted in *Davis Contractors v Fareham UDC*²² (as stated above) that it was a legal fiction to impute an implied term to the parties to a frustrated contract, since the frustrating eventuality was typically unforeseen (and unforeseeable).²³ Rather frustration occurred when a court applied an objective rule of the law of contract to a case at hand:

“[F]rustration occurs whenever the law recognizes 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. *Non haec in foedera veni*. It was not this that I promised to do.”²⁴

This objective standard has been subsequently accepted by the House of Lords in several decisions as the test for whether a contract has been frustrated.²⁵ This test for frustration involves a process known as “construction of the contract”, whereby a court will construe the terms of a contract in the light of the nature of that contract

¹⁹ See chapter 3 for a discussion of this doctrine.

²⁰ Lord Radcliffe dismisses the implied term approach using this argument in *Davis Contractors* supra note 5 at 728.

²¹ See *Denny, Mott & Dickson Ltd v Fraser (James B) & Co Ltd* [1944] AC 265 at 275.

²² Supra note 5.

²³ Ibid at 728.

²⁴ Ibid.

²⁵ *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 at 131; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 700; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 744, 745, 751; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854, 909, 918. See also Jack Beatson *Anson's Law of Contract* (2002) at 544n78; Ewan McKendrick “Discharge by frustration” in HG Beale *Chitty on Contracts Vol I* (2008) at 1487.

and then compare this with the situation which exists after the occurrence of the supervening event.²⁶ If there has been a radical change in the obligation, the contract will be discharged. The use of the word “radical” to describe the change of circumstances on which a finding of frustration can be based indicates that the doctrine will not lightly be invoked. This has been shown (above) to be a central feature of frustration. The question today is thus whether a change in circumstances is sufficiently significant and unforeseen to bring about a finding of frustration.²⁷ This of course necessitates a discussion of the allocation of risk between the parties to a contract, both *inter se* and as imposed by the common law.²⁸

4.2.4 Which eventualities give rise to discharge by frustration?

Frustration is quite a broad-ranging concept in English law. Although (as this chapter will attempt to demonstrate) the doctrine is not lightly invoked in the modern English jurisprudence, as has already been seen from the definition given above, it stretches (at least in theory) beyond impossibility to any supervening change of circumstances which renders the obligation radically different from what was undertaken at the outset. For the purposes of a South African audience, this section will attempt to break the broad conception of frustration down into its component parts.

4.2.4.1 Impossibility

The classic historical starting point for the doctrine of frustration is the case of *Taylor v Caldwell*.²⁹ The destruction of a music hall by fire in this case excused performance by its owners, who had contracted to supply the hall as a venue for a function. It is thus clear that the doctrine of frustration originally evolved to cover instances of actual impossibility. Hence if performance has become impossible under a contract, it will be frustrated.

²⁶ McKendrick in Beale op cit note 25 at 1487.

²⁷ Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law* (1998) at 530 argue that the question is less about whether one is concerned with an implied term or is construing the contract and more about whether liability should be imposed given the nature of the frustrating event and the surrounding circumstances.

²⁸ See section 4.2.5 below.

²⁹ *Taylor v Caldwell* supra note 9.

In addition, as noted in *Taylor's* case, death or incapacity will render a contract of personal service impossible of performance and hence frustrate it.³⁰

Unforeseen delay has also been held to be a ground for frustration in several cases, particularly those involving shipping. Where the delay is of such a nature that it makes the contract something radically different from what was initially undertaken, the contract will be discharged for frustration.³¹ The facts of *Jackson v Union Marine Insurance*³² illustrate this point.³³

4.2.4.2 Frustration of purpose

Frustration of purpose occurs where performance under the contract is still technically possible, but the value of that performance to the recipient party has dramatically decreased.³⁴ This is because the purpose for which he desired the performance, which was the common knowledge of both parties, has ceased to exist.³⁵ The classic starting point for discharge because of frustration of purpose in English contract law is the "Coronation cases" mentioned above. In *Krell v Henry*,³⁶ the cancellation of the coronation procession led to a successful claim that the foundation of the contract had fallen away and the agreement was hence terminated.³⁷ Although this case has been criticised as allowing too easy an escape from a contract, there is thus precedent that the doctrine of frustration applies where there has been a frustration of the contractual purpose. In other words, when the basis of the contract falls away, the contract should fall away with it. It should be

³⁰ See section 4.2.2.

³¹ It should be noted that South African law adopts a slightly different approach. If performance under a contract becomes temporarily impossible in South Africa the obligation is suspended until the impossibility ceases to exist. The creditor will have the option to terminate the contract if the interruption is likely to endure for an unreasonably long time. The question of what is an unreasonably long period of time is one of fact. See *Niemand v Okapi Investments (Edms) Bpk* 1983 (4) SA 762 (T); *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W); RH Christie *The Law of Contract in South Africa* (2006) at 474; Tjachie Naudé "Termination of obligations" in Dale Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* (2009) at 384.

³² *Jackson v Union Marine Insurance* supra note 12 discussed above at § 2.1.

³³ See also: *Metropolitan Water Board v Dick Kerr and Co* [1918] AC 119; *Fibrosa Spolka Akcyjna v Fairbairn, Lawson Combe Barbour Ltd* [1943] AC 32; *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* supra note 20.

³⁴ Treitel op cit note 1 at 309.

³⁵ Ibid.

³⁶ *Krell v Henry* supra note 11 discussed above at section 4.2.2.

³⁷ See also *Chandler v Webster* [1904] 1 KB 493 (discussed below at section 4.2.6.2). A different result was reached in *Griffith v Brymer* (1903) 19 TLR 434; *Herne Bay Steam Ship Co v Hutton* [1903] 2 KB 683 & *Blakely v Muller & Co* [1903] 2 KB 760.

noted that the term “frustration of purpose” was not used in *Krell’s* case. Vaughan Williams LJ preferred a formula which stated that the contract had become “impossible of performance by reason of the non-existence of a particular state of things”.³⁸ The term “frustration of purpose” seems to have come afterwards, but is the common parlance.³⁹

Although firmly established as a ground on which frustration will be permitted by *Krell v Henry*, this precedent has not been followed often in subsequent decisions. Treitel goes so far as to state that since the Coronation cases, there has been no instance in English law where the doctrine of frustration of purpose has been applied.⁴⁰ Indeed, even in *Krell v Henry* Vaughan Williams LJ stressed that the doctrine would only apply where the foundation of the contract which is alleged to have fallen away was common to both parties. The Lord Justice distinguished the scenario where a cab driver is engaged to take a person to see a horse race in another town. The subsequent occurrence of the horse race is fundamental only to the passenger: to the cab driver he is just another passenger, even if the price has been suitably enhanced due to the fact that the race is The Derby. Should the race be cancelled, the passenger would still have to pay.⁴¹

It should also be noted that not all the Coronation cases were decided in favour of the consumer. In *Herne Bay Steam Boat Co v Hutton*⁴² the defendant had hired a ship to take his guests to see the Naval Review on 28 June 1902, which was to accompany the Coronation, and the following day to take the party around the fleet and the Isle of Wight. The cancellation of the Naval Review was held not to discharge the contract, since this was not the foundation of the agreement.⁴³ All three judges in this case make the point that the contract was to hire the ship for a

³⁸ *Krell v Henry* supra note 11 at 749.

³⁹ McKendrick in Beale op cit note 25 at 1496; Treitel op cit note 1 at 309ff; Zweigert & Kötz op cit note 27 at 529. Beatson op cit note 25 at 534 prefers a formula similar to that actually used in the *Krell* case (performance depending on the “existence or occurrence of a particular state of things forming the basis on which the contract had been made”), but the result is the same.

⁴⁰ Treitel op cit note 1 at 346.

⁴¹ *Krell v Henry* supra note 11 at 750 – 751.

⁴² Supra note 37.

⁴³ Ibid at 689.

voyage, not a particular purpose incidental to that voyage.⁴⁴ Vaughan Williams LJ, who was also on the bench for this case, stated that it was analogous to his earlier example of the cab-driver.⁴⁵ Though these two Coronation cases may not be easy to reconcile with one another, the *Herne Bay* case does demonstrate Treitel's argument: immediately subsequent to the creation of the frustration of purpose defence by the English Courts they were already limiting its application.

Another group of cases which dealt with frustration of purpose were the so-called "black-out" cases. During World War One, legislation was passed in England which prevented the illumination of street lights in cities to avoid enemy detection. The local authorities then tried to escape from contracts which they had entered into with power companies to keep these street lights lit. Clearly the purpose of such a contract had been frustrated. In *Leiston Gas Co Ltd v Leiston-cum-Sizewell Urban District Council*⁴⁶ the plaintiff gas company had contracted to provide the necessary infrastructure and gas for street lighting for a period of five years, beginning in 1911. In 1915, government regulations prohibited the lighting of such lamps. The defendant local authority then tried to argue that the contract had been frustrated, while the plaintiff sued to recover the amounts outstanding under the remainder of the contract period. The purpose of the contract, namely obtaining street lighting was temporarily impossible to achieve, but execution of the remaining parts, such as maintaining the lights and supplying the gas, was still possible. Despite the defendant's plea that the purpose of the contract as a whole had been frustrated, the Court of Appeal held for the plaintiff. The performance of the maintenance functions of the gas company remained possible and it could not be said that the foundation of the contract had fallen away.⁴⁷

Similarly in *Amalgamated Investment & Property Co Ltd v John Walker & Son Ltd*,⁴⁸ the listing of a building as being of special architectural or historic interest did not frustrate a contract for the purchase of that building, even though the purpose of the purchasers, which was known to the sellers, was to redevelop the building, an object

⁴⁴ *Ibid* at 688 – 693.

⁴⁵ *Ibid* at 689.

⁴⁶ [1916] 2 KB 428.

⁴⁷ *Ibid* at 431 – 440.

⁴⁸ [1977] 1 WLR 164. This case is discussed further below at section 4.2.7.

which was now prohibited by the listing. Indeed the market value of the property dropped to a fraction of the sale price, but this did not influence the Court's decision. The court held that the risk of listing was one which "inheres in all ownership of buildings" and refused to discharge the purchaser.⁴⁹

Clearly, while frustration of purpose remains a ground for discharge by frustration in English law, the Courts will not lightly release a party for this reason. The policy decision at play seems to favour the position of the supplier of goods or services, so that the motive of the consumer for entering into the contract is of little significance to the ultimate bargain which is struck and the commercial interests of the supplier are protected. English law strikes a balance in this regard by refusing to discharge the supplier where performance has become more difficult to the extent that the contract is impracticable, which is in a sense the converse of the situation of frustration of purpose.⁵⁰

4.2.4.3 Impracticability

Impracticability is the term used (particularly in America) for the situation where performance by the supplier of goods or services becomes significantly more difficult or expensive.⁵¹ As stated above, this is in a sense the converse of frustration of purpose. While with frustration of purpose the common basis of the contract, which caused the recipient of the service to contract, falls away, with impracticability it is the basis on which the supplier of a service contracted which changes. Thus, for example, severe inflation or a shortage of raw materials may make performance something entirely different from what the supplier intended. Although performance is not exactly impossible, the increase in expense or difficulty would often result in dire consequences for the supplier.

The seminal case dealing with impracticability in the US is *Mineral Park Land Co v Howard*,⁵² which will be dealt with under the discussion of American law. It is

⁴⁹ Ibid at 173.

⁵⁰ Treitel *The Law of Contract* (1999) at 824.

⁵¹ Uniform Commercial Code § 2 – 615; Second Restatement of Contracts § 261.

⁵² 156 P 458 (1916).

relevant, however, that in *Mineral Park* the doctrine was indirectly derived from the English decision of *Moss v Smith*.⁵³ In *Moss's* case it was stated that:

“A man may be said to have lost a shilling when he had dropped it in deep water, though it might be possible by some very expensive contrivance to recover it.”⁵⁴

Despite this dictum, which is a variation of the test for impossibility set out in various authorities,⁵⁵ it would appear that impracticability is no ground for discharge in English law.⁵⁶ Indeed there are several dicta, of high authority, to this effect, such as the statement of Lord Loreburn in *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd*.⁵⁷

“The argument that a man can be excused from performance of his contract when it becomes ‘commercially’ impossible, ...seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect.”⁵⁸

In *British Movietonews Ltd v London and District Cinemas Ltd*⁵⁹ in a discussion of whether an “uncontemplated turn of events” would frustrate a contract, Lord Simon stated that the parties to a contract are often faced with “a wholly abnormal rise or fall in prices” or a “sudden depreciation in currency”, but that these factors would not affect their contractual obligations.⁶⁰ Indeed there is a dictum which states that a rise in price would have to be at least a hundredfold before discharge could be permitted on this ground.⁶¹

⁵³ (1859) 9 CB 94. Treitel op cit note 1 states at 264 that the rule in *Mineral Park* stems from a statement in *Beach on Contracts* Vol I at para 216 that “a thing is impossible in legal contemplation when it is not practicable” for which the only authority cited is the case of *Moss v Smith*.

⁵⁴ *Ibid* at 103.

⁵⁵ Treitel op cit note 1 at 265 refers to the German example given in Karl Larenz *Schuldrecht* 14th ed (1987) Vol I at 99 of a ring which is dropped on the ocean floor. A similar example was discussed in the South African context in chapter 2. The South African authorities William Arthur Ramsden *Supervening Impossibility of Performance* (1985) at 64 and JC De Wet & AH Van Wyk *Kontraktereg* (1992) at 85 – 86 mention an almost identical example.

⁵⁶ Apart from the dicta quoted below, see the conclusion of Treitel op cit note 1 at 290 – 291.

⁵⁷ [1917] AC 495.

⁵⁸ *Ibid* at 510.

⁵⁹ *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166.

⁶⁰ *Ibid* at 185.

⁶¹ *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] All ER 497 at 501 (per Lord Denning).

In the leading case of *Davis Contractors v Fareham UDC*,⁶² building contractors had contracted to build 78 houses in eight months for a price of £94 000. Because of labour shortages, however, the project took 22 months to complete and cost £115 000. The contractors then argued that the delay and the increase in costs had frustrated the contract. The Court disagreed, holding that these eventualities were foreseeable in the normal course of commercial undertakings of this nature.⁶³

Another case of impracticability occurred when the closure of the Suez canal due to war in the Middle East made shipping of goods from Asia to Europe much more expensive and time consuming, since ships would have to travel via the Cape of Good Hope. In *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*⁶⁴ the sellers agreed to sell a quantity of Sudanese groundnuts to the buyers and to ship the nuts from Sudan for delivery in Hamburg. The agreement was entered into in October 1956 and shipment was to take place between November and December of that year. On 2 November 1956 the Suez Canal was closed. The route via the Cape was twice as long and far more costly. The House of Lords held however that the change of circumstances was not sufficiently fundamental to discharge performance by frustration.⁶⁵

Exceptions do exist, however. In *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*⁶⁶ a hospital had given up its rights to take water from a well in favour of a Waterworks Company in 1919 and in return the Waterworks Company had undertaken to supply the hospital with water “at all times hereafter” at a fixed price. By 1975, the cost of supplying water to the hospital had risen to 18 times the stipulated price and the Waterworks Company attempted to escape the deal. The Court of Appeal held that the Company was able to escape the agreement, since it was of indefinite duration and hence contained an implied term to the effect that either party could cancel with reasonable notice.⁶⁷ Hence a specific

⁶² *Davis Contractors* supra note 5.

⁶³ *Ibid* at 730 – 731. Treitel op cit note 1 states at 287, however, that this case does not necessarily indicate a difference between American and English law, since the margin of cost increase would not have been sufficient to invoke the doctrine of impracticability in America either.

⁶⁴ [1962] AC 93.

⁶⁵ *Ibid* at 116, 119, 123, 129, 134.

⁶⁶ [1978] 1 WLR 1387

⁶⁷ *Ibid* at 1397.

class of exceptional cases can be created which do not fall within the prohibition of discharge for increased cost.

4.2.4.4 Supervening illegality

Where performance under a contract becomes illegal subsequent to the conclusion of that contract, it will be discharged for frustration. The basis on which this rests is one of supervening illegality: while performance may not be impossible and the purpose of the contract may not have been frustrated, it is not in the public interest that this type of obligation be fulfilled, since this would result in a breach of the law. Supervening illegality may arise either because of a change in law or because of a change in circumstances.

In *Denny, Mott & Dickson v James B Fraser & Co Ltd*⁶⁸ the parties entered into a contract for the purpose of trade in timber. The contract made provision for the sale of timber by one party to the other, as well as for the lease of a timber yard, with an option to buy that yard. During World War Two, however, the trade in timber of the type in question was prohibited by war time regulations. As a result of this prohibition the contract was held to be frustrated. The contract was held to be a single entity and both the provisions concerning sale and those dealing with lease and the option to purchase became invalid. This change in the law made continued performance under the contract illegal and hence the contract was frustrated by supervening illegality.

The case of *Fibrosa Spolka Akcyjna v Fairbairn, Lawson Combe Barbour Ltd*⁶⁹ concerned a contract for the sale of machinery from an English company to a Polish company. The goods were to be shipped to Gdynia, Poland. The contract was held to be frustrated when enemy forces occupied Poland in 1939 before delivery had occurred. Although performance remained possible, the change of circumstances

⁶⁸ *Denny, Mott & Dickson v James B Fraser & Co Ltd* supra note 21. See also *Baily v De Crespigny* (1869) LR 4 QB 180; *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221.

⁶⁹ *The Fibrosa* supra note 33. See also *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260.

regarding the port of destination made performance illegal due to the prohibition on trading with the enemy.⁷⁰

4.2.5 Allocation of risk: limitations on the application of frustration

Since frustration is caused by an unforeseen change of circumstances, the doctrine must seek to allocate the risk of such unforeseen eventualities between the contracting parties. The contract comes to an end and all obligations are discharged from the moment of the frustrating event. While this may bring relief to one of the parties under certain circumstances, it may also bring hardship and loss. The parties to a contract may thus well want to guard against the occurrence of a frustrating event by seeking to allocate the risk of this between them. They may do this expressly by use of a force majeure clause. In certain circumstances the risk of frustration may also have been consciously assumed by one party, such as where the frustration was foreseeable. It may then not be just for a Court to discharge his further obligations. Beyond this a party may actually be the cause of the resultant frustration of contract (whether by negligent act or not), which may again militate against discharge.

Thus it becomes clear that risk is a central issue in cases of frustration. The above scenarios may limit the application of the doctrine of frustration, arguably on policy grounds based on this allocation of risk. These limitations are important to an understanding of the application of frustration and will be discussed below.

4.2.5.1 The wording of the contract: force majeure clauses

“Force majeure” is a French term used to refer to events which are beyond the contracting parties’ control. The term has come to have a technical meaning in English law, however. Swadling attempts a definition of “force majeure” in English law as follows:

“[A]n event will be a force majeure event if it constitutes a legal or physical restraint on the performance of the contract (whether or not occurring through human intervention, although it

⁷⁰ In South Africa this would be referred to as a case of supervening legal impossibility. See RH Christie *The Law of Contract in South Africa* (2006) at 95.

must not be caused by the act, negligence or omission or default of the contracting party) which is both unforeseen and irresistible.”⁷¹

An English term with a similar meaning might be “act of God”, while in South Africa the conventional term would be “vis maior”.⁷² A force majeure clause seeks to make provision for the occurrence of unforeseen events and to allocate the risks between the contracting parties should a change of circumstances occur.⁷³ A second type of clause, which overlaps to a certain extent with a force majeure clause is a hardship clause. The operation of this type of clause is also triggered by a change of circumstances, but its effect is slightly different in that it is usually aimed at renegotiation of the contract.⁷⁴ Hardship clauses usually also require a sanction for non-performance. As Schmitthoff notes, a hardship clause without a sanction “is hardly worth the paper it is written on”.⁷⁵ Although the concept of force majeure is unknown to English law, this is nevertheless the name given to this type of clause within the English law jurisdiction.⁷⁶ An important question is as to the extent to

⁷¹ William Swadling “The judicial construction of force majeure clauses” in Ewan McKendrick (ed) *Force Majeure and Frustration of Contract* (1995) at 8.

⁷² In *Matsoukis v Priestman & Co* [1915] 1 KB 681 the court held that the terms “act of God” and “vis maior” were not the equivalents of “force majeure”, since they did not cover acts involving human intervention, such as strikes. The court in *Lebeaupin v Richard Crispin & Co* [1920] 2 KB 714 at 719 – 720 accepted this view. Force majeure is thus a broader category than the other two terms, but the idea of a force beyond the contracting parties’ control is essentially the same. In the US “act of God” refers also to events beyond a contracting party’s control which have been caused by human agency. See James P Nehf “Impossibility” in Joseph M Perillo (ed) *Corbin on Contracts* (2001) at Vol 14 at 26 – 27.

⁷³ See generally Ewan McKendrick “Force Majeure and Frustration – their relationship and a comparative assessment” in McKendrick op cit note 71 at 33.

⁷⁴ Michael Furmston “Drafting of force majeure clauses – some general guidelines” in McKendrick op cit note 71 at 59, 62. See also generally Clive M Schmitthoff “Hardship and intervener clauses” (1980) *Journal of Business Law* 82.

⁷⁵ Schmitthoff op cit note 74 at 88.

⁷⁶ McKendrick op cit note 71 at 33. A generic example of a force majeure clause might read as follows: “Neither party shall be responsible for any delay or failure to perform its obligations under this Agreement or for any loss or damage caused as a result of such delay or failure if such delay or failure is due to any act of God, war, riot, strike, lockout, trade dispute or labour disturbance, accident, breakdown of plant or machinery, failure or shortage of power supplies, fire, flood, drought, explosion, difficulty in obtaining workmen, materials or transport, refusal of any license or permit or any order, sanction or request of any Government or governmental authority or any other matters beyond the control of the party concerned. In the event of any such circumstances the affected party shall send notice of the same and the reason for it to the other party within 7 calendar days from the time the affected party knew or should have known of the force majeure in question. During the continuance of the force majeure the party subject to it shall use all reasonable endeavours to avoid or mitigate the effect of such force majeure on its obligations under this Agreement and on the other party. The performance of the affected party shall be deemed suspended so long as and to the extent that any such force majeure continues; provided however, that after 90 days of such suspension on the part of either party, the non-affected party may by notice in writing to the other party terminate this

which parties to a contract can make provision for a frustrating event and thus exclude or vary the doctrine of frustration by prior agreement. In *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA*⁷⁷ Mocatta J stated that there was “much to be said” for an argument that the doctrine of frustration was excluded by reason of elaborate provisions contained in a force majeure clause in a contract of sale.⁷⁸ This was not a conclusive finding in this regard, however, and there are several cases of long standing authority, which establish that a force majeure clause does not exclude the doctrine of frustration.⁷⁹ It is these factors which lead McKendrick to confidently assert that the existence of a force majeure clause does not exclude the operation of the doctrine of frustration.⁸⁰

What a force majeure clause does indicate, however, is that the frustrating event may have been foreseen by the contracting parties.⁸¹ In addition it is accepted in English law that a contract is not frustrated if it made express provision for a subsequent frustrating event.⁸² A reading of the cases indicates that English courts interpret force majeure clauses restrictively, however, so that a widely phrased clause may well not exclude the doctrine of frustration. In *Metropolitan Water Board v Dick Kerr and Co*,⁸³ for example, a firm of contractors contracted with the plaintiff Water Board to construct a reservoir. The project commenced in 1914 and was to be completed within six years. A widely worded clause in the contract provided for the granting of an extension of time for delays “whatsoever and howsoever occasioned”. The Government put a stop to the project in 1916, however, due to war time restrictions on civil building. The House of Lords held that the clause in question did not cover an interruption which “vitally and fundamentally changes the conditions of the contract”.⁸⁴ The basis of this finding was that the war time restrictions “could not possibly have been in the contemplation of the parties to the

agreement with immediate effect and the parties shall be relieved from any liability hereunder if and to the extent that the affected party's performance has been so prevented or delayed.”

⁷⁷ [1977] 1 Lloyd's Rep 133.

⁷⁸ Ibid at 163.

⁷⁹ Eg. *Metropolitan Water Board v Dick, Kerr and Co* [1918] AC 119; *The Fibrosa* supra note 33; *The Super Servant Two* supra note 2.

⁸⁰ McKendrick op cit note 71 at 34.

⁸¹ The proposition that foreseeability may limit the application of the doctrine of frustration is discussed below at § 2.5.3.

⁸² *Metropolitan Water Board v Dick, Kerr and Co* supra note 79.

⁸³ [1918] AC 119.

⁸⁴ Ibid at 126.

contract when it was made.”⁸⁵ The House of Lords unanimously held that the enforcement of the contract following the delay would have been to enforce a contract different from that which was entered into.⁸⁶ The contract was therefore discharged.

Unforeseen delays due to wartime conditions have been likewise held to frustrate contracts despite express provision for delay contained in clauses of those contracts.⁸⁷

It is thus clear that force majeure clauses per se cannot exclude the doctrine of frustration. Even where such a clause does make provision for a frustrating event, it is likely to be interpreted restrictively and discharge may still result. Nevertheless force majeure clauses do have a role to play in allocating risks between contracting parties, since the doctrine of frustration only applies within narrowly circumscribed parameters. Parties may wish to take account of factors relevant to their own particular transaction, such as currency exchange rates or the availability of a labour force, to regulate changes in circumstance which would not result in discharge by frustration.

4.2.5.2 Foreseeability

It is a general principle of the doctrine of frustration that the frustrating event should not have been foreseen or foreseeable by the parties. The justification for this is that the contracting parties base their contractual obligations (such as the contract price) on the risks which they foresee as likely to affect their contract. If a Court then rules that frustration has occurred when a risk which was actually foreseen materialises, this upsets the balance of risks which the parties have created by negotiation. Although Treitel states that no English case has been decided directly on this ground, there are many dicta which support the contention that foreseeability stands as a limit to the doctrine of frustration.⁸⁸ This view is echoed by McKendrick.⁸⁹ The

⁸⁵ Ibid.

⁸⁶ Ibid at 127, 130, 136, 141.

⁸⁷ Eg. *The Fibrosa* supra note 33; *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* supra note 21.

⁸⁸ Treitel op cit note 50 at 840. Supporting dicta in, for example, *Tamplin* supra note 18 at 424; *Davis Contractors* supra note 5 at 731; *The Hannah Blumenthal* supra note 25 at 909.

test for foreseeability is a higher one than is found in tort (delict), however.⁹⁰ Thus it is necessary that the parties actually foresaw the event which occurred, or the degree of foreseeability was a very high one.⁹¹

That this high degree of foreseeability is necessary appears from an examination of the relevant cases. In *WJ Tatem Ltd v Gamboa*⁹² a ship was hired during the Spanish civil war by the Republicans for the evacuation of their supporters from Spain. The ship was hired for a period of 30 days, beginning 1 July. The cost of hire was to be £250 per day “until her redelivery to the owners”, but the payment of this fee would cease if the ship went “missing”. On 14 July the ship was seized by the Spanish Nationalists and was not released until 7 September. The ship was only returned to its owners on 11 September. The costs of hire had been paid in advance up to 31 July, but the owners claimed for the outstanding days up to 11 September. The claim for outstanding hire fees was denied on the ground that the contract had been frustrated.⁹³

Treitel explains this finding with the argument that it was not foreseeable that the ship would be detained not only for the period of her charter but for longer thereafter.⁹⁴ He strengthens this argument by noting that possibility of the ship being captured and not returned was foreseen by the parties and hence the condition that payment of the hire fee should cease if the ship was lost.⁹⁵ The temporary detainment was not foreseen and hence the contract was able to be frustrated. The finding of Goddard J was based, however, on the proposition that should a “certain state of facts” which was the “foundation” of a contract come to an end, frustration would follow whether or not this was foreseen by the parties.⁹⁶ While it may logically be inferred that the parties in this case foresaw that the ship might be lost during the war and indeed made provision for this in their contract, the exact nature of the ship’s detention was not foreseen, nor the resultant circumstances of the subsequent

⁸⁹ McKendrick in Beale op cit note 25 at 1515 – 1516.

⁹⁰ Treitel op cit note 50 at 841.

⁹¹ *Ibid.* McKendrick in Beale op cit note 25 at 1516 concurs in the opinion of Treitel.

⁹² [1939] 1 KB 132.

⁹³ *Ibid* at 138.

⁹⁴ Treitel op cit note 50 at 841.

⁹⁵ *Ibid* at 842.

⁹⁶ *WJ Tatem Ltd v Gamboa* supra note 92 at 135.

contractual claim. This supports Treitel's view that while foreseeability may in theory be a defence to a claim for frustration, it will not lightly be invoked and the degree of foresight required is quite an accurate one.

In *Edwinton Commercial Corporation, Global Tradeways Limited v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The "Sea Angel")*⁹⁷ the Court of Appeal approved the discussions as to foreseeability by Treitel and by McKendrick writing in *Chitty on Contracts*.⁹⁸ The unanimous Court of Appeal went on to hold that most events are to a greater or lesser extent foreseeable, but that this does not mean that such an event cannot lead to frustration.⁹⁹ The court continued: "[t]he less that an event, in its type and its impact is foreseeable, the more likely it is to be a factor which ... may lead to frustration."¹⁰⁰ A further consideration discussed by the court was what the dictates of justice required.¹⁰¹ This was held to be a relevant factor which underlies the doctrine of frustration and which must be considered in its application.¹⁰²

In the further case of *CTI Group Inc v Transclear SA*¹⁰³ the Court of Appeal was faced with a situation where the defendants had failed to deliver a quantity of cement as contracted for. The defendants had attempted to obtain a supply of cement in Indonesia with the intention of selling it on to the buyers, who wanted to break the cement cartel in Mexico. When the Mexican company Cemex learnt of this, however, it used its influence to prevent the sale of cement to the defendants. The defendants then tried to obtain supplies in Taiwan with the same result. Unable to obtain cement, they were sued by the plaintiffs for breach of contract. The defendants' defence was that the contract had been frustrated.

The Court of Appeal held that most situations in which a supplier of goods failed to provide goods to an intermediate purchaser would not constitute frustration, since

⁹⁷ [2007] EWCA Civ 547.

⁹⁸ *Ibid* at [102] – [103].

⁹⁹ *Ibid* at [127].

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at [132].

¹⁰² *Ibid*.

¹⁰³ [2008] EWCA Civ 856.

delivery remains physically and legally possible.¹⁰⁴ In the context of the allocation of contractual risks, the court held that it was not concerned with whether the parties would have contracted differently had they foreseen the ultimate situation.¹⁰⁵ Although performance may have been “commercially impossible,” the contract was not frustrated.¹⁰⁶

Thus the importance of the foreseeability of an event as a tool for assessing whether frustration has occurred seems to be less important than the allocation of risks achieved by the actual contract between the parties. In the recent *Edwinton* case the importance of this foreseeability criterion was undermined and in the *CTI* case the fact that the frustrating event was unforeseen did not preclude the failure of a frustration argument. While the analysis of *Treitel and McKendrick* is thus important, the central test based on the construction of the contract as laid down in *Davis Contractors*¹⁰⁷ seems to be the overriding consideration in this type of case.

4.2.5.3 Self-induced frustration

A contract will not be held to have been frustrated where the frustrating event is the result of one of the parties' conduct. In *The Eugenia*¹⁰⁸ a ship was chartered in September 1956 to carry a cargo of iron and steel goods from certain Russian ports to India. A clause in the charterparty stated the vessel was not to be ordered into a war zone without first obtaining the consent of its owners. The ship was nevertheless ordered to proceed to India via the Suez Canal, despite the crisis in the Middle East. As she passed through the canal she was detained by the Egyptian authorities. Since the passage to the East via the Suez Canal was effectively blocked, the charterers claimed that the contract had been frustrated. Lord Denning, however, held that the contract was not frustrated. The charterer's own breach of contract in ordering the *Eugenia* into a war zone had brought about the delay in the charterparty.¹⁰⁹ The alleged frustration was self-induced. In any event the contract

¹⁰⁴ *Ibid* at [23].

¹⁰⁵ *Ibid* at [26].

¹⁰⁶ *Ibid* at [26] – [27].

¹⁰⁷ See the discussion above at section 4.2.3.

¹⁰⁸ *Ocean Tramp Tankers v V/O Sovfracht* [1964] 2 QB 226.

¹⁰⁹ *Ibid* at 237.

was held not to have been frustrated since passage to India was still available via the Cape of Good Hope.¹¹⁰

The Eugenia was a fairly clear cut case, where the alleged frustration was as a result of one party's own breach of contract. A slightly less obvious line of cases is those where a contracting party was faced with outstanding obligations under a number of contracts and due to a change in circumstances was unable to perform under all those contracts and was as a result forced to choose which of them he would breach. Two leading cases illustrate this problem. The first is *Maritime National Fish Ltd v Ocean Trawlers Ltd*.¹¹¹ This was a case arising in Canada, which came before the Privy Council on appeal. The defendants in that case intended to operate a fleet of five fishing ships, which would fish using an otter trawl. Three of the ships they owned directly or through subsidiaries, two they chartered. To fish with an otter trawl, however, a government licence was required and though the defendants applied for five licences, they received only three, which they allocated to their own ships. They then argued in response to a claim for breach of contract by the owners of the chartered ships that these contracts had been frustrated. The Privy Council disagreed: the reason for the lack of licences for the chartered ships was the defendants' own decision to allocate the licences they did have to the other ships. The frustration was thus self-induced and did not discharge their obligation.

The second case where the parties were faced with a choice between contracts was *The Super Servant Two*.¹¹² In that case the defendants owned two barges specially designed for towing oil rigs. These were known as Super Servant One and Super Servant Two respectively. The defendants contracted to transport the plaintiffs' oil rig on a fixed date and took an internal decision to allocate Super Servant Two to this task. Super Servant One was allocated to a different job. Before the time for performance, however, Super Servant Two sank whilst performing a different contract in the Zaire River and was thus unavailable for the contract to which she had been allocated. Super Servant One was also already otherwise detained as stated. Thus the defendants negotiated a more expensive means of transport for the

¹¹⁰ Ibid at 240.

¹¹¹ [1935] AC 524.

¹¹² *The Super Servant Two* supra note 2.

plaintiffs' oil rig, causing unforeseen expense for which the plaintiffs claimed. The defendants' case was based on two grounds: firstly that the contract had been frustrated by the sinking of Super Servant Two or secondly that this event resulted in discharge under the force majeure clause in the contract. Neither argument was successful. The plaintiffs relied on the *Maritime National Fish* case to demonstrate that the defendants' own election had led to their failure to perform and that the frustration was hence self-induced. The Court of Appeal agreed with this argument and the defendants were held not to be discharged by frustration.¹¹³ With regard to the force majeure clause, it was held that this would give the defendants the right to cancel the contract, but not if negligence was present in the sinking of the Super Servant Two.¹¹⁴ The way in which this appeal was framed assumed that negligence could be proven by the plaintiffs, without going into the matter.

4.2.5.4 Fault

A further question, which relates to the doctrine of self-induced frustration, is whether a contract can be discharged for frustration if the frustrating event occurs as a result of the defendant's own negligence. In other words, what if the frustrating event can be seen as having been caused not by the deliberate choice, but by the negligent act of one of the parties? In *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd*¹¹⁵ an explosion on board a ship while it was in the harbour prevented it from carrying a cargo for the plaintiffs as agreed in a charterparty. The cause of the explosion was not ascertained, but the plaintiffs argued that it had occurred due to the negligence of the defendant ship owners and as a result a finding that the contract had been frustrated was precluded. The House of Lords disagreed, however, and held that there was no onus on the defendants to prove that the explosion had not been due to their fault and hence that the contract was discharged.

Lord Simon distinguished those cases where there was deliberate choice on the part of the defendants which led to the frustrating event, so-called "self-induced" frustration, from the broader class of cases where the frustrating event was caused

¹¹³ Ibid at 10.

¹¹⁴ Ibid at 7 – 8.

¹¹⁵ [1942] AC 154.

by a “default” on the part of defendant, which he stated was often treated as the equivalent of negligence.¹¹⁶ Lord Simon stated that the ambit of “default” to disable a plea of frustration was not clear in English law:

“Some day it may have to be finally determined whether a prima donna is excused by complete loss of voice from an executory contract to sing if it is proved that her condition was caused by her carelessness in not changing her wet clothes after being out in the rain. The implied term in such a case may turn out to be that the fact of supervening physical incapacity dissolves the contract without inquiring further into its cause, provided, of course, that it has not been deliberately induced in order to get out of the engagement.”¹¹⁷

A more modern pronouncement on the issue of fault can be found in *The Super Servant Two*.¹¹⁸ In that case (discussed under § 2.5.4 above) the plaintiffs tried to argue that the sinking of Super Servant Two was caused as a result of the negligence of the defendants and hence that a plea of frustration was precluded. Bingham LJ stated that the “real question” is “whether the frustrating event relied upon is truly an outside event or extraneous change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about.”¹¹⁹ The Lord Justice did, however, go on to hold *obiter* that if negligence had been established on the part of the defendants, their plea of frustration would have been precluded.¹²⁰

McKendrick notes that the issue of whether a contract may be frustrated by an event caused by the defendant’s negligence has never been finally resolved.¹²¹ In a more recent contribution in *Chitty on Contracts*, McKendrick states that the “real question” is whether the party seeking to invoke the doctrine of frustration had the means and opportunity to prevent the frustrating event, but nevertheless caused or permitted it to come about.¹²² Treitel argues that negligence should exclude frustration.¹²³ This view is echoed by Beatson who argues that this conclusion “appears logical”.¹²⁴

¹¹⁶ Ibid at 166.

¹¹⁷ Ibid at 166 - 167.

¹¹⁸ *The Super Servant Two* supra note 2.

¹¹⁹ Ibid at 10.

¹²⁰ Ibid.

¹²¹ McKendrick op cit note 71 at 50.

¹²² McKendrick in Beale op cit note 25 at 1518. This “question” is taken from the *Super Servant Two* case supra note 2 at 10. Writing from an American perspective, Nehf notes that a supervening event caused intentionally or negligently by the defendant will generally not discharge performance. He

4.2.6 Effect on a contract

4.2.6.1 The general rule

The effect of frustration on a contract is to bring it to an end forthwith and automatically.¹²⁵ The contract thus terminates from the time of the frustrating event (*ex nunc*) and any future obligations are discharged.¹²⁶ The result for the parties to a contract is discharge of any obligations which their agreement had imposed upon them. A question left unanswered by discharge *ex nunc*, however, is what is to become of performance already tendered under a contract before the frustrating event? It is possible that a party may have paid money in advance under the contract, or that a party may have acted in reliance upon the contract in performing work or incurring expense. To allow the losses to lie where they fall could lead to injustice (and did do so in the earlier case law). Hence there needs to be a process of adjustment following a frustrating event. This was recognised first in the case law and was then incorporated in statute as the law developed.

4.2.6.2 Adjustment for payments made under the contract

The original position in the common law was that obligations accrued before the frustrating event occurred remained binding.¹²⁷ This was because frustration discharged *future* obligations under a contract only.¹²⁸ Hence in *Chandler v Webster* the plaintiff had already paid £100 to view the scheduled coronation procession of King Edward VII. The total contract price was £141. When the contract in this case (like the other Coronation cases) was frustrated by the illness of the King, not only was he not able to recover this amount upon cancellation of the procession, but he was held liable for the outstanding balance, since this obligation was held to have accrued before the frustrating event.¹²⁹ The argument that the consideration given

does, however, mention the case of *CNA International Reinsurance Co v Phoenix* 678 So 2d 378 (Florida Appeal Court 1996) where the death of an actor by a self-administered dose of drugs did not preclude his estate from asserting the impossibility defence. See Nehf in Perillo *op cit* note 72 at 98 – 99.

¹²³ Treitel *op cit* note 50 at 844.

¹²⁴ Beatson *op cit* note 25 at 553.

¹²⁵ *The Super Servant Two* *supra* note 2 at 8.

¹²⁶ *Appleby v Myers* (1867) LR 2 CP 651; *Chandler v Webster* *supra* note 37.

¹²⁷ *Chandler v Webster* *supra* note 37.

¹²⁸ McKendrick in Beale *op cit* note 25 at 1523.

¹²⁹ *Ibid* at 500 – 501.

for the rent had failed did not succeed.¹³⁰ Because the contract was not totally wiped out, the argument as to total failure of the consideration could not succeed.¹³¹ This case can be distinguished from *Krell v Henry* where the obligation to pay the rent had not matured prior to the cancellation of the coronation procession.

This decision was criticised as being one of considerable injustice and the House of Lords overruled it in 1943 in *The Fibrosa*.¹³² In that case (discussed above) an English Company had agreed to sell and deliver machinery to a Polish company situated in Poland. The contract was frustrated by the German occupation of Poland in 1939. In terms of the contract £1 000 had been paid in advance for the machinery and this sum was held to be recoverable. The rule in *Chandler v Webster* was held to be wrong since the consideration given for the money paid was not a promise, but the promised performance.¹³³ If the performance became impossible, then there had been a total failure of consideration resulting from the frustration of contract.¹³⁴

The problem was not entirely solved at common law, however, for the solution provided by *The Fibrosa* applied only where there had been a total failure of consideration. Situations where the failure of consideration was only partial were not covered. As a result the Legislature intervened with the passing of the Law Reform (Frustrated Contracts) Act 1943 to prevent the unjustified enrichment of parties following frustration of contract. Section 1(2) of this Act now deals with sums paid “in pursuance of the contract” before the time when the parties were discharged by frustration. According to this sub-section:

- (a) Sums already paid under a frustrated contract may be reclaimed.
- (b) Sums payable (but not yet paid) in terms of an obligation which accrued under the contract before the frustrating event need not be paid.
- (c) The reliance expenditure incurred before the frustrating event by a party to whom such sums were paid or payable, may be retained from amounts already received or recovered from the opposing party at the Court’s

¹³⁰ Ibid at 499.

¹³¹ Ibid.

¹³² *The Fibrosa* supra note 33 at 49.

¹³³ Ibid at 48.

¹³⁴ Ibid at 48 – 49.

discretion. The sum recovered may not exceed the reliance expenditure (or the sums paid or payable under the contract).

4.2.6.3 Adjustment for performance not sounding in money

The deficiency of the common law in dealing with performance made under a contract prior to a frustrating event did not extend solely to monetary performance, however. In *Appleby v Myers*¹³⁵ engineering contractors agreed to erect machinery in the defendant's factory and to maintain this machinery upon completion for a period of two years. While the machinery was only partially erected the factory burnt down and the contract was held to be discharged by frustration. The Court held that the contractors were entitled to nothing in respect of the work which they had already done. As with the rule in *Chandler v Webster*, this was seen as being unjust and hence the Law Reform (Frustrated Contracts) Act deals also with this type of situation.

Section 1(3) of the Act provides that:

- (a) Where one contracting party has received a valuable benefit due to the actions of the other in performance of a contract which has subsequently been frustrated; the party who has performed may recover from the party who has received the benefit an amount subject to the Court's discretion.
- (b) The amount recovered may not exceed the value of the benefit received by the other party.
- (c) The valuable benefit must not be a payment of money (since this is covered by s 1(2)).

4.2.7 The difference between frustration and common mistake

Both frustration and common mistake are grounds on which a contract may come to an end in English law. With common mistake, the parties contract on the basis of a false common assumption about a material fact relating to their contract. When the error is discovered the contract can be set aside, provided the mistake is material. With frustration there is a change of circumstances after the contract is concluded resulting in a radical change in the obligation.

¹³⁵ *Appleby v Myers* supra note 126.

McKendrick argues that there is a connection between these two concepts, citing the case of *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd*.¹³⁶ In this case a property was sold to the plaintiff, who wished to redevelop it. The contract price was £1,7m. In the negotiations the plaintiff asked the defendant whether the building had been proclaimed to be of special historic or architectural interest, since this would preclude redevelopment. Unknown to both parties the relevant government department had indeed decided to list this building as being of special historic or architectural interest. The agreement of sale was, however, signed on 25 September 1973 with both parties in ignorance of this fact. On 26 September, the Secretary of State wrote to the defendant informing it of the listing of the building, which occurred officially the next day. The effect of the listing was to reduce the value of the building by £1,5m.

The question which faced the Court was at what point the change in circumstance had occurred. If the building was deemed to have been listed before the contract was signed, the plaintiffs could argue that there had been a common mistake. If the listing had occurred only when officially recognised on the 27 September then the plaintiff could argue that the contract had been frustrated. The Court of Appeal held that the relevant date was 27 September 1973, precluding the argument of common mistake.¹³⁷ The listing of the building was held not to have been an unforeseen event, however, and was within the plaintiff's consciously assumed sphere of risk. Hence the argument for frustration failed as well.¹³⁸

Thus we see that common mistake and frustration have elements of similarity, but arise at different stages of the contracting process. A common mistake is present at the time the contract is concluded and is based on a mistaken assumption common

¹³⁶ *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* supra note 48. See: McKendrick *Contract Law* (2003) at 299 – 301. Nehf in Perillo op cit note 72 at 84 – 85 makes the important point that a contract will be discharged for common mistake, provided the mistake is material, but frustration requires a higher standard of onerosity with regard to the difference between the expected outcome and the actual one. This statement is made with reference to the US jurisdiction where discharge for impracticability is more readily permitted, but the point is an important one.

¹³⁷ *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* supra note 48 at 172.

¹³⁸ *Ibid* at 173 – 174.

to both parties. With frustration there is no common belief, but nevertheless the basis on which the contract rests falls away after the conclusion of the contract. The connection between these concepts, as illustrated by the *Amalgamated Investment & Property Co* case, is that the same set of facts could give rise to either a finding of common mistake or frustration, simply depending on the date on which an event occurs. If the contract is concluded after the date of the event the law of common mistake pertains, if the contract is concluded before the event, frustration is applicable.

An interesting question from a South African point of view would be as to the status of a common assumption relating to a future state of affairs in English law.¹³⁹ This would have to fall under the frustration banner rather than that of common mistake, since the assumption relates to a fact which may change after the conclusion of the contract. If the so-called “supposition *in futuro*” is to be a ground on which a contract is terminated, then a change in circumstance which results in the basis of the contract falling away would terminate the contract as well. This, as noted in chapter two, is to be classified as frustration of purpose.

4.2.8 Conclusion

After the brief description of the parameters of the doctrine of frustration outlined above, it is appropriate to reflect briefly on what has been said in sum. The doctrine does indeed offer a certain amount of justice in making discharge available to the parties to a contract where frustration is deemed to have occurred. Discharge is limited to cases where there has been a radical change in the obligation of an unforeseen nature, however. Despite the argument that discharge brings justice, the prevalence of force majeure clauses in contracts demonstrates that discharge is not always the preferred result for the parties in question. Parties to a contract undertake a particular allocation of risk and discharge can upset this balance. It is perhaps for this reason that Bingham LJ described the effects of frustration as drastic and stated that the doctrine should thus not be lightly invoked.¹⁴⁰ The truth remains, however, that the future will always be uncertain and to a large extent

¹³⁹ About the status of the supposition *in futuro* in South African law see chapter 2 section 2.3.2.

¹⁴⁰ *The Super Servant Two* supra note 2 at 8. This passage is reproduced in section 4.2.1.

unforeseeable, which necessitates some sort of doctrine to deal with changed circumstances.

A study of the English doctrine of frustration reflects the fact that after an initial period of growth, the courts became reluctant to invoke the doctrine outside of clear cases where the stringent test of a radical change in the obligation was met. The doctrine may at first glance seem permissive to a South African audience, the reason for this being that South African contract law recognises only true impossibility as terminating a contract, and not a mere change in circumstances, no matter how radical. The differences between English law and South African law in this regard are less drastic than they seem, however. As has been set out in chapter two, apart from the doctrine of frustration of purpose, which is not recognised in South African law, the categories of physical and legal impossibility, central to English law frustration, are known to South African law.

4.3 US Law

4.3.1 Introduction

Since the US is a federal country, there is not one unified body of contract law, but rather a separate body of law for each state.¹⁴¹ Although American contract law is largely uncodified,¹⁴² there is the Uniform Commercial Code (1979) (the “UCC”), which has been enacted by all the US states except for Louisiana.¹⁴³ Most of the provisions contained in this code are not relevant to basic contract law – Article 2, however, which deals with the sale of goods, is relevant.¹⁴⁴ In addition, there is the Second Restatement of Contracts published by the American Law Institute in 1981 (“Restatement 2d”). While the Restatement does not form binding legislation, it provides a model or ideal law for all states to follow and is of highly persuasive

¹⁴¹ Robert S Summers “The conceptualisation of good faith in American contract law: a general account” in Reinhard Zimmermann and Simon Whittaker (eds) *Good Faith in European Contract Law* (2000) at 118.

¹⁴² Joseph M Perillo *Calamari and Perillo on Contracts* (2009) at 14.

¹⁴³ *Ibid* at 15.

¹⁴⁴ *Ibid* at 16.

authority.¹⁴⁵ An examination of US contract law should thus begin with the applicable codified rules.

The impracticability defence is dealt with in the UCC at § 2 – 615. This provision reads in part:

“Except to the extent that a seller may have assumed a greater obligation...

- (a) Delay in performance or non-performance in whole or in part by a seller that complies with paragraphs (b) and (c) is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made...”

Perillo identifies two “hurdles” in this section which must be overcome before the defence it contains may be invoked.¹⁴⁶ The first is that impracticability must be proved, the second is that the risk of that impracticability must not have been assumed by the contracting party. “Impracticability” is a word used largely in the US jurisdiction and refers to extreme and unreasonable difficulty or expense in performing, rather than actual impossibility,¹⁴⁷ although true impossibility would be captured under the impracticability requirement. As far as the assumption of risk goes, it must not have been made in terms of the contract (“except to the extent that the seller may have assumed a greater obligation”) or be allocated to a party by operation of law (“the non-occurrence of which was a basic assumption on which the contract was made”).¹⁴⁸

The Second Restatement deals with the issue of frustration at Chapter 11: “Impracticability of performance and frustration of purpose”. Of the provisions which appear in this chapter, the most relevant are § 261 (“Discharge by supervening impracticability”) and § 265 (“Discharge by supervening frustration”). § 261 reads as follows:

“Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”

¹⁴⁵ Ibid at 14.

¹⁴⁶ Ibid at 447.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

This provision largely repeats the UCC text, except that it makes explicit the requirement that there must be no fault on the part of the disadvantaged party with regard to the occurrence of the supervening event. The text of § 265 states the following:

“Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

This provision deals with the defence of frustration of purpose. This is essentially the converse of impracticability and occurs when the value of performance to the buyer has dramatically diminished.¹⁴⁹ Apart from this major difference, however, the wording of § 265 is largely identical to § 261. The differences between the two defences they create will be dealt with below.

4.3.2 Impracticability

As noted above, the term “impracticability” implies a lower standard than the term “impossibility” would. Cases of impossibility would also fall under the rules on impracticability, however, in terms of the definition of the latter. The UCC and the Second Restatement thus use the term “impracticability” inclusively to refer also to cases of impossibility.¹⁵⁰ Thus the death or disability of the debtor under a contract requiring personal performance; destruction of the subject matter of the contract or supervening legal impossibility would all generally be examples of events leading to discharge of an obligation under dispute. These grounds for discharge are the specific listed instances of impracticability at §§ 262 – 264 of the Second Restatement. § 261 and the equivalent § 2 – 615 of the UCC are broader provisions, however, intended to capture any instance of impracticability.

The doctrine of impracticability is usually traced back to the decision in *Mineral Park Land Co v Howard*.¹⁵¹ In this case the defendants agreed to take all the gravel

¹⁴⁹ Treitel op cit note 1 at 309.

¹⁵⁰ Perillo op cit note 142 at 458.

¹⁵¹ 156 P 458 (1916). Cf Treitel op cit note 1 at 263.

needed for a particular construction project from the plaintiff's land, against payment of five cents per cubic yard. After only half the required amount of gravel had been removed from the land, however, the water table was reached, so that removing the rest of the gravel would have cost 10 to 12 times more. In addition the gravel would have to be dried before use, which increased the time required for performance. The defendant refused to perform further under the contract, arguing that this had become prohibitively expensive. The court held that "a thing is impossible in legal contemplation when it is not practicable" and discharged the defendant.¹⁵²

A later example is the case of *Northern Corporation v Chugach Electric Association*.¹⁵³ In this case a contractor undertook to perform work on a dam in Alaska. The rock necessary for this project was to be hauled across a frozen lake by truck. This method proved more difficult than expected, however, since the ice kept breaking and two of the contractor's employees were killed. The contractor was discharged from its obligation on the ground that performance was "impossible". The court held, however, that "legal impossibility does not demand a showing of actual or literal impossibility".¹⁵⁴ "Commercial impracticability" would suffice and this standard was met due to the difficulty in performance resultant from the thinness of the ice.¹⁵⁵

Today the Second Restatement defines "impracticability" as existing where "extreme and unreasonable difficulty, expense, injury or loss to one of the parties will be involved."¹⁵⁶ The Second Restatement gives the following examples of impracticability: "A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like..."¹⁵⁷ Furthermore impracticability will be present where there is a "risk of injury

¹⁵² *Mineral Park* supra note 52 at 459.

¹⁵³ 518 P 2d 76 (1974). See also *Red River Commodities, Inc v Eidsness* 459 NW 2d 805 (ND 1990). Discharge was refused in *Missouri Public Service Co v Peabody Coal Co* 583 SW 2d 721 (Mo App 1979); *R & R Construction v Junior College District No 529* 55 Ill App 3d 115, 370 NE 2d 599 (1977) & *Bumby & Stimpson Inc v Peninsula Utilities Corp* 169 So 2d 499, 501 (Fla App 1964).

¹⁵⁴ *Ibid* at 81.

¹⁵⁵ *Ibid*.

¹⁵⁶ Official comment (d) to § 261.

¹⁵⁷ *Ibid*.

to person or to property ... that is disproportionate to the ends to be attained by performance.”¹⁵⁸

While increased expense is in theory a ground for discharge, Treitel notes that such an argument rarely succeeds where the increase in expense is due to market fluctuations.¹⁵⁹ Nehf, writing in *Corbin on Contracts*, notes that the degree of cost increase necessary to invite discharge is uncertain and that increases of up to 300 per cent have proved insufficient in the past.¹⁶⁰ He also notes that an Official Comment to UCC § 2 – 615 states that increased cost alone will not discharge performance, but that an increase must “alter the essential nature of the performance”.¹⁶¹ The suggested rationale for this state of affairs is that market-related increases or decreases in price are foreseeable.¹⁶² Thus in *Eastern Airlines Inc v Gulf Oil Corp*, an agreement by Gulf Oil to supply Eastern Airlines with aviation fuel for four and a half years from 1972, was not discharged by impracticability when the fuel price rose drastically due to the Middle East “energy crisis” of 1973.¹⁶³ In its judgment the court pointed out that the events which led to the rise in prices were reasonably foreseeable at the time of conclusion of the contract.¹⁶⁴

Further evidence of the restrictive approach of the American courts to the doctrine of impracticability is to be found in the decisions relating to the closure of the Suez Canal in the mid 1960s. The closure of the Suez Canal meant that shipping contracts requiring the delivery of goods to the East could only be performed by taking the longer route around the Cape of Good Hope. In *Transatlantic Financing Corp v United States*¹⁶⁵ the resultant increase in price was \$44 000 (against a total contract price of \$306 000) and in *American Trading & Production Corp v Shell International Marine*¹⁶⁶ the increase was \$132 000 against a total of \$417 000. Neither increase was too drastic in comparison to the overall contract price and in

¹⁵⁸ Ibid.

¹⁵⁹ Treitel op cit note 1 at 279.

¹⁶⁰ Nehf in Perillo op cit note 72 at 48 – 49.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ 415 F Supp 429 (1975).

¹⁶⁴ Ibid at 441.

¹⁶⁵ 363 F 2d 312 (1966).

¹⁶⁶ 453 F 2d 939 (1972).

neither case was discharge permitted. It would thus seem that increase in cost alone is not a common ground for discharge due to impracticability in American law.¹⁶⁷ In the seminal *Mineral Park* case, the increase in cost was tenfold and hence far exceeded the increases in the subsequent cases listed above. Perillo suggests that the increase in cost should result from the necessity of performing in a manner radically different from what was originally contemplated in order to invoke discharge.¹⁶⁸

4.3.3 Frustration of purpose

Frustration of purpose is not covered by the UCC. Perillo, however, contends that this is because the common law is intended to apply.¹⁶⁹ The doctrine is expressly included in the Second Restatement, however – the relevant provision has been set out above. The comment to § 265 makes clear what is already stated in the text: it must be the *principal* purpose of a party which is frustrated.¹⁷⁰ It is not sufficient that there was a private motivating factor which was not disclosed to the other party, the object must have been so completely the basis of the contract for both parties, that without it the agreement will make little sense.¹⁷¹ The first illustration given in the Second Restatement is the English case of *Krell v Henry*: although this was not decided within the American jurisdiction, it appears to be regarded as the locus classicus on frustration of purpose in this country as well.¹⁷²

There are also indigenous examples of frustration of purpose in the US, although Nehf notes that these cases are “not wholly consistent in reasoning or outcome” and that the defence fails more often than it succeeds.¹⁷³ For instance the passing of the prohibition laws in 1920 made the sale of intoxicating liquor illegal. There were

¹⁶⁷ See also *Missouri Public Service Co v Peabody Coal Co* supra note 153; *Iowa Electric Light & Power Co v Atlas Corp* 467 F Supp 129 (ND Iowa 1978) where discharge for impracticability caused by market related cost increases was denied. For a different outcome see *Aluminum Co of America v Essex Group, Inc* 499 F Supp 53 (1980).

¹⁶⁸ Perillo op cit note 142 at 459 - 460.

¹⁶⁹ Ibid at 467.

¹⁷⁰ Comment (a) to § 265.

¹⁷¹ Ibid.

¹⁷² Illustration 1 to § 265.

¹⁷³ Nehf in Perillo op cit note 72 at 250 & 257. Examples of cases where the defence failed are *Shanghai Power Co v Delaware Trust Co* 316 A 2d 589 (Del Ch 1974); *Gold v Salem Lutheran Home Association* 53 Cal 2d 289 (1959) & *Ingram-Day Lumber Co v McLouth* 275 US 71 (1928).

several cases where premises had been leased for the sole purpose of running a saloon and the beginning of the prohibition frustrated such leases. In *Doherty v Monroe Eckstein Brewing Co*¹⁷⁴ the lease actually stipulated that “the only business to be carried on in the said premises is the saloon business”. This lease was held to have been discharged when it became illegal to sell liquor. The court rejected an argument that it was still possible to sell soft drinks and items such as tobacco.¹⁷⁵ A similar result was reached in *Industrial Development and Land Co v Goldschmidt*¹⁷⁶ where the lease was to operate a “general winery and/or wholesale and/or retail liquor business” and the lessee had agreed not to “permit the said premises to be used for any other purposes.”

Another example is the “blackout” legislation passed during the Second World War due to the threat of bombing by Japan. As in the UK and Australia there were contracts for illumination which were frustrated when legislation regulated that lights were to be extinguished at night. In *20th Century Lites v Goodman* a contract for the lease of an “electrical advertising display” for a drive-in restaurant in Los Angeles was entered into in September 1941.¹⁷⁷ The lease agreement was to run for three years. When the US declared war on Japan in December 1941, black out legislation was imposed on the West Coast. The contract was held to have been discharged by “commercial frustration”.¹⁷⁸

What is clear from a comparison between the English and the US case law on frustration of purpose, is that while the doctrine takes its origin from the English case of *Krell v Henry*, this ground of discharge is not favoured in English law. US law is far more permissive and there are several instances of discharge for frustration of purpose, as evidenced by the examples set out above. Treitel notes that the same is true of the courts’ approach to impracticability in these two countries.¹⁷⁹ Clearly change of circumstances is a stronger ground for discharge in the US jurisdiction than within the English.

¹⁷⁴ 191 NYS 59 (1921).

¹⁷⁵ Ibid at 61.

¹⁷⁶ 206 P 134 (1922).

¹⁷⁷ 149 P 2d 88 (1944).

¹⁷⁸ Ibid at 93.

¹⁷⁹ Treitel op cit note 1 at 348.

4.3.4 The allocation of risk

The issue of the prior allocation of risk is central to any question of impracticability or frustration. This is made clear by the proviso in the Second Restatement that there should not be a “contrary indication” that the non-occurrence of the event was a basic assumption on which the contract was made. Comment (c) to § 261 spells out that in order to invoke the doctrine of impracticability the defendant must not expressly or impliedly have assumed a greater risk in terms of the contract to which it was party. Factors relevant in this regard will be the extent to which the contract was standardised and the degree to which the other party supplied the terms.¹⁸⁰ In addition if the disadvantaged party was a middleman, then he may have had more opportunity to diversify his supply bases than where he is a producer with a limited source of supply.¹⁸¹ Furthermore if the supplier could reasonably have been expected to insure against its loss, this will be a factor to be considered in the allocation of risk.¹⁸² It will be noted that the last two considerations mentioned are largely economic in nature and there is a significant body of writing in the specialised field of law and economics dealing with the allocation of risks following discharge for impracticability or frustration. This will be dealt with in the following section.

The illustration given in comment (c) is of an experienced salvage company which undertakes to raise the plaintiff’s boat which has run aground on some rocks.¹⁸³ The salvage company signs a contract which makes no provision for unfavourable weather or unforeseen circumstances. During the operation the boat slips off the rocks, sinks in deep water and then fills up with mud. Salvage at this point becomes impossible. The illustration suggests that the obligation to raise the boat is not discharged by impracticability, since the salvage company assumed the risk of this event by the omission of any qualifying risks from its contract. This illustration is based on the actual case of *Wills v Shockley*.¹⁸⁴ In that case the defendant was held liable to the plaintiff for damages arising out of an absolute commitment to raise a boat under the same circumstances as set out in the illustration.¹⁸⁵

¹⁸⁰ Comment (c) to § 261.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Illustration 5 to § 261.

¹⁸⁴ 157 A 2d 252 (1960).

¹⁸⁵ *Ibid.* at 254.

An example of a case where a court refused to discharge a middleman who failed to supply goods under a contract was *Canadian Industrial Alcohol Co v Dunbar Molasses Co*.¹⁸⁶ There, the defendant had contracted to supply 1,5 million gallons of molasses to the plaintiff company. The molasses factory which was the intended source of the molasses produced less output than expected that year, however, and the defendant was only allocated 344 000 gallons, which he supplied to the plaintiff buyer. The plaintiff bought the shortfall on the open market and charged the defendant for the difference. The Court of Appeals of New York refused to discharge the defendant: the impossibility of performance was subjective and he had failed to make adequate provision for risk of the failure of his source of supply.¹⁸⁷

4.3.5 Law and economics

In a seminal article in 1977, Posner and Rosenfield claimed that the proper criterion for evaluating the rules of contract law is economic efficiency.¹⁸⁸ The ideal set of rules would maximise the value created by the transaction and the more efficiently the exchange is structured, the greater the potential profit for the parties.¹⁸⁹ The authors noted the inconsistency in the court decisions regarding what they broadly termed “the impossibility defence”.¹⁹⁰ This they argued was due to a lack of concrete criteria assigning the risk of impossibility to a particular party.¹⁹¹ The authors proposed to find such criteria by means of an economic analysis of law.¹⁹² The solution which Posner and Rosenfield proposed was based on a consideration of who was the superior risk bearer.¹⁹³ This was determined by means of asking first, who is better able to prevent the risk from materialising and second, who is better able to manage that risk by means of insurance?¹⁹⁴ Where these factors suggested

¹⁸⁶ 258 NY 194 (1932).

¹⁸⁷ *Ibid* at 201. See also Illustration 13 to § 261 of Restatement 2d.

¹⁸⁸ Richard A Posner & Andrew M Rosenfield “Impossibility and related doctrines in contract law: an economic analysis” (1977) 6 *Journal of Legal Studies* 83 at 89. This was not an entirely original claim, however, the economic analysis of law dates back to at least 1960. See Richard A Posner *Economic Analysis of Law* (1998) at 25 – 26 for a brief history.

¹⁸⁹ Posner & Rosenfield op cit note 188 at 89.

¹⁹⁰ *Ibid* at 87.

¹⁹¹ *Ibid* at 88.

¹⁹² *Ibid*. Their hypothesis is described as an “empirical hunch” at 118.

¹⁹³ *Ibid* at 90. Compare the more recent (but less detailed) description of this approach in Posner op cit note 188 (1998) at 115 – 121.

¹⁹⁴ *Ibid*.

the promisor was the better risk bearer, the contract should be upheld. Where the promisee was the better risk bearer the contract should be discharged.¹⁹⁵

The article goes on to apply this analysis to several leading cases of impracticability in an attempt to prove the author's hypothesis. One of the cases analysed was *Transatlantic Financing Corp v United States*,¹⁹⁶ which was dealt with above and which concerned a claim for impracticability by a shipping company arising out of the closure of the Suez Canal. It will be recalled that discharge was refused in this case.¹⁹⁷ Posner and Rosenfield quote from the judgment of Judge Wright in this case where he ruled that it was more reasonable to expect a shipping company to insure against the hazard of war than to expect this of the government charterer.¹⁹⁸ The authors commend this approach and underline its rationale: the shipowner is the superior risk bearer since it is better able to estimate the magnitude of potential loss and the probability of the unexpected event.¹⁹⁹ Furthermore the shipowner owns several ships, which operate along several routes and hence it can insure against the risk of delay without purchasing market insurance.²⁰⁰ If it were to purchase market insurance, however, then it could purchase insurance in a single transaction for multiple contracts.²⁰¹

Posner and Rosenfield do admit, however, that their "empirical hunch" is proved using methods which are casual and crude.²⁰² Another important limitation to their hypothesis is that it should only be used to allocate risk where the contract does not expressly do so.²⁰³ It should be noted that there has been significant criticism of the approach of these authors. Trimarchi criticised their analysis on the basis that it fails to take account of the nature of the typical event giving rise to hardship, namely that it was general and extraordinary, as well as unforeseeable.²⁰⁴ This author's

¹⁹⁵ Ibid.

¹⁹⁶ Supra note 165.

¹⁹⁷ See the discussion of this case above at section 4.3.2.

¹⁹⁸ Posner & Rosenfield op cit note 188 at 104. The quoted passage appears at 319 in the judgment.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid at 117.

²⁰³ Ibid.

²⁰⁴ Pietro Trimarchi "Commercial Impracticability in contract law: an economic analysis" (1991) *International Review of Law and Economics* 63 at 65.

argument is that insurers base their claim on the statistical probability of a particular event.²⁰⁵ Events such as wars, international crises and national political crises were too “spasmodic” to be readily calculable risks and insurers will hence not be able to readily fix a premium on providing cover.²⁰⁶ In addition if an insurer were to underwrite such a risk in multiple contracts, the losses would be likely to be correlated and heavy were the event to occur.²⁰⁷ Hence it was not reasonable to expect parties to a transaction to insure against hardship ex ante. The argument of Posner and Rosenfield with regard to insurance has also been doubted by Wagner, since it does not take account of further factors such as whether the parties to a contract are risk preferring or risk averse, or whether they have equal access to market insurance.²⁰⁸

Both Trimarchi and Wagner argue in favour of determining the availability of the impossibility defence ex post. Trimarchi argues that to require performance in a case of impracticability where a market shift has increased expense of performance could provide a windfall gain to the promisee, which is not in the interests of economic efficiency.²⁰⁹ In this type of case discharge would be better.²¹⁰ Wagner reaches a similar conclusion, but by means of a different argument. He argues that the possibility of discharge for impracticability forces promisees to make socially efficient reliance decisions.²¹¹ The essence of this argument is that a promisee should not spend too heavily in reliance on an uncertain outcome, but should rather take into account the probability of default by the promisor. Over-investing in reliance is a waste of resources, since it could place unnecessary costs on the promisor should he default.²¹²

²⁰⁵ Ibid at 66.

²⁰⁶ Ibid at 67.

²⁰⁷ Ibid.

²⁰⁸ Gerhard Wagner “In defense of the impossibility defense” (1995 – 1996) 27 *Loyola University of Chicago Law Journal* 55 at 88. See also: Mark P Gergen “A defense of judicial reconstruction of contracts” (1995 – 1996) 71 *Indiana Law Journal* 45 at 54, who argues that discharge for impracticability is too unpredictable to positively influence the parties’ behaviour in taking risks.

²⁰⁹ Trimarchi op cit note 204 at 82.

²¹⁰ Ibid.

²¹¹ Wagner op cit note 208 at 63.

²¹² Ibid at 68 – 69.

The economic analysis of law provides a fascinating approach to normative questions such as the apportionment of risk. It is also essentially an American invention, which is why it is dealt with in the present chapter. The principles enunciated above with regard to determining whether discharge should be awarded in cases of impracticability and frustration are universal, however, and can be applied to the analysis of this issue in any legal system. A further normative question could be asked in the context of allocation of risk in frustration cases, however, and that is what does good faith require?²¹³ This question will be addressed in chapter seven.

4.3.6 Effect of a finding of impracticability or frustration

In the US the effect of a finding that total impracticability or frustration has struck a contract will be discharge of the obligation.²¹⁴ American courts then generally hold that the parties must make restitution for the benefits which have been conferred on them under the contract.²¹⁵ It may however be that redress of profits and losses beyond mere unjustified enrichment is required, in which case § 272(2) of the Second Restatement can be applied, which provides that a court may grant relief “as justice requires including protection of the parties reliance interests.”²¹⁶ Thus it is possible for a court to adapt obligations under a frustrated contract. Generally this power is exercised within carefully prescribed limits, but there is one case example where a US trial court attempted to reformulate the contract under dispute.²¹⁷ In *Aluminum Co of America v Essex Group, Inc*²¹⁸ a contract required Alcoa to deliver aluminium to Essex in specified quantities for a period of 16 years. The contract price was tied to various indices. There was a profit over the first seven years, but a rise in production costs caused a significant loss thereafter, which was set to be

²¹³ Compare the discussion in LF van Huyssteen and Schalk van der Merwe “Good faith in contract: proper behaviour amidst changing circumstances” (1990) *Stellenbosch Law Review* 244. These authors juxtapose the normative considerations of economic efficiency and good faith, see especially at 247 – 248.

²¹⁴ Restatement 2d §§ 261 & 265. See also Perillo op cit note 142 at 480.

²¹⁵ Perillo op cit note 142 at 481.

²¹⁶ Ibid at 557.

²¹⁷ Cf John P Dawson “Judicial revision of frustrated contracts: the United States” (1984) 64 *Boston University Law Review* 1. In this article Prof Dawson describes the circumstances under which judicial revision may occur following a finding of impracticability or frustration and contrasts this with the position in Germany where revision of contracts is the usual remedy. See also: Dawson “Judicial revision of frustrated contracts: Germany” (1983) 63 *Boston University Law Review* 1039.

²¹⁸ Supra note 167.

magnified by the passage of time. The court rejected the argument that it should not make a new contract for the parties and replaced their complex pricing mechanism with one of its own.²¹⁹ This decision was taken on appeal, but before the appeal court could rule, the parties settled.²²⁰ Dawson describes the trial court's finding in this case as "grotesque"²²¹ and notes that while this is the only US instance of an attempt to revise a contract by a direct order, it should not pave the way for the American courts to follow the German approach to adaptation of contracts.²²²

Thus while some measure of redress of profits and losses may be ordered by a US court in terms of the Second Restatement, it does not appear that the US has gone as far down the path of adaptation of contracts as Germany has. The fact that the *Alcoa v Essex* decision is the only reported instance of undisguised revision of a contract seems to indicate that greater value is attached to the principle of *pacta sunt servanda* in the US jurisdiction.

4.4 Conclusion

A juxtaposition of the English and American doctrines of discharge for supervening events shows that while one is the parent legal system of the other, developments in these two countries have moved in different directions. In English law strong weight is given to the concept of the sanctity of contracts. Hence while the test for discharge remains as to whether there has been a "radical change in the obligation" – focussing on change of circumstances – there are very few actual instances where a change in circumstances short of impossibility has led to discharge. Indeed the true elements of hardship – impracticability and frustration of purpose – are largely absent from English law. *Krell v Henry* is an isolated judgment where discharge was permitted. For the far larger part obligations have been enforced. Normative questions as to the allocation of risks are thus either dealt by agreement, such as in

²¹⁹ Ibid at 80.

²²⁰ Dawson op cit note 217 at 28.

²²¹ Ibid at 26.

²²² Ibid at 28 – 29. Nehf in Perillo op cit note 72 at 67 states that US courts have generally rejected the approach in the *Alcoa* case on the basis that fixed-price contracts contain an inherent risk allocation.

a force majeure clause, or are decided by the courts with a strong policy orientation toward the value of *pacta sunt servanda*.

In the US by contrast, although it is also a common law country, the introduction of the Restatements of Contract have led to a system of law which is reminiscent of a codified civil law system. It is noteworthy too that the international model rules on contract, such as the Unidroit Principles of International Commercial Contracts are arguably based (at least in terms of structure) on the Restatements.²²³ This implies a certain amount of progress in the US, away from the strict English doctrine of frustration and in the direction of an indigenous doctrine of discharge for change of circumstances. It is noteworthy in this regard that the US doctrine is not an all-or-nothing doctrine of discharge, but that (minor) adjustments are permitted under the Second Restatement. There is even evidence of a flirtation with a civil law type of contract revision by the courts.²²⁴

As far as adjudicating the allocation of risks goes in American contracts, the analysis provided by the law and economics school of thought provides an insightful explanation of the normative factors at play. While there is not unanimity among the writers, their analysis provides a useful tool when considering whether judicial policy should favour discharge for changed circumstances and when.

From a South African point of view, common law case studies provide an interesting standard of comparison. While our own law of discharge for supervening impossibility is firmly based in the Roman-Dutch civil law, the South African emphasis is on *pacta sunt servanda*, not unlike the English approach. Indeed as noted in chapter two, the English and South African systems are not that different. At least in theory, however, discharge for changed circumstances is permitted in certain (albeit limited) instances in English law and thus the doctrine proceeds from a fundamentally different basis. The Second Restatement as well as the common law of the USA make their law on discharge for supervening events vastly different from our own, as the reader will establish from a comparison with the South African law

²²³ See below: chapter 6.

²²⁴ *Alcoa v Essex* supra note 167. As noted above, however, this appears to be an isolated incident of full court-ordered revision.

set out in chapter two. The US is of interest as a more progressive common law system. Ultimately, whether lessons can be learned from either of these jurisdictions is a question which will be dealt with in chapter eight.

Since South Africa is a mixed legal system, however, the position in civil law jurisdictions remains of interest to our courts. In order to get the fuller picture this thesis now turns to the position in certain leading civil law countries.

Chapter 5: The position in civil law jurisdictions

5.1 Introduction

A full, detailed survey of all – or even most – of the civil law countries in Europe is beyond the scope of this work.¹ In chapter three the historic sources of the *ius commune* were considered with reference to the *clausula rebus sic stantibus*. French law was also briefly canvassed in that chapter. Here the major focus will be on Germany, with a brief look also at Dutch law. These two countries have been selected, both because secondary sources are available in English from which to access their rules on changed circumstances, and also because they are leaders in this field. Both Germany and the Netherlands have recently codified their existing rules on changed circumstances in contract law, the former in 2002 and the latter in 1992. This means that the codifications of both countries now reflect the latest developments in hardship jurisprudence.

The history of recognition of the hardship problem predates the relatively recent inclusion of provisions on hardship in both countries, however. Adopting the stance that good faith could not countenance the injustice which resulted from a change in circumstances, both had adopted judge-made law in advance of the ultimate legislative enactments to address this problem. Historic factors are thus also relevant to the study of law in this area, since they explain the need for the developments which took place. The twentieth century history of Germany in particular will be examined here.

What follows is thus not only an account of the gradual development of doctrines to deal with changed circumstances in two countries, but also an attempt to show the ways in which such a doctrine can be indigenously created by use of the good faith concept.

¹ For a very brief comparative survey see: Ole Lando & Hugh Beale *Principles of European Contract Law – Parts I & II* (2000) at 327 – 328.

5.2 German Law

German contract law provides an essential case study for an examination of change of circumstances doctrine. The German doctrine of Wegfall der Geschäftsgrundlage (collapse of the underlying basis of the transaction) has been developed by academics and applied by the courts to address a gap in the law with regard to the regulation of contracts affected by a change of circumstances. Since the promulgation of the Bürgerliches Gesetzbuch (“BGB”) in 1900, Germany has lost two World Wars, which has had wide-ranging consequences, both economically and socially, for its nation. Thus while the BGB initially did not recognise change of circumstances doctrine, the drastic upheavals which Germany has faced since it came into being have necessitated the development of such a doctrine.

5.2.1 The present position under § 313 BGB

Today the law developed under the banner of Wegfall der Geschäftsgrundlage has finally been incorporated into the BGB as § 313 Störung der Geschäftsgrundlage (interference with the basis of the transaction²). This change, effected in 2002 during a major reform of the German civil code, aims to capture the uncodified law of Wegfall der Geschäftsgrundlage applied in practice in a statutory provision.³

The heading of the new § 313 has been broadened to “Störung der Geschäftsgrundlage”, no doubt to more accurately reflect the wide variety of cases to which this provision may be applied. The section reads as follows:

“§ 313 Interference with the basis of the transaction

- (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the

² This translation is taken from the Bundesministerium der Justiz website available at http://www.gesetze-im-internet.de/englisch_bgb (last accessed 5 February 2010).

³ Basil S Markesinis, Hannes Unberath & Angus Johnston *The German Law of Contract* (2006) at 324. For a general discussion of the impact of the 2002 revision of the BGB on the German law of contract, see Peter Schlechtriem “The German Act to modernize the law of obligations in the context of common principles and structures of the law of obligations in Europe” (2002) *Oxford U Comparative L Forum* 2 at www.ouclf.iuscomp.org

specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

- (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.
- (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may withdraw from the contract. In the case of continuing obligations, the right to terminate takes the place of the right to withdraw.”⁴

A distinction is thus drawn between objective and subjective foundations of contracts.⁵ § 313(1) refers to an objective foundation of a contract (“circumstances upon which a contract was based”). Should there be a change in this objective foundation, the contract must be adjusted. The wording of the subsection, which indicates that a change of circumstances will be sufficiently fundamental to invoke adjustment if the parties would not have promised had they foreseen the change, harks back directly to the formula used by many authors who dealt with the *clausula rebus sic stantibus*.⁶ The fact that actual judicial adjustment of the contract itself is permitted is a defining characteristic of German law in this regard. The international recognition of the value of this power is reflected in the incorporation of a similar power into the Principles of European Contract Law (PECL) and the Unidroit Principles of International Commercial Contracts (PICC).⁷ In both these sets of principles adjustment is similarly allowed of a contract struck by an unforeseen change of circumstances which was not within the sphere of risk adopted by either party.

§ 313(2) sets out the subjective foundation of a contract: the “material conceptions that have become the basis of the contract”. The subsection does not spell this out, but presumably the “material conceptions” have to be commonly held by both parties, which would be described as a “common assumption” or a “supposition” in South African law.⁸ The alternative would be to make a unilateral motive the ground

⁴ Translation taken from the website for the Bundesministerium der Justiz: www.gesetze-im-internet.de/englisch_bgb.

⁵ See the discussion by Markesinis et al op cit note 3 at 324 – 325.

⁶ See chapter 3.

⁷ Art 6:111 PECL and Art 6.2.2 – 6.2.3 Unidroit PICC. See Schlechtriem op cit note 3 text attached to note 49.

⁸ Cf Markesinis et al op cit note 3 at 325. See also Anne Janzen “Unforeseen circumstances and the balance of contract: A comparison of the approach to hardship in the Unidroit Principles and the

for terminating a contract, a position for which Windscheid, the nineteenth century German pandectist, had been criticised.⁹

§ 313(3) provides for termination of a contract where imposing adjustment would be unreasonable. This sub-section makes clear that adjustment is the default solution to a contract struck by a fundamental change of circumstances: termination is an exceptional remedy only.

§ 313(1) makes it clear that the “contractual or statutory allocation of risk” is a central feature in the application of this provision. According to Markesinis et al this allocation of risk is determined first from the terms of the contract itself, then from the general principles of contract law.¹⁰ The doctrine of *pacta sunt servanda* remains highly important and a contract will only be adjusted or discharged where it is intolerable (*unzumutbar*) to expect performance following a change of circumstances.¹¹ There are three main groups of cases, to which the doctrine described in § 313 has been held to apply. Markesinis et al describe these as “an imbalance between performance and counter-performance, the frustration of the purpose of the contract and common mistake.”¹²

The modern doctrine of *Störung der Geschäftsgrundlage* has only existed in codified form since 2002, as has been seen. The genesis of the doctrine from a historical perspective needs to be examined to understand the full import of its provisions. The earlier history of change of circumstance doctrine in Germany was set out in chapter three. This chapter will pick up the historical development of this doctrine from the time of the promulgation of the BGB and trace it through to its arrival in developed form after the Second World War. The chapter will conclude with an examination of the various classes of cases dealt with under the modern doctrine of

German law of obligations” 2006 *Journal of Contract Law* 156 at 167. Janzen notes that a major difference between the Unidroit PICC’s approach to hardship and that of German law is that the PICC require a change in circumstances, but in German law relief may be available where the foundation itself is faulty due to a failed common assumption. On the supposition in South African law see chapter 2 above.

⁹ See chapter 3.

¹⁰ Markesinis et al op cit note 3 at 325

¹¹ *Ibid.*

¹² *Ibid.*

Störung der Geschäftsgrundlage and attempt, in sum, to pin down a theoretical basis for the doctrine.

5.2.2 The original position after promulgation of the BGB

Any history of the doctrine of Störung der Geschäftsgrundlage should, for the sake of completeness, begin with the *clausula rebus sic stantibus* of medieval Europe. For a historical description of the rise and fall of this doctrine, the reader is referred to the preceding chapter three of this work. It will be recalled that despite being included in the early codifications of Bavaria (1756) and Prussia (1794), the *clausula* doctrine was not included in the ultimate text of unified Germany's BGB (1900). This was notwithstanding the influence of Windscheid, who was involved in the initial drafting commission of that code, and who was famous for his own doctrine of the tacit presupposition (*Voraussetzung*), which dealt with the effect of changed circumstances on contracts.

Originally change of circumstances was thus not dealt with in the provisions on contract in the BGB. The code made provision for impossibility of performance to terminate a contract under § 275, while illegality and legal impossibility were covered by § 134.¹³ At the time of promulgation, § 275 contained no definition of what was intended by the term "impossibility". The issue was clouded further by the enigmatic § 275(2) which provided that the "inability" of the debtor to perform after the creation of the obligation was equivalent to impossibility, seemingly to include subjective impossibility along with the objective impossibility of § 275(1).

The BGB had been promulgated in a time of peace, however. World War I brought upheaval to the German economy, with dire inflationary consequences. The suspension of commercial relations with enemy powers was reflected in the interruptions suffered by many contracting parties. All this led to litigation by parties seeking discharge from their contracts. The Reichsgericht responded by expanding

¹³ Markesinis et al op cit note 3 at 323.

the definition of impossibility to include “economic” impossibility: performance need not be strictly speaking impossible, but only economically impracticable.¹⁴

This shift did not occur immediately, however. In a case which arose before the war, the debtor had promised delivery of a quantity of flour, of a kind produced only at his mill. Before delivery could occur, the mill was destroyed by fire. Shortly before the fire, however, 2000 tons of this particular type of flour was sent from the mill to another customer. The Reichsgericht held that the contract was not terminated due to impossibility since there was 2000 tons of flour in existence somewhere: the debtor should buy back this produce to supply the creditor!¹⁵

The Reichsgericht continued to stick to this position following the outbreak of World War One. In one case a debtor had undertaken to supply tin at a fixed price between August and December 1914. The outbreak of war, however, saw an increase in the price of tin by 200 to 300 per cent. After honouring the contract in the first two months, the debtor repudiated his obligation due to the increases in cost. The creditor was forced to buy tin from other suppliers at a higher price and claimed damages. The Court found for the creditor, despite the debtor’s contentions for an expanded concept of impossibility and an appeal to the good faith provision (§ 242).¹⁶

As the war progressed, however, the Courts became more willing to release debtors from contracts struck by economic impossibility. A case where a party had undertaken to deliver bark from Madagascar to Hamburg by ship was interrupted by hostilities between France and Germany. The Reichsgericht held that should the debtor have to wait until after the war to perform his obligation, it would be something

¹⁴ See John P Dawson “Effects of inflation on private contracts: Germany, 1914 – 1924” 33 *Michigan L Rev* 171 (1934 – 1935) 178 – 190 for cases to this effect. It should be noted at this point that the 2002 amendment of § 275 reflects this development with the inclusion in the new § 275(2) of a ground of withdrawal for “impossibility” where the expense of performance by the debtor is out of all proportion to the expected benefit to the creditor. The subsection also invokes an application of the principle of good faith in this regard.

¹⁵ RGZ 57, 116 as cited by Dawson op cit note 14 at 181.

¹⁶ RGZ 88, 172 as cited by Dawson op cit note 14 at 180. For an earlier WWI case in which discharge was similarly disallowed see RGZ 86, 397 (decided in 1915).

significantly different from what he had initially undertaken. The contract was thus discharged.¹⁷

Following the end of World War One the inflation rate in Germany continued to climb. A new defence to a claim for performance was instituted by the Reichsgericht: a debtor would be released from an obligation where insistence on the performance thereof would result in his economic ruin. Thus in a case involving the sole distributor of Opel motor cars for Southern Germany, a seller which had entered into a large number of contracts for the sale of motor cars at the February 1919 prices was discharged in April 1919 from the obligation to deliver these vehicles. The reason for this was that due to the rapid rise in car prices, performance at the fixed price would have led to its economic ruin.¹⁸ This decision was criticised for distinguishing between debtors based on their economic means, however, and was abandoned by the Reichsgericht at the end of 1921.¹⁹

None of these judicial expansions of the Code were to equip the Courts to deal with the drastic inflation which was to follow, however. German theorists turned to the task of addressing disparities between performance and counter-performance which were constantly arising from inflation. In particular the discharge of contracts for impossibility was seen to be an inadequate remedy: what was needed was adjustment of the terms.²⁰

5.2.3 The 1920s

Defeat in World War One had dire consequences for Germany. Not only was its economy already afflicted, following four years of war, but the victors demanded huge economic reparations. As a guarantee of payment, France occupied the Ruhr, Germany's major industrial area. The result was a downward spiral by Germany's economy: inflation became more and more rampant as time progressed. Markesinis et al describe this descent into hyper-inflation as follows:

¹⁷ RGZ 88, 71 as cited in Dawson op cit note 14 at 182. See also RGZ 90, 102 and the discussion in Dawson op cit note 14 at 181 – 182.

¹⁸ RGZ 100, 134 as cited in Markesinis et al op cit note 3 at 327.

¹⁹ RGZ 103, 177 as cited in Markesinis et al op cit note 3 at 328.

²⁰ Markesinis et al op cit note 3 at 328.

“[I]n Germany, at the beginning of the First World War, one gold mark had an internal purchasing power of RM1.05. By the end of the war, the figure was RM2.62 (somewhat higher than the rise that occurred in the US but lower than that found in France); and it had risen to 36.7 RM by 1922. But one year later – 1923 – the rise became steep: 2,785 RM had the purchasing power of 1 RM of 1914. Then in May of that year prices literally went berserk, so that by the end of that year the mark had a trillionth of its 1914 value (1,200,400,000,000 RM equalled one 1914 RM).”²¹

Naturally this hyper-inflation had a profound effect on reciprocal contracts involving a payment of money. In many cases the balance between performance and counter-performance was upset and there was a need to revise such contracts. Legal theorists thus began to suggest new ways in which the crisis could be addressed. One writer, Krückmann, writing as early as 1918, suggested a reintroduction of the medieval concept of the *clausula rebus sic stantibus*.²² Certain court decisions indeed accepted the *clausula* doctrine as one of the reasons for their decision, but the doctrine was never fully revived.²³ In the end the courts seized on the solution proffered by Oertmann with his doctrine of *Wegfall der Geschäftsgrundlage*.²⁴

Oertmann’s theory provided that the basis of the transaction was the “assumption made by one party, which has become obvious to and acquiesced in by the other,” that certain circumstances, important to both parties, are extant or will come about, even though such an assumption was not an express term of the contract.²⁵ Oertmann’s theory was different from that of his father-in-law, Windscheid, in that the assumption could not merely have been privately entertained by one party, but must have been manifested to the other party and acquiesced in by him.²⁶ The major innovation of Oertmann’s approach was to shift from subjective inquiry into the motives of a contracting party to the manifested effects on the transaction itself of the

²¹ *Ibid* 329.

²² John P Dawson “Judicial revision of contracts: Germany” (1983) 63 *Boston U Law Rev* 1039 at 1045.

²³ *Ibid*. Dawson cites RGZ 100, 129 (1920) as an example of such a case.

²⁴ This doctrine appeared in a publication titled “Die Geschäftsgrundlage – Ein neuer Rechtsbegriff” (The basis of the transaction – a new legal concept) (1921). See Markesinis et al *op cit* note 3 at 322; Werner Lorenz “Contract modification as a result of changed circumstances” in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 369.

²⁵ Oertmann *op cit* note 24 at 37. Cited in Markesinis et al *op cit* note 3 at 322.

²⁶ Markesinis et al *op cit* note 3 at 322.

change in circumstances.²⁷ Whether performance could be enforced was to be evaluated against a standard of good faith, as set out in § 242 of the BGB.²⁸

The Reichsgericht adopted Oertmann's theory as the basis of a decision soon after in 1922.²⁹ In that case a partner in an enterprise had concluded a complicated agreement with a party external to the partnership. The contract envisaged a fixed price for the purchase of the real property of the partnership upon dissolution thereof. The price agreed upon reflected the market value of that property at the time of agreement. Dissolution of the partnership was delayed, however: by the time the partner was ready to transfer ownership of the real property, its value had increased markedly due to inflation. The defendant partner refused to honour his obligation. The Reichsgericht held that a change in the value of money could undermine "the foundations of the transaction" (the Court referred to Oertmann as the origin of this concept). Since the equivalence of performance and counter-performance had been shattered, the Court refused to enforce the contract. Rather it was referred back to the lower court to investigate whether the price should be adjusted. Only if the plaintiff was not prepared to accept the revised price should rescission occur.³⁰ This decision proved the starting point for a long line of cases which cited a disturbance in the foundations of the contract as the basis for their decision.³¹

The disruption of the equivalence between performance and counter-performance due to inflation was reflected in the refusal of many creditors to accept the paper money which the government kept printing. The problem for cases dealing with the value of the paper Reichsmarks, however, was that legislation had in 1909 declared this paper money to be a legal medium of payment.³² By the end of 1923, however, these paper notes were fast becoming worthless due to inflation. In order for the German courts to intervene and restore equality of exchange to contractual

²⁷ Dawson op cit note 22 at 1046.

²⁸ § 242 reads as follows: "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration." Translation found at the website for the Bundesministerium der Justiz: www.gesetze-im-internet.de/englisch_bgb.

²⁹ RGZ 103, 328 as cited in Dawson op cit note 14 at 193.

³⁰ See Dawson op cit note 14 at 193 – 194; Lorenz op cit note 24 at 370.

³¹ For a discussion of further cases see Dawson op cit note 14 at 193 – 201. See for further authorities Dawson op cit note 22 at 1046n19.

³² Dawson op cit note 22 at 1048.

relationships, this legislation would have to be invalidated. In a decision handed down in November 1923, the Reichsgericht did just that.³³ The case involved a loan of money secured by a mortgage bond. The loan had originally been granted in 1913 and was due to be repaid in 1920. The debtor did indeed tender performance in 1920, but in paper marks, which inflation had rendered of little value. The creditor refused to accept performance. The Court upheld the creditor's refusal: he was not bound to accept the paper Reichsmarks at the value printed on their face. This decision was based on good faith: it would not be in good faith to settle a debt using worthless money. The earlier legislation was in conflict with § 242 and was hence invalid.³⁴

This decision was confirmed by the legislature a little while after. On 15 July 1925, the Law of Revalorization (*Aufwertungsgesetz*) came into effect.³⁵ The effect of this law was to prescribe specific rates at which certain classes of debt could be repaid. Thus mortgages secured by land could be extinguished by a payment of 25 per cent of the original loan in gold marks. For negotiable bonds the rate was 15 per cent.³⁶ Debts which did not fall into one of the categories listed in the Act were not revalorized, rather these were left to be dealt with under the "general provisions of the law".³⁷ Dawson suggests that these more idiosyncratic forms of debt would have required "individualized solutions" and hence their omission by the legislature.³⁸

The measures introduced by the courts and the legislature proved largely successful in Germany. The currency had been stabilised from 1924 onwards by the actions of the government and most of the country's problems resulting from the war had been solved. Indeed the country seemed to be well on its way to recovery. Even the legal disputes arising from changed circumstances had been solved by the new doctrine invented by the courts and members of the legal fraternity.³⁹ This legal doctrine

³³ RGZ 107, 78 as cited in Dawson op cit note 14 at 205.

³⁴ Dawson op cit note 22 at 1049.

³⁵ This law replaced temporary legislation dealing with revalorization, which had been passed on 14 February 1924. Dawson op cit note 22 at 1050n26. Markesinis et al op cit note 3 at 330.

³⁶ Revalorization Act 1925, §§ 10 and 63 listed most of the types of transaction for which repayment would be revalorized. Dawson op cit note 22 at 1051n28. Markesinis et al op cit note 3 at 330 – 331.

³⁷ Revalorization Act 1925, § 62.

³⁸ Dawson op cit note 22 at 1051.

³⁹ *Ibid* 1070.

developed during this period as a response to the upheaval of changed circumstances was to prove a useful creation and the concomitant process of adjustment of contracts was by then entrenched.

5.2.4 World War II and its aftermath

The Wall Street Crash in 1929 threw the Western World into a depression which was to last into the early 1930s. In Germany this depression was felt particularly severely.⁴⁰ The effect on contractual obligations was the converse of that experienced during the hyper-inflation of the 1920s: whereas before performance had been made easier due to the fact that money was worth less, during the depression economic hardship due to a shortage of money meant performance became more difficult. In 1931 the British currency was taken off the gold standard and allowed to sway with the market and then in 1933 the US currency was devalued. The resultant fall in the value of both currencies led, in Germany, to a call for adjustment of contract prices based on these foreign measures. Although the plaintiffs argued in these cases that the value of these foreign currencies was the foundation of their transactions, no decisive action was taken by the Reichsgericht.⁴¹ Indeed in several cases relief was not allowed on the grounds that the devaluation had been foreseeable.⁴²

The depression of the early 1930s made conditions rife for the rise of National Socialism in Germany from 1933 and the totalitarian state which emerged under the Nazis was largely to blame for World War Two.⁴³ The effect of Nazi policies on the doctrine of Wegfall der Geschäftsgrundlage was that the courts were now forced to apply it according to the prevailing ideology.⁴⁴ This meant that the doctrine was used during the 1930s to dissolve contracts, particularly the pension agreements of Jews and other victims of Nazi discrimination.⁴⁵ The Nazi government passed “contract assistance” legislation in November 1939 which conferred wide powers on tribunals

⁴⁰ Ibid.

⁴¹ See the cases discussed by Dawson op cit note 22 at 1071 – 1073.

⁴² Ibid at 1072.

⁴³ Ibid at 1070.

⁴⁴ Ibid at 1070. EJ Cohn “Frustration of Contract in German Law” (1946) 28 *Journal of Comparative Legislation and International Law* 15 at 23.

⁴⁵ Ibid.

tasked with resolving contractual disputes.⁴⁶ These tribunals applied the “law” according to largely undefined standards, although the procedure was said to be governed by good faith (§ 242).⁴⁷

Following the war, the German civilian leadership, which replaced Hitler and the Nazis, sought to stabilise the economy and to undo the efforts of the former leaders. In June 1948 a new currency was introduced, into which the old currency could be converted at the rate of ten to one. The reason for this decision was that distrust of the old currency had set in, due to its association with the defeated former government.⁴⁸ At the same time the wage and price controls, which were still in force, were abandoned. Both measures proved successful.⁴⁹ In May 1949 a new West German Constitution was passed, which provided for a new High Court, the Bundesgerichtshof, to replace the Reichsgericht. The result of all these measures was a new Germany which soon returned to the position of being one of the world’s leading economies.

The positive economic results following the end of the war did not mean that it was without negative consequences, however. There had been widespread destruction during the war and many people were rendered refugees. The problem of changed circumstances persisted. The new government passed the Vertragshilfegesetz in March 1952 to deal with contracts concluded before the monetary reform in 1948. Under this legislation, a court could declare that complete performance by a debtor was unjust, given the circumstances of both parties, and hence revise the obligation.⁵⁰

The rise and fall of Nazi Germany thus proved to be yet another upheaval in the twentieth century history of that country. Again special measures were needed to deal with the effects of that upheaval on contracts. The doctrine of judicial revision of frustrated contracts was firmly entrenched in Germany by the beginning of World War Two; the subsequent dislocation of contracts served merely to reinforce it. The

⁴⁶ Vertragshilfeverordnung 1939. See Dawson op cit note 22 at 1076; Cohn op cit note 44 at 24.

⁴⁷ Dawson op cit note 22 at 1076.

⁴⁸ Ibid 1077.

⁴⁹ Ibid.

⁵⁰ Lorenz op cit note 24 at 373.

history of Germany's contract law remains written in its provisions, however. As Cohn noted in 1946: "[i]t is a truism that the fate of a nation is mirrored in its law."⁵¹ Today change of circumstances doctrine has been codified in § 313 Störung der Geschäftsgrundlage, as we have seen. What remains is to examine specific theoretical issues in the implementation of the doctrine, to facilitate comparison with other jurisdictions.

5.2.5 Specific issues in the application of the doctrine

5.2.5.1 Adjustment of contracts

As has been shown, adjustment was by no means the solution to changed circumstances from the outset in Germany. The starting point was rather that pure impossibility would terminate a contract. This was then stretched during the period of economic impossibility around the time of World War One when the courts experimented with the definition of "impossibility" in § 275. The early 1920s saw the introduction of Oertmann's theory and the courts began to address inflationary problems on the basis that the "foundation" of the transaction had disappeared. In the eventual move toward revalorization, this ultimately saw the courts revising monetary obligations, an approach which was confirmed by the legislature in the 1925 Law of Revalorization. It should be noted, however, that the judicial adjustment of contracts was not a measure advocated by Oertmann in his treatise on *Geschäftsgrundlage*. Indeed he thought it "nothing less than unthinkable" that a court should revise a party's obligations under a contract – he preferred the all or nothing approach of discharge for collapse of the foundation of the contract.⁵²

This proves that the process of judicial revision of contracts struck by changed circumstances – so entrenched in German law today – has become law by judicial precedent. One case in particular since World War Two indicates the tenacity with which the German courts have clung to this approach. This case, commonly referred to as "the Volkswagen case" was decided in October 1951 by the newly

⁵¹ Cohn op cit note 44 at 15.

⁵² Oertmann op cit note 24 at 168 – 170, cited in Dawson op cit note 22 at 1052.

created Bundesgerichtshof.⁵³ The case concerned a scheme, set up under the Nazi government, whereby buyers could save for the purchase of a Volkswagen motor car. These prospective buyers would purchase stamps to be pasted into a savings book and when the requisite number of stamps had been acquired, the book could be exchanged for a motor car. The administrator of the scheme was the German Labour Front (DAF), a Nazi institution which represented workers as a replacement for trade unions. The DAF had deposited the money, obtained from 336 000 purchasers and amounting to 268 million marks, in a Berlin bank account. The plaintiffs in the Volkswagen case were two such buyers, who had made payments to the DAF in 1938 and 1939 before the outbreak of World War Two.

The problem was that the war had intervened in the purchasing process: the Volkswagen factory had been turned to war purposes from the start of World War Two and had then been bombed by the Allies. The money which had been deposited in Berlin had been seized by the Russians when they entered that city. In addition, 13 years had passed between the plaintiff's claim and the initial payment, during which time the price of a Volkswagen motor car had risen from 990 marks to 4 400 marks. Rather than simply discharge Volkswagen of liability, however, the Bundesgerichtshof stressed the concept of *pacta sunt servanda*. The Court reiterated that it had the power to adjust contracts under § 242. Instead of simply ruling for the plaintiffs, the Court (no doubt mindful of the vast number of other potential claimants) referred the matter back to the lower court. The trial judge was given the task of determining which of the 336 000 other purchasers were still interested in obtaining a Volkswagen, along with a host of other related questions.

This enormous burden placed on the trial judge prompted the American commentator, Dawson, to ask the "basic" question: "why should such a monumental, unmanageable task be undertaken at all?"⁵⁴ Dawson notes in his criticism of this case that revision of contracts has become so entrenched in the German system that

⁵³ BGH JZ 1952, 145 as cited in Dawson op cit note 22 at 1086.

⁵⁴ Dawson op cit note 22 at 1086.

even this type of finding elicits only minimal German criticism.⁵⁵ In comparison with his own legal system Dawson concludes:

“It is on such grounds [difficulty of compliance] that in Anglo-American law, courts empowered to give equitable relief can deny it, especially specific performance of contract; it would be on such grounds that most of the specific relief that the high court approved in the Volkswagen case surely would have been denied by an American court. But one would have to look far to find a German case (I have found none) in which the difficulties, uncertainties or costs of manufacturing new terms for frustrated contracts are mentioned as reasons for refusing to undertake the task.”⁵⁶

5.2.5.2 Frustration of purpose

“Frustration of purpose” is a concept employed by the English courts to refer to the position where a motive for entering into a contract is known to both parties and forms the basis of their transaction. In English law it has been held that should such a commonly held purpose disappear, contractual performance is discharged.⁵⁷ Markesinis et al note that analogous situations in German law where the contractual purpose has disappeared lead to judicial revision of the contract under the doctrine of *Störung der Geschäftsgrundlage*.⁵⁸ These authors base their discussion on certain German cases, two of which will be discussed below.⁵⁹

In the “pneumatic drill case” (*Bohrhammerfall*) the defendant who was engaged in business in West Berlin ordered 600 pneumatic drills.⁶⁰ It was known to both parties that these drills were to be used in mines in East Germany. The plaintiff had already accepted the offer and begun work on producing these drills, when the Berlin blockade intervened, making delivery of the drills to East Germany impossible. The defendant then tried to resile from the contract on the grounds that he could no longer dispose of the drills in the intended manner. In addition he would have had difficulty in disposing of these drills in West Germany as well, since they were of an outdated model. The plaintiff sued for the contract price. The Bundesgerichtshof held that the assumption that these drills would be resold in the East had been the

⁵⁵ Ibid 1086 – 1087.

⁵⁶ Ibid 1088.

⁵⁷ *Krell v Henry* [1903] 2 KB 740. See chapter 4 for a discussion of this case.

⁵⁸ Markesinis et al op cit note 3 at 342 – 346.

⁵⁹ Markesinis et al op cit note 3 at 343 also refer to the discussion of the similarity between these cases and *Krell v Henry* in Larenz *Schuldrecht* 14th ed (1987) at § 21 II 1.

⁶⁰ BGH MDR 1953, 282 as cited in Markesinis et al op cit note 3 at 343.

basis of the transaction for both parties and hence the agreement fell to be revised under § 242. The Court held the defendant liable to pay for the drills already produced, but discharged its liability for those which had not yet been made.

Lorenz cites this case as an example illustrating the point that: “[a] critical review of the large number of pertinent cases decided by German courts after 1945 permits the generalization that, at least at the beginning, there was some inclination to make a rather liberal use of Oertmann’s theory of the *Geschäftsgrundlage*.”⁶¹ He goes on to illustrate that in more recent times the courts have shifted to an approach which focuses more closely on the allocation of risk between the parties.⁶² This is also the view of Zweigert and Kötz⁶³ and Markesinis et al echo this argument in their discussion of frustration of purpose.⁶⁴

A more recent revision for frustration of purpose occurred in a case decided by the Bundesgerichtshof in 1984.⁶⁵ The plaintiff, situated in Iran, put in an order for a consignment of German beer. This beer arrived in a damaged state. In settlement with the defendant supplier it was agreed that the plaintiff would receive his next order of beer at two thirds of the original price per case and that he would receive a discount of DM 20 000 when he placed his next order. The settlement agreement thus rested on the assumption that future orders of beer would be possible. When the Islamic fundamentalist regime took over in Iran in January 1979, all future orders of beer became impossible. The plaintiff failed to reach a compromise with the defendant following this change of circumstances and sued for the full loss which he had sustained as a result of the original damaged shipment.

The Bundesgerichtshof held that since the frustrated contract was not the original sale agreement, but the subsequent settlement agreement, the usual rules governing the passing of risk in sale contracts did not apply and revision had to take place. There was nothing in the settlement agreement which indicated that the risk of non-fulfilment was to be borne by the plaintiff alone. The Court ordered the

⁶¹ Lorenz op cit note 24 at 373.

⁶² Ibid 374, citing BGH JZ 1978, 235.

⁶³ Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law* (1998) at 522.

⁶⁴ Markesinis et al op cit note 3 at 344 – 346.

⁶⁵ BGH NJW 1984, 1746 as cited in Markesinis et al op cit note 3 at 344.

defendant to pay half the profit which the plaintiff would have made had the settlement agreement been acted upon.

Markesinis et al note the shift in the approach of the Court evident in this decision:

“This case ... represents a good example of a decision applying the more legalistic approach which currently prevails among German courts. This ... pays more attention to the allocation of risk which the contract and the surrounding circumstances dictate than to the vaguer, equitable grounds which figured so prominently in the earlier case law.”⁶⁶

5.2.5.3 Common mistake

“Common mistake” is another legal concept which falls to be dealt with under *Störung der Geschäftsgrundlage*. Common mistake refers to the situation where both parties to a contract labour under the same misapprehension as to the facts on which the contract is based. In English law for example, the test for discharge due to common mistake is whether the mistake is sufficiently fundamental.⁶⁷ The mistake must thus exist in the minds of the parties at the time of the conclusion of the contract. A distinction is drawn between frustration and common mistake in the English jurisdiction as follows: if a change in circumstances occurs which alters the facts on which a contract is based *before* the contract is entered into, a common mistake will result; frustration occurs where a change in circumstances occurs *after* the conclusion of the contract and radically changes the nature of the obligation.⁶⁸

The BGB makes provision for rescission of a contract for unilateral error under § 119. The common mistake type scenario does not fall under this section, however, and hence must be dealt with under § 313. For an example of a German case dealing with this problem, consider the dispute concerning the transfer of a professional football player from one club to another, decided in 1976.⁶⁹ This player had, unbeknown to both clubs involved, accepted a bribe to lose a game before the time of transfer. This type of dishonesty on the part of a player was fundamental to the transaction, since it rendered him “worthless” to the transferee club, undermining

⁶⁶ Markesinis et al op cit note 3 at 344 – 345.

⁶⁷ See chapter 4. In South African law a common mistake discharges a contract if the mistake meets the test of materiality: see chapter 2.

⁶⁸ See chapter 4 for a fuller discussion.

⁶⁹ BGH NJW 1976, 565 as cited by Markesinis et al op cit note 3 at 347.

the assumption on which he had been purchased. The Bundesgerichtshof held that the actions of the player had made him “worthless” to both clubs, and upset the fundamental basis of the transaction. The case thus invited discharge under the doctrine of Wegfall der Geschäftsgrundlage. Due to the circumstances of the case, revision of the contract was not possible and hence the agreement was discharged and the return of the transfer fee was ordered.

5.2.5.4 Theoretical basis

For comparative purposes, it is necessary finally to discuss the theoretical basis which underpins the doctrine of Störung der Geschäftsgrundlage. It seems obvious to state that the theory behind § 313 is Oertmann’s conception of the “foundation of the contract” which necessitates judicial intervention when it is undermined. This theory in turn is said to rest on the more fundamental notion of good faith, as encapsulated in § 242. Lorenz is critical of such an invocation of Oertmann, however:

“Oertmann’s theory has become famous because the Supreme Court adopted it and cited it in numerous leading cases. However, a perusal of these cases leaves the reader with the impression that these citations are mere ornaments. It thus appears that the decisions in cases where performance has unexpectedly been rendered more onerous for one of the parties depend very much on their own particular facts. Moreover, the weight to be attached to such supervening events is not the same in all types of contract. The allocation of risk inherent in each type of contract seems to be the most important element in these crucial cases, turning on the ‘collapse of the underlying basis of the transaction’.”⁷⁰

If Lorenz is to be believed, the approach of the courts is rather than to attempt to interpret the contract, while considering the surrounding circumstances to determine what is the predetermined (or proper) allocation of risk between the parties. Having determined this, the court may then revise the contract in accordance with the dictates of good faith. Lorenz defends his position with the following (fairly recent) case, which he argues illustrates the return of the Bundesgerichtshof from the liberal use of Geschäftsgrundlage theory to a more conservative, pacta sunt servanda approach.⁷¹

⁷⁰ Lorenz op cit note 24 at 370. See also Zweigert & Kötz op cit note 63 at 522 & 524.

⁷¹ Ibid 373 – 374.

This 1978 decision of the Bundesgerichtshof concerned a contract to supply oil.⁷² In 1972 an oil importer agreed to supply the plaintiff with oil at a fixed price. At the time of conclusion of the agreement, the market price of oil was DM 100 per ton. Following the Yom Kippur war in 1973, the market price of oil reached DM 600 per ton. Given the rise in prices the supplier refused to provide any more oil to the plaintiff unless the price was adjusted. The plaintiff was forced to obtain oil at a higher price from a different source and claimed the difference from the defendant supplier. In its decision the court restated the principle that performance and counter-performance should be of comparable value, but it went on to state that the contract and its surrounding circumstances might indicate an implied assumption of risk by one party. The court held that the inclusion of a fixed price in the agreement was indicative of an intention to assume the risk of price fluctuations and hence the defendant supplier was liable to compensate the plaintiff for its losses. In reaching its decision the Court noted that the principle of *pacta sunt servanda* was of paramount importance and that the defence of collapse of the underlying basis of the transaction could only be invoked where it was “indispensable for avoiding intolerable results, irreconcilable with law and justice.”⁷³

This statement by the Bundesgerichtshof seems to lead us back to the principle of good faith, the original starting point for intervention. Whether intervention occurs in the manner set out by Oertmann, or in order to give effect to a preconceived allocation of risk, the basis for that intervention remains good faith. The ultimate manner in which intervention occurs seems largely to be left to the discretion of the courts, as reflected in the permissive wording of § 313 and the open-ended way in which the role of the judge in applying the BGB is conceived in the German legal system.

5.2.6 Conclusion on German law

This account of the doctrine of *Störung der Geschäftsgrundlage* may appear to the reader to be somewhat historical in its focus. This type of approach appears to be necessary, however. The doctrine has developed due to the catastrophic events

⁷² BGH JZ 1978, 235 as cited in Lorenz op cit note 24 at 374.

⁷³ Markesinis et al op cit note 3 at 345.

which struck Germany in the first half of the twentieth century. In addition the doctrine retains a connection to the earlier medieval concept of *clausula rebus sic stantibus* by means of the wording used in § 313. This connection does not mean that the two doctrines are equivalent in their application and effects, but rather shows that a concern for fair dealing in contract, based on the acknowledgement that circumstances do change, is a necessary feature of any legal system.

The specific features of the German approach have been outlined above. Perhaps the most notable of these is that rather than discharge, the typical remedy for changed circumstances is judicial adjustment of the contractual obligation. The proven success of this approach is mirrored in its adoption in the general European principles of contract law, the PECL, and the Unidroit PICC.⁷⁴

While viewed in comparison with foreign jurisdictions the doctrine of *Störung der Geschäftsgrundlage* may appear permissive, the recent trends in the relevant German case law seems to be toward stressing the concept of *pacta sunt servanda*.⁷⁵ Loose invocations of § 313 to deal with just any change in circumstances are avoided. The modern approach, which focuses on the allocation of risks between the parties seems to be a feature of a mature legal doctrine. The good sense behind such a development cannot be doubted, particularly since it balances contractual certainty with considerations of equity, while allowing the doctrine of good faith to play an informing role in German contract law.

5.3 Dutch law

5.3.1 Codification in the Netherlands

The Netherlands is a typical “civil law” country in that its law was originally derived from the Roman law and is today encapsulated in a code.⁷⁶ The first *Burgerlijk*

⁷⁴ See above: section 5.2.1.

⁷⁵ Hugh Beale et al *Cases, Materials and Text on Contract Law* (2002) at 637 notes that “[c]ontrary to fears expressed, particularly by French academic writers, judicial revision in the event of disappearance of the contractual basis is not a threat to security of contract because the German courts use it conscientiously and with moderation.”

⁷⁶ Arthur S Hartkamp “Judicial discretion under the new civil code of the Netherlands” (1992) 40 *American Journal of Comparative Law* 551 at 551.

Wetboek (“BW”) was promulgated in 1838. This civil code was based largely (and often quite literally) upon the French Code Civil (or Code Napoleon) of 1804.⁷⁷ By the mid twentieth century the BW was thus largely outdated.⁷⁸ Revision was necessary to maintain the status of the law of the Netherlands as code-based, rather than resting on case decisions. Thus in 1947 the Dutch government asked Prof Meijers to draft a new civil code.⁷⁹ The aim of this Nieuw Burgerlijk Wetboek (“NBW”) was to incorporate existing case law into a new code. This recodification took longer than expected, however, and extended long after the death of Prof Meijers.⁸⁰ The main part of the codification, on patrimonial law, came into effect only in 1992. Certain parts of this codification project remain uncompleted to this day.⁸¹ The net result of this process is that today the Netherlands is governed by a modern codification, which reflects current legal trends and is part of no recognised family of codifications.⁸²

What this means for the present inquiry is that although, like the Code Civil, the old BW contained no provision on changed circumstances in contract, the subsequent recognition of this defence by the Courts has led to the incorporation of a hardship defence in the NBW.

5.3.2 The problem of changed circumstances

The old BW was promulgated early in the nineteenth century during a period of laissez-faire capitalist growth in Europe and as such it is not surprising that it stresses the concept of *pacta sunt servanda*.⁸³ This principle was encapsulated in article 1374(1) BW, which was basically a translation of the equivalent article 1134(1) of the Code Civil. As a result of increased international trade, technological

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Martijn W Hesselink “The ideal of codification and the dynamics of Europeanisation: the Dutch experience” in Stefan Vogenauer and Stephen Weatherill (eds) *The Harmonisation of European Contract Law* (2006) at 39.

⁸⁰ Ibid at 40. Prof Meijers died in 1954.

⁸¹ Ibid.

⁸² Christoph Brunner *Force Majeure and Hardship under General Contract Principles* (2009) at 16. Brunner describes (ibid) the French Code Civil of 1804 as a first generation codification, representative of the Romanistic legal family; the Swiss Code of Obligations of 1911 as a second generation codification, representative of the Germanistic legal family and the Dutch NBW as a third generation codification, representative of no particular legal family.

⁸³ HM Scholtz “Pacta sunt servanda en verandering van omstandigheden na kontraksluiting” (1976) *Responsa Meridiana* 153 at 153.

advancements and two devastating World Wars, however, strict contractual autonomy and individualism began to be tempered in the twentieth century by competing altruist ideals.⁸⁴ As a result the competing principle of good faith, contained in article 1374(3) came increasingly to the fore.⁸⁵ This process did not happen immediately, however.

To illustrate the need for an inference of good faith into the law on changed circumstances, Hartkamp posits a general situation where a contract of sale has been entered into, but a war intervenes before payment or delivery can take place. Performance can only take place years later, and rampant inflation has intervened in the meantime.⁸⁶ In cases decided after World War I, the Hoge Raad took the position that even such events cannot discharge a party's obligations.⁸⁷ It appeared at first as if the Hoge Raad would support a new approach with good faith providing an independent ground for intervention in contracts,⁸⁸ but in 1926 it expressly refused to limit the principle of *pacta sunt servanda* on this ground.⁸⁹ Writing in 1976, Scholtz noted that there was beginning to be evidence of a shift towards recognising such a good faith limitation.⁹⁰ In the years preceding the promulgation of the NBW, the good faith defence was expressly recognised by the Hoge Raad, creating a far greater role for this equitable doctrine in Dutch law.⁹¹ The doctrine of changed circumstances likewise was recognised by the Dutch courts in the years preceding the promulgation of the NBW in 1992.⁹²

Under the NBW good faith ("redelijkheid en billijkheid") is referred to in multiple places, especially at article 6:2 and article 6:248.⁹³ Change of circumstances is likewise dealt with at article 6:258:

⁸⁴ Ibid.

⁸⁵ Ibid at 156 – 157.

⁸⁶ Arthur S Hartkamp "The binding force of contract in Dutch law" in Attila Harmathy (ed) *Binding Force of Contract* (1991) at 46.

⁸⁷ Ibid.

⁸⁸ HR 9 February 1923, NJ 1923, 676. Cited in Scholtz op cit note 83 at 157.

⁸⁹ HR 8 January 1926, NJ 1926, 203. Scholtz op cit note 83 at 157.

⁹⁰ Ibid at 158. Scholtz cites the following decision: HR 19 May 1967, NJ 1967, 261. In this case the Hoge Raad limited the application of an exemption clause based on good faith.

⁹¹ Hartkamp op cit note 86 at 46 – 47.

⁹² Ibid at 46.

⁹³ Compare the discussion of good faith in chapter 7.

- “1. Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.

2. The modification or the setting aside shall not be pronounced to the extent that it is common ground that the person invoking the circumstances should be accountable for them or if this follows from the nature of the contract.

3. For the purposes of this article, a party to whom a contractual right or obligation has been transmitted, is treated as a contracting party.”⁹⁴

Article 6:258(1) thus contains the essence of the new provision on changed circumstances. The threshold test for the operation of the article requires, first, that the change in circumstances be unforeseen. Busch et al state that this requirement is not to be taken literally, but depends rather on an interpretation of the contract.⁹⁵ Second, the test requires that good faith (“reasonableness and fairness”) prevents the other party from relying on the contract in unmodified form. Since a primary requirement of good faith in Dutch law is that parties observe the sanctity of contracts, this standard will not easily be met.⁹⁶ There is no attempt to pin down the exact nature of the change in circumstances needed to invoke the provision, other than by means of a good faith requirement. Perillo interprets this article as applying to impossibility, frustration of purpose and impracticability.⁹⁷ Busch et al add that certain classes of common mistake will also be dealt with by this provision. The example given is of a miscalculation of circumstances based on past or present facts upon which future facts, significant for the legal relationship, depended.⁹⁸ Hartkamp and Tillema note that the hardship complained of need not only be of a general character such as war or a natural disaster, but may be of specific concern to a

⁹⁴ Hans Warendorf, Richard Thomas & Ian Curry-Sumner *The Civil Code of the Netherlands* (2009) 714.

⁹⁵ Danny Busch, Harriet Schelhaas et al (eds) *The Principles of European Contract Law and Dutch Law* (2002) at 288.

⁹⁶ *Ibid.*

⁹⁷ Joseph M Perillo “Force majeure and hardship under the Unidroit principles of International Commercial Contracts” (1997) 5 *Tulane Journal of International and Comparative Law* 5 at 10.

⁹⁸ Busch et al op cit note 95 at 288.

particular contract alone.⁹⁹ Furthermore the provision does not require that the unforeseen circumstances concern a basic assumption on which the contract was made, they may be of a secondary character, such as the time and place of delivery.¹⁰⁰

With regard to the powers of a court, article 6:258(1) provides that a contract may be modified or terminated if the test for hardship is met. This power is also granted with retroactive effect. Article 6:258(2) places an important limitation upon the operation of this hardship provision, however: if the contract allocates the risk of a particular event to a party, the courts should not upset this contractual balance. Likewise if it is common opinion between the parties that the risk of the occurrence of a particular event should be borne by one of them, the court should not interfere in this allocation of risk.

The provisions of article 6:258 may not be excluded by prior agreement, due to the operation of article 6:250. Due to the general nature of the language used in article 6:258 there may be some overlap with the doctrines of mistake and force majeure. Hartkamp and Tillema note that while in theory the distinctions between these doctrines should be maintained, from a practical point of view these distinctions are today less important within the sphere of application of article 6:258, due to the general possibility of discharge or modification due to changed circumstances.¹⁰¹

5.3.3 Conclusion on Dutch law

Dutch law provides an interesting study with regard to the problem of change in circumstances. At first the courts followed the French approach to hardship, refusing to allow discharge. This was understandable given the origins of the BW in the Code Civil. As in Germany, however, there was a move towards recognising a defence based on change of circumstances under the influence of good faith doctrine. Although this movement took far longer to gain momentum in the Netherlands than it did in Germany, the end result was the same and the modern approach to changed circumstances is fairly similar to that of the Germans, particularly with regard to the

⁹⁹ Arthur S Hartkamp & Marianne M Tillema *Contract Law in the Netherlands* (1995) at 125.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid* at 125 – 126.

threshold test and the available remedies, as the discussion of the modern article 6:258 above demonstrates.

5.4 Conclusion

A comparative study of the German and Dutch law on change of circumstances reveals many similarities. First, although both systems now have explicit recognition of such a defence in their codes, in both countries this defence had to be developed by the Courts due to an omission of such a provision from the initial codification. Both German and Dutch courts relied on the general good faith provision of their prior codifications as a peg on which to hang a doctrine of change of circumstances. Good faith thus played a creative and supplementing function in these legal systems in order to justify the creation of a new doctrine to fill a gap in the original code. A difference between the relevant code provisions, however, is that while Dutch law invokes “reasonableness and fairness” directly in the threshold test for the application of the provision, there is no such reference in German law.

Second, although today the wording of the Dutch and German provisions on changed circumstances is different, the effect is largely the same. Both provisions cover any change of circumstances including impracticability, frustration of purpose, impossibility and even extend under certain circumstances to the doctrine of common mistake. Again there is a difference in wording in the provisions here though, in that the Dutch article refers to changes in circumstances generally, whereas the German § 313 distinguishes objective alteration in the equilibrium of the contract from subjective frustration of purpose. Both doctrines have further reach than the English doctrine of frustration, however. A purposive reading of both the German and Dutch provisions in the context of their respective codes and case law would probably iron out most of the discrepancies between them, leaving the differences largely in the realm of semantics.

In terms of powers of a court upon a finding that circumstances have changed, both permit variation or discharge of a contract, which may be ordered with retroactive effect. It will be seen in chapter six that these features of these leading European

codes have been replicated in the soft law codifications which have been published, such as the PECL and the PICC.

At the same time, particularly in Germany, it was seen that there remains considerable concern for the concept of *pacta sunt servanda*, as evidenced in the reluctance to lightly invoke discharge for changed circumstances. While these laws may be formulated in general terms and thus afford a measure of discretion to the interpreting judge, this is merely evidence of the civil law style and has not overthrown contractual certainty entirely. Courts are guided by past judicial decisions in the exercise of their discretion under these provisions. The net result of this is that the modern German and Dutch codifications stand at the forefront of the law on the problem of change of circumstances in contract law.

Examples of laws on change of circumstances have now been considered from both common law and civil law jurisdictions. Another important comparative analysis is still required, however, and that is of certain supra-national model rules as well as the UN Convention for the International Sale of Goods. This will be examined in the following chapter.

Chapter 6: International model rules and the UN Convention on Contracts for the International Sale of Goods

6.1 Introduction

Contracts are not only concluded within the borders of a particular country – international trade necessitates that contracts be concluded between parties from different countries. The consequent question will then be which country's law will govern the transaction. This is a matter for private international law. In the modern world, however, there is a movement towards unification of the laws governing international trade. This has seen the promulgation of international conventions, such as the UN Convention on Contracts for the International Sale of Goods, 1980 (CISG), as well as supra-national model rules such as the Unidroit Principles of International Commercial Contracts (PICC), first published in 1994. Within the European context there are the Principles of European Contract Law (PECL), published between 1995 and 2003, as well as a very recent development, the Draft Common Frame of Reference of 2009.

There is considerable overlap between the rules of the PICC, the PECL and the DCFR, since each intends to provide a complete set of principles of contract law. Each originates from a different source and hence its sphere of application is slightly different. Since the realm in which this type of transnational contract law operates is typically that of international trade, its application is often left to arbitration tribunals. As far as a choice of a general – rather than a particular national – system of contract law to govern a particular contractual transaction goes, this is determined by agreement between the parties.¹ As Brunner notes, the choice of general principles does not have to be to the exclusion of national law.² General contract principles can be used to supplement and interpret a chosen system of national law.³ Given

¹ The application of the CISG to a transaction is determined differently. In terms of article 1(1) of this treaty, it applies when the contracting parties come from states which are signatory to the CISG, or where the rules of private international law require that the law of a signatory state should apply.

² Cristoph Brunner *Force Majeure and Hardship under General Contract Principles – Exemption for Non-performance in International Arbitration* (2009) at 24.

³ *Ibid.* Brunner notes in this regard that this is the most common use to which general contract principles are put.

that international trade transactions happen in a transnational context, it is fitting that a particular municipal system of law be applied “with a broader brush” to reflect the international nature of the contract.⁴ That is not to say that general principles cannot be used to the exclusion of national law, but this approach is limited by the lack of case law applying the various transnational codifications.⁵ General contract principles thus have a role to play in supplementing and interpreting municipal law and arguably – at least in the context of arbitration proceedings – could be used to develop it.

Since these model rules are abstracted from leading legal systems around the world, they provide a good picture of what an ideal system of law would be like. They are thus useful in an analysis of what is the best way of dealing with a particular contract problem, such as that of changed circumstances. In this context this problem is more commonly referred to under the heading of “hardship”. While most international contracts would include a hardship clause, and thus obviate the need for reference to general principles to determine the outcome of a dispute, this is not always the case. Kessedjian makes the practical point that it may be more difficult or more expensive for parties to obtain insurance when they include a hardship clause in their contracts.⁶ The fact that most of the transnational codifications to be considered below include a hardship provision is highly relevant to the question of whether such a rule should form part of an ideal system of contract law. Knowledge of international practice would be valuable to South Africa if it were to decide to adopt rules on hardship. The questions to be investigated in this chapter are thus twofold: first, whether transnational contract law contains an ideal model for dealing with the problem of hardship and second, whether lessons learnt in this regard in the arena of international trade can be applied within South Africa to develop our own contract law.

⁴ Ibid at 29.

⁵ Ibid at 25. It should be noted that there is, however, a considerable body of case law dealing with the CISG in particular. Brunner seems here to be referring to the soft law rules of (for example) the PICC or the PECL. For a case database on the CISG see <http://www.cisg.law.pace.edu> (last accessed 8 February 2010).

⁶ Catherine Kessedjian “Competing approaches to force majeure and hardship” (2005) *International Review of Law and Economics* 415 at 421.

6.2 A note on terminology

The subject matter of this thesis has been set out by use of the phrase, “change of circumstances”. While this phrase is preserved in, for instance, the PECL, the Unidroit PICC prefers the term “hardship”. These two appear to be synonymous concepts and will be used interchangeably. A concept which overlaps with hardship, but which is slightly different is that of “force majeure”.⁷ The literal meaning of this phrase is “higher power” and it is typically used in international contracts to refer to situations of impossibility. The Latin equivalent of force majeure is vis maior.

Thus a change in circumstances may result in a fundamental alteration in the equilibrium of the contract (to use the language of PICC). Under certain circumstances which are defined in the various codifications (and which will be examined below) this shift in the equilibrium may result in hardship. When, however, the change of circumstances results in an impediment beyond the control of a party, which in turn causes it to default under the contract, force majeure is present. (This formulation is borrowed from article 79 of the CISG.) Thus whether a change of circumstances has resulted in hardship or force majeure will be a question of the degree of difficulty of performance. Is performance actually impossible, or is it merely unfair to expect a party to perform given a change in circumstances? Given this degree of overlap in the applicable rules, both concepts will be considered below.

6.3 The UN Convention on Contracts for the International Sale of Goods

This Convention (the “CISG”) was adopted by the United Nations in 1980 in Vienna and came into force on 1 January 1988.⁸ To date 74 states have ratified the CISG.⁹

⁷ Joern Rimke “Force majeure and hardship: application in international trade practice with specific regard to the CISG and the Unidroit Principles of International Commercial Contracts” (1999 – 2000) *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* 193 at 241 notes that while the “classical concept of force majeure is primarily directed at settling the problems resulting from non-performance... [t]he concept of hardship ... is mainly directed at the adaptation of the contract.”

⁸ Karin Lehmann “The United Nations Convention on Contracts for the International Sale of Goods: should South Africa accede?” (2006) *SA Merc LJ* 317 at 317.

⁹ www.cisg.law.pace.edu/cisg/countries/cntries.html (accessed 7 September 2009).

South Africa, however, is not among these.¹⁰ One of the stated underlying aims in the preamble of the CISG is that:

“[T]he adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade...”

This creation of a uniform law of international sale is thus intended to overcome difficulties encountered where States operate under different legal systems and thereby remove uncertainty and disagreement over legal issues from the international trading arena.¹¹

The provision in the CISG which is relevant to this discussion is article 79. Article 79 is a force majeure provision, although this term was not favoured by its drafters. The essence of the article is captured in article 79(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.”

The drafters of this provision chose to express the impossibility concept by use of the word “impediment”. The relevant requirements of the sub-article are: (1) an impediment; (2) beyond the control of the contracting party; (3) which the party could not reasonably have been expected to take into account at the time of contracting and (4) that the party could not have avoided or overcome the impediment.¹² Although the word “impediment” implies some obstacle to performance, rather than increased hardship in performance, academic opinion remains divided over whether the CISG can be interpreted to admit discharge on this ground.¹³ On the one hand it

¹⁰ Ibid.

¹¹ Sieg Eiselen “Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa” (1999) *SALJ* 323 at 324.

¹² For a comparable analysis, see: Hannes Rösler “Hardship in German codified private law – in comparative perspective to English, French and international contract law” (2007) *European Review of Private Law* 483 at 502.

¹³ Alejandro M Garro “Exemption of liability for damages: comparison between provisions of the CISG (Art 79) and the counterpart provisions of the Unidroit Principles (Art 7.1.7)” in John Felemegas (ed) *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as uniform sales law* (2007) 236 at 242.

can be argued that the omission of a hardship provision from the CISG was deliberate and on the other it can be argued that the word “impediment” is sufficiently flexible to admit extreme cases of hardship.¹⁴ Garro notes that the judicial decisions on this provision are too scant at the moment to sufficiently back up the argument of either side.¹⁵ Since Garro wrote, however, the Belgian Supreme Court has decided that the PICC can be used to supplement article 79 of the CISG to impose a duty on the buyer under an international contract of sale to renegotiate following an unforeseen price rise of 70 per cent.¹⁶

The argument in favour of allowing hardship under the CISG rests on the interpretation provision of the Convention, found at article 7. Article 7(1) notes the need to “promote [international] uniformity” in the application of this treaty, as well as the observance of “good faith in international trade”. Article 7(2) provides as follows:

“Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

Since hardship could arguably be said to fall under the purview of article 7(2) as a matter not “expressly settled” by the rules of the CISG, there is scope for the suggestion that the Unidroit provisions on hardship could be used to augment article 79(1) in an appropriate case.¹⁷ This was the approach adopted by the court in the Belgian *Scaform International* case referred to above. This would promote international uniformity of law and also would further the principle of good faith, as per article 7(1). Alternatively, municipal doctrines such as frustration or *Wegfall der Geschäftsgrundlage* could come into play. The counter argument to this type of interpretation of article 79, however, could be that the exclusion of a hardship

¹⁴ Ibid. Rimke op cit note 7 at 226 argues that “in the absence of an ‘acquired patina of legal meaning’, it is probable that elastic terms like ‘due to an impediment’ will be read in the context of each system’s view of the limits within which an excuse of that kind should be admitted.”

¹⁵ Ibid.

¹⁶ 19 June 2009 Belgian Court of Cassation [Supreme Court] (*Scaform International BV v Lorraine Tubes SAS*). Translation available at <http://cisgw3.law.pace.edu/cases/090619b1.html> (last accessed 8 February 2010).

¹⁷ Garro op cit note 13 at 243. Although Garro does not refer to the PICC by name, he does suggest that the gap-filling technique of art 7(2) can allow for some underlying principle to augment art 79. A further alternative would be to refer to a particular municipal legal system which recognises hardship, as Garro notes. This was the reasoning adopted by the court in *Scaform International* supra note 16.

exemption was deliberate and should not be circumvented by interpretation. Garro has traced the travaux préparatoires of the CISG in this regard, however, and finds no conclusive evidence of this.¹⁸ Since this question is not entirely settled in law, Kessedjian makes the eminently practical solution that parties should include a hardship clause in their contract to avoid a lengthy dispute as to whether this is covered by the CISG.¹⁹ This is possible, since article 6 of the CISG provides that parties may exclude or vary its provisions by agreement.

6.4 The Unidroit Principles of International Commercial Contracts

“Unidroit” is the acronym referring to the International Institute for the Unification of Private Law, which is an independent intergovernmental organisation, based in Rome and functioning under an international convention.²⁰ The purpose of this organisation is to harmonise international private and particularly commercial law.²¹ To this end, Unidroit had published the Principles of International Commercial Contracts in 1994, which were revised ten years later in 2004. These principles (the “PICC”) are “soft” law, since they are non-binding, yet have the intention of influencing “hard” law as a set of model rules for international trade.²² “Hard” law would be relevant national law or international agreements such as the CISG and typically this influence would be exerted in arbitration proceedings.²³

The PICC deal with hardship at articles 6.2.1 to 6.2.3.²⁴ These provisions are set out in chapter six, which deals with “performance”, in their own section headed “hardship”. In chapter seven, headed “non-performance”, force majeure is dealt with separately under article 7.1.7. The hardship provisions begin with a general statement in article 6.2.1 that:

¹⁸ Ibid at 244 – 245.

¹⁹ Kessedjian op cit note 6 at 419.

²⁰ The Unidroit Statute (1940). See www.unidroit.org and Sieg Eiselen & Sebastian K Bergenthal “The battle of forms: a comparative analysis” (2006) *Comparative and International Law Journal of Southern Africa* 214 at 227.

²¹ www.unidroit.org

²² Stefan Vogenauer “Introduction” in Stefan Vogenauer & Jan Kleinheisterkamp (eds) *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* (2009) at 4 – 6. See also Eiselen & Bergenthal op cit note 20 at 227.

²³ Eiselen & Bergenthal op cit note 20 at 228.

²⁴ See generally Michael Joachim Bonell *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (2004) at 117 – 124.

“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.”

This makes it clear that *pacta sunt servanda* is still a founding principle under the PICC and that discharge for hardship will only be permitted in exceptional circumstances. These circumstances are set out in article 6.2.2:

“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.”

McKendrick notes that the above definition of hardship can be broken down into two elements, firstly the requirement of fundamental alteration of the equilibrium of the contract and second the considerations listed as items (a) to (d).²⁵ The shift in the equilibrium of the contract may be due to an increase in the cost of performance under the contract, due (for example) to an increase in the cost of raw materials necessary for the production of the contract goods.²⁶ This would encompass the impracticability defence known to US law. Alternatively the equilibrium may be upset by a diminishing of the value of performance to be received by one party, due (for example) to inflation or frustration of the purpose of the contract.²⁷ An example of the latter would be the *Krell v Henry*²⁸ type scenario, where the value of the use of a flat leased by the defendant decreased drastically after the cancellation of the coronation procession which was to pass by that flat.

²⁵ Ewan McKendrick “Section 2: Hardship” in Stefan Vogenauer & Jan Kleinheisterkamp (eds) *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* (2009) 709 at 717. Compare the structure of the analysis in the official comment to the PICC.

²⁶ Official comment 2a to the PICC text.

²⁷ Official comment 2b to the PICC text.

²⁸ [1903] 2 KB 740 – discussed in Chapter 4 above.

As McKendrick notes, the important word used in this construction is “fundamental”.²⁹ This reinforces the stress placed upon the concept of *pacta sunt servanda* by article 6.2.1.³⁰ A question which has been asked in this regard is what degree of shift in the equilibrium is required? Maskow, who was a member of the drafting committee of the PICC, noted in an early article that he felt the shift should be of at least 50 per cent of the contract price.³¹ This opinion was reflected in the 1994 edition of the PICC.³² This figure was dropped from the 2004 revised version of the PICC, however, following criticism that it was too low and was arbitrary.³³ Brunner argues that in a situation of frustration of purpose (where the potential for loss is limited to the contract price) the shift should be in the order of 80 to 100 per cent of the contract price.³⁴ In a situation of impracticability, where the cost of performance has increased, the margin should be 100 to 125 per cent of the contract price.³⁵

The first additional requirement at article 6.2.2 (a) is that “the events occur or become known to the disadvantaged party after the conclusion of the contract”. This provision is inserted because generally if the relevant event occurs before the conclusion of the contract, the result is a situation of mistake rather than hardship. This provision is “generous”, however, since the hardship defence will still apply, even in a case which is truly one of mistake, provided the relevant event only becomes *known* to the disadvantaged party after the conclusion of the contract.³⁶ A US case example where the frustrating event only became known after the conclusion of the contract, although it was a pre-existing state of affairs, is *Mineral Park Land Co v Howard*.³⁷ Despite the fact that this was strictly speaking a case of

²⁹ McKendrick op cit note 25 at 718.

³⁰ Ibid.

³¹ Dietrich Maskow “Hardship and force majeure” (1992) *American Journal of Comparative Law* 657 at 662.

³² McKendrick op cit note 25 at 719.

³³ Ibid.

³⁴ Brunner op cit note 2 at 432.

³⁵ Ibid. In the *Scaform International* case (discussed above) an unforeseen rise in the cost of supplying goods under an international contract of sale in the order of 70 per cent was held to “fundamentally disturb the contractual balance” and renegotiation was enforced on the buyer. See the text of this case at the Pace Law School website (supra note 16).

³⁶ McKendrick op cit note 25 at 720.

³⁷ 156 P 458 (1916).

common mistake, the court in that case discharged the defendant on the ground of impracticability.³⁸

Article 6.2.2 (b) requires that the event “could not reasonably have been taken into account by the disadvantaged party at the time of conclusion of the contract”. This is a test of foreseeability. The test is an objective one, as indicated by the inclusion of the word “reasonably”. The official comments to this provision note that if the change in circumstances is a gradual one, and the change had already begun at the time of conclusion of the contract, the resultant disadvantage will not discharge a party’s obligations unless there was a dramatic increase in the pace of the change.³⁹

The requirement in article 6.2.2 (c) is that the event be “beyond the control of the disadvantaged party”. Hardship resulting from acts of God, such as unusual weather patterns will be clear examples under this provision. The same would be true of events resulting from war or change in political regime. McKendrick suggests a more problematic example: what about delays resulting from industrial action?⁴⁰ Where the employer is a third party, McKendrick suggests the provision will be satisfied, but it could become more difficult to show that requirement (c) has been complied with if the disadvantaged party is itself the employer of the striking workers. The industrial action could potentially then have been ended earlier by submitting to the workers’ demands.

The final requirement at article 6.2.2 (d) states that the disadvantaged party must not have assumed the risk of the occurrence of the ultimate event. This will obviously exclude speculative transactions where risks are calculated as part of the contract price, such as insurance agreements or trading in financial instruments.⁴¹

Once it has been determined that hardship exists, article 6.2.3 – which deals with the effects of hardship – comes into play. There are a number of steps to be followed in terms of this article. The first is that the disadvantaged party is entitled to request

³⁸ Ibid at 459.

³⁹ Official comment 3(b) to article 6.2.2.

⁴⁰ McKendrick op cit note 25 at 721.

⁴¹ See Illustration 4 to article 6.2.2.

renegotiations from its counterpart. Such request is to be made without “undue delay”. McKendrick notes that no express duty is placed on the opposing party to enter into such renegotiations, but this may be implied, especially given the existence of a good faith provision at article 1.7 and the duty to co-operate in terms of article 5.1.3.⁴² These duties of good faith and co-operation apply also to the disadvantaged party, so that it should only request renegotiation in a genuine case of hardship and not merely as a matter of strategy.⁴³

A request to renegotiate does not entitle the disadvantaged party to withhold performance in terms of article 6.2.3 (2). Should the renegotiations fail, article 6.2.3 (3) directs that their dispute be referred to a court. Under article 6.2.3 (4), a court may either terminate the contract “at a date and on terms to be fixed” or adapt the contract. This will only occur, however, if the court finds hardship is present and if such a ruling is “reasonable”. Termination of the contract would probably only be a measure of last resort.⁴⁴ Whether such termination operates *e tunc* or *ex nunc* will be determined by the court. The alternative of adaptation is to be preferred. The official comment to this article notes the inclusion of the word “reasonable” in article 6.2.3 (4) – if the court is of the opinion that neither termination nor adaptation is appropriate, it may decline to make any such award and either order that the parties resume negotiations or that the contract stands as is.⁴⁵

Compared to other municipal systems of law it can be seen from the brief analysis above that the regulation of hardship in the PICC is extremely progressive. Compared to the CISG, which does not expressly incorporate hardship, or even the English law of frustration, which recognises frustration of purpose, but not impracticability – and only allows discharge for hardship under very limited circumstances – the PICC cut huge inroads into the concept of *pacta sunt servanda*. Indeed their regulation of hardship reminds one of the position under German law, which is at the forefront in this area of the law. In this regard the analysis of Rösler that the PICC do not merely “restate” the law and search for a common core, but

⁴² McKendrick *op cit* note 25 at 722.

⁴³ Official comment 5 to article 6.2.3.

⁴⁴ McKendrick *op cit* note 25 at 723.

⁴⁵ Official comment 7 to article 6.2.3.

seek to find the best possible version of it, is pertinent.⁴⁶ The concern shown in the PICC for keeping a contract alive, rather than terminating it, and for settling matters out of court by renegotiation where possible is admirable and evidences a very practical manner of dealing with contractual disputes concerning hardship. The financial realities of high level international trade clearly call for a realistic approach to the problem of hardship and the PICC seem eminently fair and reasonable in this regard.

6.5 The Principles of European Contract Law

The PECL were the product of the labours of a Commission on European Contract Law.⁴⁷ This commission was headed by Professor Lando of the Copenhagen Business School (and is hence often referred to as the “Lando Commission”) and featured academics from all member states of the European Union.⁴⁸ The PECL consist of three parts, published between 1995 and 2003 and are inspired by the American Restatements in their style and structure.⁴⁹ They compete with the Unidroit PICC in the international arena and both bodies of rules are very similar, both in their layout and content. The major difference is that Unidroit’s rules are aimed at international commercial contracts, whereas the Lando Commission’s PECL are a body of general contract law rules.⁵⁰

The PECL contain both a force majeure and a hardship provision. Like the PICC and the CISG, the force majeure provision is not referred to by conventional terminology, but under the heading: “excuse due to an impediment”.⁵¹ Hardship is dealt with under the heading of “change of circumstances” at article 6:111:

“(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

⁴⁶ Rösler op cit note 12 at 505.

⁴⁷ Reinhard Zimmermann “Ius commune and the Principles of European Contract Law: contemporary renewal of an old idea?” in Hector MacQueen & Reinhard Zimmermann (eds) *European Contract Law – Scots and South African Perspectives* (2005) 1 at 4.

⁴⁸ Ibid.

⁴⁹ Ibid at 6.

⁵⁰ Ibid at 7.

⁵¹ Article 8:108.

- (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 ending it, provided that:
 - (a) the change of circumstances occurred after the time of conclusion of the contract,
 - (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.
- (3) If the parties fail to reach agreement within a reasonable period, the court may:
 - (a) end 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 in circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.”

The similarity of this provision to its counterpart in the PICC is striking. There are differences, however, which need to be taken into consideration. Like the hardship provision in the PICC, article 6:111 begins by reaffirming the principle of *pacta sunt servanda*. Again, this default position is qualified by an exception for hardship. The threshold which will have to be met in order to trigger the application of the article is then set out in sub-article (2). This provision is slightly different from the PICC, since the standard required is one of “excessive onerosity”, rather than a “fundamental alteration in the equilibrium of the contract”. The formulation used in the PECL is based on the equivalent provision in the Italian Civil Code at article 1467, which uses the formula “*eccessivamente onerosa*”. The ultimate meaning of both provisions is essentially the same, however: the comment to the PECL notes that excessive onerosity may be due to increased cost of performance or diminished value of performance. In other words: frustration of purpose, or impracticability of sufficient measure will give rise to an application of the provision. The requirements as to time (frustrating event to have occurred after the conclusion of the contract); foreseeability and risk are essentially the same those of the PICC, as the comments and illustrations in the text of the PECL demonstrate. Notably the requirement in the PICC at 6.2.2(c) that the (frustrating) event be beyond the control of the

disadvantaged party is not included in article 6:111, but one could argue that it is implied by sub-articles (2)(b) and (c).

The impact of sub-articles (3)(a) and (b) is essentially also the same as article 6.2.3 of the PICC, giving a court the power to terminate the contract from a date to be determined, or to adapt the contract to effect a fair distribution of losses and gains under the contract. The major difference between the two provisions is the power to award damages, which is given to a court by article 6:111(3), for failure to (re)negotiate under the hardship provision in good faith. This arguably provides this provision with more mettle than its PICC equivalent, although a duty of good faith applies to the latter as well.

The comment to article 6:111 ends with the following statement:

“So the mechanism adopted by Article 6:111 gives the court wide powers. These must be used in moderation, to avoid any reduction in the vital stability of contractual relations. This moderation is shown by the experience of countries which have already a similar rule.”⁵²

This statement reaffirms the importance of the principle of *pacta sunt servanda*, asserted from the outset in article 6:111. The provisions on hardship in the PECL reflect the common practice of the majority of states comprising the European Community, however, which include a similar rule in their municipal legal systems.⁵³ The PECL are thus in conformity with the majority of their member states when it comes to the provisions on hardship, and given the similarity to the PICC, can largely be said to conform to international trends as well. Whether contracting parties will choose to adopt the PECL or the PICC will be a matter of individual preference, given that neither codification is “hard” law. The PECL is clearly intended to be of regional application, however, and they may be the natural choice for European parties. Again, as with the PICC, the provision on hardship holds up to scrutiny and seems to reflect a good solution to the problem of changed circumstances and to stand as a synthesis of European municipal law in this regard.

⁵² Official comment D to article 6:111.

⁵³ Official comment A to article 6:111.

6.6 The Draft Common Frame of Reference

The Draft Common Frame of Reference (DCFR) is an academic initiative undertaken in 2005 under the auspices of the European Commission.⁵⁴ It stands as “soft” law and as a possible draft for an ultimate Common Frame of Reference (CFR). A CFR was called for in the European Commission’s “Action Plan on a More Coherent European Contract Law” of February 2003. The DCFR is thus a move in the direction of an ultimate “political” CFR, which will have to be ratified by member states and will then become “hard” law.⁵⁵ Thus, like the PECL, the DCFR is merely a set of non-binding model rules.

The DCFR deals with hardship in Book III at article 1:110 “Variation or termination by court on a change of circumstances”:

- “(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received has diminished.
- (2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:
 - (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or
 - (b) terminate the obligation at a date and on terms to be determined by the court.
- (3) Paragraph (2) applies only if:
 - (a) the change of circumstances occurred after the time when the obligation was incurred;
 - (b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;
 - (c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and
 - (d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.”

⁵⁴ Christian von Bar et al (eds) *Principles, Definitions and Model Rules of European Private Law* (2009) “Introduction 1” at 3 – 4.

⁵⁵ *Ibid*: “Introduction 6” at 7.

While it is clear that there has been a reshuffle of the formula used in the PECL and the PICC, essentially the same elements of those two previous hardship clauses are restated here. At the outset the principle of *pacta sunt servanda* is reaffirmed. Then the hardship exception is set out. The formula used here is similar to that of the PECL: performance must have become “so onerous because of an exceptional change in circumstances that it would be manifestly unjust to hold the debtor to the obligation”. Notable additions here are the inclusion of the requirement that the change must be “exceptional” and that the change must have resulted in “manifest injustice”. These inclusions render the threshold requirement more specific than that of the PECL, spelling out what was only implied in that formulation. The DCFR provision also demands that further requirements must be met, as to the time of occurrence of the frustrating event; the foreseeability of the event and that the risk of it had not been assumed by the debtor. An additional requirement is added here, that the debtor must have attempted to renegotiate the contract to achieve the necessary adjustment. This is different to the format used in the PICC and the PECL, although arguably the same result is achieved by equivalent provisions in those sections.⁵⁶ In all three sets of model rules an attempt at renegotiation is expressly or impliedly a condition precedent for an award of relief. A notable exclusion here is the power to award damages for a failure to renegotiate in good faith (as appears at art 6:111(3) of the PECL). This lack of a damages provision takes account of the criticism levelled at the equivalent PECL rule that a creditor might be acting in a fiduciary capacity and forcing it to comply with a request for renegotiation could potentially result in a conflict of interest.⁵⁷ As far as remedies under the DCFR go, the powers of the court are also the same: the contract may be varied to make it “reasonable and equitable” or terminated “at a date and on terms to be determined by the court”.

⁵⁶ The PECL provides at art 6:111(3) that relief is to be provided “if the parties fail to reach agreement within a reasonable period” and that damages may be awarded following a change of circumstances “for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing”. The PICC state at 6.2.3(1) – (2) that in case of hardship the disadvantaged party is entitled to request renegotiations, but that such a request does not entitle it to withhold performance.

⁵⁷ Official comment C to DCFR III 1:110.

Thus it can be seen that the DCFR provisions on hardship are largely based on the PICC and PECL, but take into account criticism levelled at these earlier rules. Like the PECL and the PICC, the DCFR contains a separate force majeure provision, which retains the language of the CISG by use of the formula, “excuse due to an impediment”.⁵⁸ What is abundantly clear from a simultaneous study of these various texts is that the formulations are repeated from one set of rules to the next and a purposive interpretation of the different sets of rules would probably proffer largely the same result.⁵⁹ The DCFR is thus largely unremarkable with regard to hardship – the provision will increase in importance, however, should it make the necessary leap from the realm of “soft” law to “hard” law and be included in an ultimate “political” CFR. To do so would be unproblematic for the majority of European countries, which as noted under the previous heading, already incorporate such a rule. Countries such as France and England, which have more restrictive rules on hardship than those of the DCFR, might not be so quick to accede, however. England has, in addition, not yet acceded to the CISG either at present date.⁶⁰ Clearly the move into the more concrete realm of a CFR will not be an easy one.

6.7 Relevance of the above model laws to South African law

To argue that the “soft” law codifications on hardship should guide the development of municipal law within a particular country is harder in practice than in theory. In theory, provisions such as those found in the PICC, the PECL and the DCFR present an ideal model as to what contract law should be. In practice, however, two major difficulties present themselves in such an argument. First, since the principles are relatively new, there is a lack of case law and academic writing to give meaning to these provisions.⁶¹ Second, the argument has been raised by Christie that for a municipal court to adopt the provisions of a soft law codification would be to encroach onto the territory of the legislature.⁶² This second argument seems to

⁵⁸ DCFR Book III – 3:104.

⁵⁹ Von Bar op cit note 54 “Introduction 49” at 30. The DCFR was prepared by the Study Group on a European Civil Code, which was the successor group to the Lando Commission which produced the PECL (ibid).

⁶⁰ www.cisg.law.pace.edu/cisg/countries/cntries.html

⁶¹ Brunner op cit note 2 at 26 – 27.

⁶² RH Christie “Our law of contract and the modern lex mercatoria” in Graham Glover (ed) *Essays in Honour of AJ Kerr* (2006) 59 at 73.

ignore the inherent power of the South African courts to develop the common law, however, and the necessity for the common law to be developed in accordance with the value of fairness in contracting.⁶³

The principles of “general” contract law examined in this chapter are evidence of a trend in international contracting which should influence the development of the South African common law. While our municipal courts would be wary to adopt the text of any of the codifications examined above verbatim, the fact that most of them (with the exception of the CISG) recognise hardship should encourage our courts to follow suit and do likewise. In this regard the common features of the soft law model rules as to what constitutes hardship and what remedies should follow a finding that hardship is present in a particular case, should be indicative of the type of features which should find their way into South African law.⁶⁴ Ideally South Africa should formulate its own rules on hardship, which should draw on the learning displayed in the various models studied here.

Although the differences between the available models are slight, there is different emphasis placed on the various elements of the hardship defence by the separate bodies of rules examined here. The common elements are the stress placed on the concept of *pacta sunt servanda*; the establishment of a threshold test for hardship in order to invoke the provision in the first place and the setting out of remedies once hardship has been found to be present in a contract. As stated above, on a purposive reading of these different models the effects of the individual rules are largely the same. Since South Africa need not adopt one model verbatim, but may draw on all three, this allows for the best elements of each provision to be chosen.

The PICC threshold test for hardship is, however, the most expressive, setting out the necessity of a “fundamental alteration in the equilibrium of the contract”. This best captures the effect of a change of circumstances on the mechanics of a reciprocal obligation. In interpreting this provision, one might well want to ask,

⁶³ Constitution, s 173. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and the arguments developed in chapters 7 & 8 below.

⁶⁴ Suggestions as to the appropriate means for South Africa to fill this gap in its municipal law will be considered below in chapter 8.

however, whether the obligation has become “excessively onerous” so as to cause “manifest injustice”. Clearly also the change in circumstances must be “exceptional”. As far as the additional guidelines go, the requirements of the PICC – that the frustrating event occurs – or becomes known to the parties – after the conclusion of the contract, is reasonably unforeseeable, is beyond the control of the disadvantaged party and that the risk of such an event has not been assumed by it – are the most thorough of the guidelines on offer and are hence the best guide to interpretation.

Based on the above considerations, the PICC seem to contain the best model rules on change of circumstances. Again it must be stressed, however, that each of the models discussed above has its merits and all three should be taken into account when attempting to derive an ideal method of dealing with this problem. It is hard to justify the choice of one set of rules over the other when one is simply trying to choose the best model and hence a pragmatic approach is advisable.

A foreseeable problem with the “soft” law codifications is that they are based on having an enforceable duty of good faith in contracting. Although South Africa is moving in this direction, such a duty remains at present at variance with our municipal law.⁶⁵ South African courts do have the power to develop the common law in terms of s 39(2) and s 173 of the Constitution, but it is notable that there has been, to date, no reported reference to any of the “soft” law codifications in our reported case law. A point worth noting in this regard, however, is that the South African Law Commission proposed a draft Bill in 1998 which included provisions on change of circumstances not too far removed from those of the model laws discussed in this chapter.⁶⁶ This Bill has to date not been enacted, however.

⁶⁵ See below: chapter 7. The provisions on hardship in the Bill appear to be based closely on art 6:111 of the PECL.

⁶⁶ Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms, Clause 4. Published as Annexure A to *Report on Unreasonable Stipulation in Contracts and the Rectification of Contracts*, South African Law Commission, Project 47, April 1998. These provisions were discussed above in chapter 2.

6.8 Conclusion

What can be learned from the study of supranational rules of contract law is what international panels of experts think contract law *should* be like. Indeed in the realm of international trade these model rules have enjoyed a fair measure of success and the ongoing trend towards a Common Frame of Reference in Europe provides evidence that this type of body of model rules does have a use. What our municipal courts can glean from a study of these transnational provisions on hardship is that South Africa is out of line with international practice and that steps need to be taken to address the problem of changed circumstances in our law.

The question as to how South Africa will seek to fill this gap remains, however. From the analysis of this and previous chapters, it becomes apparent that the doctrine of good faith has an important role to play in formulating an approach to the problem of changed circumstances. This doctrine will be addressed in the next chapter.

Chapter 7: Good faith and public policy as a basis for development

7.1 Introduction

In an article published in 1990, two South African academics, Van Huyssteen and Van der Merwe, argued that:

“In a system of contracts based on bona fides, a contractant should be entitled to proper conduct on the part of his co-contractant.”¹

This claim was based on the notion that bona fides should play a greater role in the law of contract, following on the Appellate Division decision in *Bank of Lisbon and South African Ltd v De Ornelas*,² which had eradicated the *exceptio doli generalis* from South African law. This statement was used as a stepping stone to make another claim which is relevant to the present discussion:

“A change in circumstances surrounding a contract could then result in a refusal to enforce the contract or a specific term if insistence on its enforcement in spite of the changed circumstances is objectively not in good faith when the relationship between the contractants is considered.”³

While the authors of the above proposition were unable to cite any South African authority for this view, they do mention that this is the German approach to the problem.⁴ In chapter five the German doctrine of *Wegfall der Geschäftsgrundlage* was described. With the introduction of this doctrine in the early 1920s, the German courts used § 242 of the German Civil Code (the good faith provision) as a peg on which to hang the new doctrine of changed circumstances. A simplified view of the German law at the time would have been similar to Van Huyssteen and Van der Merwe’s argument as set out above: after a change of circumstances a contract will cease to bind when it is no longer in good faith to rely on it.

¹ LF Van Huyssteen & Schalk Van der Merwe “Good faith in contract: proper behaviour amidst changing circumstances” (1990) *Stell LR* 244 at 248.

² 1988 (3) SA 580 (A).

³ Van Huyssteen & Van der Merwe op cit note 1 at 249.

⁴ *Ibid* at 250n33.

The use of a good faith standard is more controversial in the common law world, however. In the English jurisdiction, a fairly recent dictum of Lord Hoffmann states that:

“The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be ‘unconscionable’ is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.”⁵

Yet, while this may be the position in English law, the doctrine of frustration is still acknowledged to be an exception to the doctrine of absolute contracts, which is intended to achieve a “just and reasonable result” and “to do what is reasonable and fair”.⁶ Writing on the topic of good faith in Australian law, Carter and Peden note the following:

“Frustration’, as a concept, is a judicial construct designed to prevent injustice. Expressed in terms of good faith, good faith requires each party to respect the substance of the bargain struck and neither can call upon the other to perform in circumstances which are ‘radically different’ from those contemplated by the parties in their bargain.”⁷

In the United States, while the exact role to be played by good faith is debated amongst the writers on this topic,⁸ good faith as a general concept is recognised by the Uniform Commercial Code and the American Law Institute’s Second Restatement of Contracts.⁹ It is thus perhaps not surprising that both the UCC and the Second Restatement contain well defined rules on change of circumstances, which go beyond the confines of English law and recognise both frustration of purpose and impracticability as grounds of discharge. It has been shown already in

⁵ *Union Eagle Ltd v Golden Achievement Ltd* [1997] 2 All ER 215 (PC) at 218 – 219. (This was a unanimous decision of the Privy Council). See Roger Brownsword “Positive, negative, neutral: the reception of good faith in English contract law” in Roger Brownsword, Norma J Hird and Geraint Howells (eds) *Good Faith in Contract – Concept and Context* (1999) 13. Brownsword identifies positive, negative and neutral views in respect of the role of good faith in English law, but notes that the majority of English lawyers favour the negative or neutral view (at 25).

⁶ *J Lauritzen AS v Wijsmuller BV* (“*The Super Servant Two*”) [1990] 1 Lloyd’s Rep 1 at 8.

⁷ JW Carter & Elisabeth Peden “Good faith in Australian contract law” (2003) *Journal of Contract Law* 155 at 161 – 162.

⁸ Compare the different conceptions described in Robert S Summers “The conceptualisation of good faith in American contract law: a general account” in Reinhard Zimmermann and Simon Whittaker (eds) *Good Faith in European Contract Law* (2000) 118.

⁹ E Allan Farnsworth “Good faith in contract performance” in Jack Beatson & Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) at 155. The UCC recognises good faith at § 1 – 203 and the Restatement 2d at § 205.

chapter four that American law is more permissive when it comes to contracts struck by changed circumstances than the other common law jurisdictions.

What does this mean for South Africa's mixed legal system, when leading legal systems of both the common law and the civil law world recognise good faith as the underlying justification for discharge of contracts struck by changed circumstances?¹⁰ At the outset, this brief glance at the international context provides the backdrop against which Van Huyssteen and Van der Merwe's article was written and shows that all these authors were claiming is that South Africa be brought into line with international practice. The weakness of their argument of course is that good faith as a "free-floating", independent ground for intervention in contracts has been declared dead in South Africa.¹¹ It has always been recognised, however, that good faith is an underlying concept, with indirect influence on the development of the law.¹² While arguments for good faith to stand as an independent ground of intervention in contracts appear to be on the wane, the notion of fairness in contracting is alive and well, living on under the banner of public policy.¹³ In the recent *Barkhuizen* judgment, the Constitutional Court demonstrated that constitutional values demand that fairness be given a role to play in the South African law of contract.¹⁴ While the court was careful to stress that the Constitution also valued the sanctity of contracts,¹⁵ s 39(2) required the development of the common law to give effect to considerations of fairness which underpin the Bill of Rights.¹⁶

¹⁰ For civil law examples see section 7.2.1 below as well as article 6:258 of the Dutch BW and the discussion of the German doctrine of Wegfall der Geschäftsgrundlage in chapter 5. For the common law context see section 7.2.2 below generally as well as *The Super Servant Two* supra note 6 at 8 and § 1 – 203 read with § 2 – 615 of the Uniform Commercial Code, which applies in the US.

¹¹ *Bank of Lisbon* supra note 2 – see the discussion of this case below. Compare the decision of the Supreme Court of Appeal in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at [22] – [24]. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at [79] – [82] where the majority of the Constitutional Court declined to revisit the question as to the status of good faith in South African contract law.

¹² Compare *Brisley v Drotzky* supra note 11 at [22] where the majority judgment quotes Dale Hutchison to the effect that good faith has a "creative, a controlling and a legitimating or explanatory function."

¹³ See *Sasfin v Beukes* 1989 (1) SA 1 (A) and more recently *Barkhuizen v Napier* supra note 11.

¹⁴ *Barkhuizen* supra note 11 at [28] – [30].

¹⁵ *Ibid* at [57].

¹⁶ *Ibid* at [70].

This trend toward fairness in contracting has been furthered (in addition) by the Legislature through the promulgation of the Consumer Protection Act.¹⁷ Precisely what this means for the concept of good faith, or public policy, which requires the furtherance of good faith conduct, remains to be resolved through the interpretation of this statute by the courts.

Whether this concern for fairness will extend into the realm of discharge for changed circumstances based on good faith remains to be seen in South Africa. The notion advanced by Van Huyssteen and Van der Merwe needs to be explored, particularly given the recent trends in constitutional law with regard to contracts. If for no other reason, then because a general survey of the various “parent” legal systems shows that good faith requires that a solution to the problem of changed circumstances be found. Even in medieval times, the problem of changed circumstances was viewed as a morally defensible exception to the binding force of contracts through the *clausula rebus sic stantibus*.¹⁸ In this regard this chapter has several aims: First, to explore the meaning of good faith as an international legal concept and to evaluate the role which it plays in foreign countries, particularly in the context of changed circumstances. (This has already been partly demonstrated in the various case studies in preceding chapters). Second, to explore the meaning and role of good faith in the South African jurisdiction, with particular regard to the latest developments in constitutional law and the imperative that the common law be developed to give effect to fairness in contracting. Finally the aim of this chapter is to flesh out the contentions of Van Huyssteen and Van der Merwe highlighted above. Their article was published in a pre-constitutional South Africa and much has changed in our common law of contract since then. Furthermore the article suggests a solution without really giving content to its ideas. To progress a more concrete proposal is required.¹⁹ Hence, in sum, the aim of this chapter is to evaluate the possibility of the development of a solution to the problem of changed circumstances in South African contract law which relies on good faith (or some analogous concept) as the peg on which to hang the doctrine.

¹⁷ See in particular sections 40, 48 and 52 of the Consumer Protection Act.

¹⁸ See chapter 3 in this regard.

¹⁹ This will be considered fully in chapter 8.

7.2 Good faith in other countries

Aside from the role which it has played in shaping the law of changed circumstances in contract in several countries, good faith appears as a more general concept in many leading Western legal systems. Either the doctrine underlies and legitimates the established rules of contract law as a mere principle or value, or serves as an independent standard or rule that parties must act in good faith in their contractual relations.²⁰ Thus while we see that most authors deny good faith any sort of independent role in English law, in countries like Germany and the Netherlands good faith provides a direct basis on which the conduct of a party under a contract may be challenged. In order to answer the questions, “What is good faith?” or, “How can good faith be used to address the problem of changed circumstances in South African law?” it is useful to see the role which this concept plays in foreign jurisdictions. This section will focus on the legal systems which have received particular attention in this thesis, particularly German and Dutch law, as well as the law of several Common law countries, such as England, the USA and Australia.

7.2.1 Civil law examples

The German civil code (BGB) imposes a duty to act in good faith on contracting parties at § 242. A translation of this section reads as follows, “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”²¹ The concept of good faith is reflected in the original German by the phrase, “Treu und Glauben”. Whittaker and Zimmermann note that this phrase, which literally means “fidelity and faith”, is a traditional German concept taken from medieval law, which came to be used as the equivalent of the Roman concept of *bona fides*.²² This type of provision in a code is often referred to as a “general

²⁰ For a succinct, jurisprudential account of the difference between rules and principles, see: Ronald Dworkin *Taking Rights Seriously* (1977) at 14 – 46. The author gives the examples of a principle “that no one should profit from his own wrongdoing” and a rule “that a will is invalid unless signed by three witnesses”. See also Duncan Kennedy “Form and substance in private law adjudication” 89 *Harvard Law Review* (1975 – 1976) 1685 who distinguishes a rule (“clearly defined and highly administrable”) from a standard (“equitable ... producing ad hoc decisions with relatively little precedential value”) at 1685.

²¹ Translation found at the website for the Bundesministerium der Justiz: www.gesetze-im-internet.de/englisch_bgb (last accessed 9 November 2009).

²² Simon Whittaker & Reinhard Zimmermann “Good faith in European contract law: surveying the legal landscape” in Reinhard Zimmermann & Simon Whittaker (eds) *Good Faith in European Contract Law* (2000) at 18.

clause”, which can be put to several different uses as the situation requires.²³ In this regard, Ebke and Steinhauer argue that the German good faith provision has the following uses:

“In German contract law, the doctrine of good faith fulfils three basic functions: it serves as the legal basis of interstitial law-making by the judiciary, it forms the basis of legal defences in private law suits, and it provides a statutory basis for reallocating risks in private contracts.”²⁴

This is clearly the use of a general good faith clause, but what does “Treu und Glauben” actually mean? Whittaker and Zimmermann note that this concept entails more than the sum of its component parts and implies an objective standard of good faith.²⁵ Rather than dealing with the subjective intentions of the parties to a contract, § 242 holds them up to an objective standard of conduct, against which their actions may be compared. For this reason these authors argue, good faith cannot be given an abstract meaning, but takes its shape from the cases in which it is applied.²⁶ Thus a body of case law is able to grow, which is based on § 242 and which gives meaning to it.

Thus to take the doctrine of Wegfall der Geschäftsgrundlage as an example, it was developed by the courts to address a lacuna in the BGB regarding the problem of changed circumstances. Judges who had been trained in the civil law tradition which prevented them (in theory) from making law, used § 242 as a peg on which to hang the new doctrine. In time a body of case law grew up around the concept of Wegfall der Geschäftsgrundlage, so that reference to the doctrine of good faith became unnecessary. Finally the concept received its own place amongst the provisions of the BGB when the code was amended in 2002.²⁷

The widespread examples of this type of use of general clauses, particularly in German law, but also in Dutch law, led Hesselink to argue that good faith is not

²³ Peter Schlechtriem “The functions of general clauses, exemplified by regarding Germanic laws and Dutch law” in Stefan Grundmann & Denis Mazeaud (eds) *General Clauses and Standards in European Contract Law* (2006) at 41.

²⁴ Werner F Ebke & Bettina M Steinhauer “The doctrine of good faith in German contract law” in Jack Beatson & Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) at 171.

²⁵ Whittaker & Zimmermann op cit note 22 at 30 – 31.

²⁶ Ibid.

²⁷ This doctrine is now captured under § 313 “Störung der Geschäftsgrundlage”. See chapter 5 for a fuller account.

merely a “norm” in these systems, but is rather a “mouthpiece ... for new rules”, disguising the role of the judge in making law.²⁸ Rather than good faith being a rule on which new decisions are based, Hesselink argues, judges should formulate the new rule as explicitly as possible.²⁹ Thus Hesselink sees good faith as merely an underlying principle in the Netherlands. He sums up:

“Good faith is not the highest norm of contract law or even of private law, but no norm at all, and merely the mouthpiece through which new rules speak, or the cradle where new rules are born. What the judge really does when he applies good faith is to create new rules.”³⁰

The new Dutch civil code (Burgelijk Wetboek – “BW”), promulgated in 1992, gives effect to good faith in articles 6:2 and 6:248. The formula used to express the concept of good faith is “redelijkheid en billijkheid”, which translates roughly to “reasonableness and fairness”. In ascribing meaning to this phrase, a court must refer to “generally accepted principles of law, to the current legal convictions in the Netherlands, and to the societal and personal interests involved in the given case” (art 3:12 BW).³¹ The concept is an objective one and plays a role in supplementing duties, limiting rights and in the interpretation of contracts.³² As in Germany it is thus a clause of general application, used in shaping the law of contract and can thus be seen either as an “open norm”³³ or alternatively, as in Hesselink’s view above, good faith is an underlying principle which justifies the creation of new rules.

7.2.2 Common law examples

In English law there is no duty of good faith, in the sense of a separate doctrine which can be used at judicial discretion in the resolution of appropriate problems. The denial of the existence of such a doctrine in *Union Eagle*³⁴ has already been cited in the introduction to this chapter. This does not mean, however, that considerations of fairness do not play a role in English contract law. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, Bingham LJ said the following:

²⁸ Martijn Hesselink “Good faith” in Arthur Hartkamp et al (eds) *Towards a European Civil Code* (1998) at 302 – 304.

Ibid.

³⁰ Ibid at 307.

³¹ Whittaker & Zimmermann op cit note 22 at 54n287.

³² Hesselink op cit note 28 at 287, 291.

³³ Ibid at 287 – 289.

³⁴ Supra note 5.

“English law has, characteristically, committed itself to no such overriding principle [of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law has also made its contribution, by holding that certain classes of contract require the utmost good faith ... and in many other ways.”³⁵

Writing in the context of Australian law, Carter and Peden give a few more relevant examples: implied terms (the test for the inclusion of an implied term takes account of what the parties acting in good faith would have intended); interpretation of contracts (this is an objective process, which assumes that the parties negotiated the terms in good faith); misrepresentation (in the sense that the law corrects bad faith) and frustration (the ultimate rationale of this doctrine is good faith).³⁶ The central argument of the contribution of these authors is that good faith is the “essence of contract” – in other words that it already is encapsulated in the specific rules of contract law – and does not need to stand as an independent doctrine or implied term to a transaction.³⁷ Differences between Australian and English law aside, Kötz makes a relevant point in his defence of the affinity of English law for good faith principles:

“Indeed, instead of saying, as an English judge would, that implied terms should be read into a contract in accordance with the dictates of business efficacy, one could as easily say, as the German judge does, that a certain implied obligation should be imposed on a party because good faith requires it.”³⁸

As an uncodified system, English law has no such thing as a “general clause” in the sense that civil law systems do. There are certain statutory protections available to consumers, based on the ideal of fairness in contracting. The foremost of these is the Unfair Contract Terms Act 1977, which (inter alia) restricts the extent to which an exemption clause may exclude liability for negligence or breach of contract. In addition there are the Unfair Terms in Consumer Contracts Regulations 1999, which

³⁵ [1988] 2 WLR 615 at 621.

³⁶ Carter & Peden op cit note 7 at 158 – 162. This is a selection from the full list of examples given by these authors.

³⁷ Ibid at 158.

³⁸ Hein Kötz “Towards a European civil code: the duty of good faith” in Peter Cane & Jane Stapleton (eds) *The Law of Obligations – Essays in honour of John Fleming* (1998) at 250.

apply to terms “which have not been individually negotiated”.³⁹ Such a contract will be considered “unfair” (and therefore not binding on the consumer⁴⁰) if “contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”⁴¹

Thus it is perhaps the methods and institutions of civil law systems which are alien to English law, rather than ideas of fairness or equity. Granted, the good faith principle manifests itself differently in the English legal system and civilian systems like German law, but this does not mean that English law is unjust or inequitable. Rather the lack of a general doctrine of good faith reflects the lack of a codified legal system and a different role being ascribed to judges, who in the English system go cautiously from one case to the next, rather than exercising a more general discretion within a broadly worded code.⁴²

Australia, by contrast, seems to be moving in the direction of recognising an explicit general duty to act in good faith. In *Renard Constructions (ME) Pty Ltd v Minister for Public Works*⁴³ the New South Wales Court of Appeal held that a good faith obligation should be accepted in Australia, in the same way that such an obligation was recognised in Europe and the United States.⁴⁴ Mason argues that this obligation should thus extend only to the performance and enforcement of the contract, rather than its making, since this is the limit placed on the doctrine of good faith in the US.⁴⁵ Subsequently it has been held that there is an implied term in all contracts that parties must act in good faith.⁴⁶ This has remained the view of the New South Wales Court of Appeal.⁴⁷ These cases led Mason to argue that good faith and fair dealing are “already substantially in place under [Australian] law” and that this inclusion would bring “greater coherence” to the existing rules governing

³⁹ Section 5(1).

⁴⁰ Section 8(1).

⁴¹ Section 5(1).

⁴² Kötz op cit note 38 at 245 – 247.

⁴³ (1992) 26 NSWLR 234.

⁴⁴ *Ibid* at 263 – 269 (per Priestley JA). See the discussions of this case in Carter & Peden op cit note 7 and in Anthony Mason “Contract, good faith and equitable standards in fair dealing” (2000) *LQR* 66 at 67 – 69.

⁴⁵ Mason op cit note 44 at 67.

⁴⁶ *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 36 – 37.

⁴⁷ See authority cited in Mason op cit note 44 at 68.

contract performance.⁴⁸ Carter and Peden, in their contribution, do not doubt that Australian law recognises a principle of good faith. Rather they disagree with the mechanism of an implied term, arguing that an “inherent principle” of good faith already exists, “underlying and informing the whole framework of contract law.”⁴⁹ Thus whether as an enforceable rule, as per *Renard*, or as an inherent feature of contract law – as arguably is the case in its parent, English law – it would appear that good faith is alive and well in Australia.

Good faith in the United States is entrenched via legislation and appears to be a fairly well-developed concept in that country. Thus in the Uniform Commercial Code, introduced in the US during the 1960s, good faith is enforced by § 1 – 203, which provides:

“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”

The meaning of the term “good faith” is defined in § 1 – 201(20) as “honesty in fact and the observance of reasonable commercial standards of fair dealing.” This is a revised definition, which incorporates the objective standard of fair dealing, and has been enacted in over two thirds of the American states.⁵⁰ This new definition replaces the previous § 1 – 201(19), which defined good faith as “honesty in fact in the conduct or transaction concerned,” and required the subjective notion of honesty, rather than a more general notion of objective reasonableness in conduct.⁵¹

The concept of good faith contained in the American Law Institute’s Restatement of Contracts Second, promulgated in 1979, is more far reaching:

“§ 205 Duty of Good Faith and Fair Dealing. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

This is a far broader notion of good faith. Comment (a) to § 205 defines “good faith and fair dealing” as: (i) “faithfulness to an agreed common purpose”; (ii) “consistency with the justified expectations of the other party” and (iii) excluding conduct

⁴⁸ Mason op cit note 44 at 94.

⁴⁹ Carter & Peden op cit note 7 at 171.

⁵⁰ Joseph M Perillo *Calamari and Perillo on Contracts* (2009) at 414.

⁵¹ Summers op cit note 8 at 122 – 123. See also Perillo op cit note 50 at 414.

characterised as being in “bad faith” because it violates “community standards of decency, fairness or reasonableness.”⁵² Thus we see that good faith is defined as being an “excluder” of bad faith behaviour, which is how it had initially been characterised in the writing of Summers.⁵³ According to Mason, this simple technique is used to counter arguments that good faith is an “obscure and uncertain concept.”⁵⁴

According to Summers, § 205 does not apply to the negotiation stage of a contract, but only to the performance and enforcement of it.⁵⁵ In addition, the Second Restatement is not legislation, but only a body of model rules. It does appear that good faith has a fairly tangible existence in the United States, however, with the protection it provides being reminiscent of the European codes.

A common feature of both the civil and common law is that good faith is an underlying rationale for the development of equitable rules. In England this development takes a rather ad hoc form and the view that good faith is a separate legitimating factor is not favoured. In Germany the courts draw directly on the principle of good faith in developing the law and § 242 has played an important role in developing a doctrine of changed circumstances. These two countries represent perhaps the poles of good faith with other legal systems fitting somewhere in between. Notably the US and, to an extent, Australia also recognise a doctrine of good faith, although the conceptualisation of this doctrine seems to be a bit vaguer than in Germany. US contract law is based on a system of model rules, however, and thus does not have to rely on ad hoc development to create new equitable doctrines.

What this brief survey has shown is that developing an equitable doctrine to deal with changed circumstances could easily be legitimated by reference to a doctrine of

⁵² See the discussion in Summers op cit note 8 at 123 – 125.

⁵³ Ibid at 125 – 129. This “excluder” concept was first formulated by Summers in 1968. See: Robert S Summers “Good faith in general contract law and the sales provisions of the Uniform Commercial Code” (1968) 54 *Virginia Law Review* 195. Summers op cit note 8 gives a general synthesis of the leading American views on good faith, comprising his own, as well as those of Burton and Farnsworth.

⁵⁴ Mason op cit note 44 at 69. Further authority is cited there in support of this contention.

⁵⁵ Ibid at 125.

good faith, provided such a role for good faith is recognised in a country's legal system. Since South Africa is a mixed legal system and thus its contract law displays features of both the common law and civil law regimes, it will be interesting to plot where the South African system fits on this continuum. Ultimately the question must be asked: if we are to have a doctrine to deal with changed circumstances and it appears that the existing technical rules of contract law are deficient, could South Africa not introduce a new rule of changed circumstances based on good faith?

7.3 Good faith in South African law

Good faith, as encapsulated in the traditional Roman phrase “bona fides,” is one of the founding principles of South African contract law.⁵⁶ This principle comes to us directly from the Roman law notion of a *negotia bonae fidei*, in the sense of a consensual contract.⁵⁷ A Roman judge could decide a case concerning a contract of this type by use of a discretionary standard of good faith, rather than according to the strict, formulaic rules applicable to the *negotia stricti iuris*.⁵⁸ In medieval times Roman law was received in Holland and blended to form the traditional Roman-Dutch law. In classical Roman-Dutch law, all contracts were considered to be *bonae fidei*, so that good faith became a universal contractual requirement.⁵⁹ Since Roman-Dutch law forms the backbone of our present day South African law of contract, the assertion of the courts that good faith is a cornerstone of our modern law of contract is understandable. Exactly how this ideal is to be achieved has been the subject of some contention in the case law, however. The first resort of the courts was to a Roman law device, which had good faith as its goal.

⁵⁶ This principle has been asserted on several occasions by the Appellate Division (and subsequently the Supreme Court of Appeal). See for example: *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A); *Brisley v Drotzky* supra note 11 at [22]. See also Reinhard Zimmermann “Good faith and equity” in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross* (1996) at 240 and AJ Barnard-Naudé “‘Oh what a tangled web we weave...’ Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract” (2008) 1 *Constitutional Court Review* 155 at 176.

⁵⁷ Compare (generally) Zimmermann op cit note 58 at 217 – 220 and Dale Hutchison “Good faith in the South African law of contract” in Roger Brownsword, Norma J Hird & Geraint Howells (eds) *Good Faith in Contract: Concept and Context* (1999) at 215.

⁵⁸ See Hutchison op cit note 57.

⁵⁹ Zimmermann op cit note 56 at 220.

7.3.1 Exceptio doli generalis

The exceptio doli was an equitable defence introduced by the Roman administration to curb the injustice under a second class of contracts, known as *negotia stricti iuris*.⁶⁰ The most famous example of this class of contracts was the *stipulatio*, which was binding because a particular verbal formula had been used in its conclusion.⁶¹ Good faith initially played no role in the *stipulatio*.⁶² The aim of the *exceptio doli* was to give a defence to the innocent party where fraud had been perpetrated under a *stricti iuris* contract.⁶³ The defence had two forms: the *exceptio doli specialis*, where the plaintiff's fraud had induced the contract and the *exceptio doli generalis*, where the plaintiff's conduct in bringing the action in the first place constituted bad faith.⁶⁴ As noted above, however, by the time of classical Roman-Dutch law, all contracts were *bonae fidei*. Since the *stricti iuris* class of contracts had ceased to exist, the justification for the *exceptio doli* had likewise terminated. Nevertheless the *exceptio doli generalis* was to enjoy a "surprising afterlife"⁶⁵ in South African law.

In South Africa the *exceptio doli generalis* was dredged up from the annals of history toward the end of the nineteenth century. While it seldom served its traditional function as an *independent* ground for intervention in contracts, it was used in a justificatory fashion. The English law doctrines of estoppel, rectification as well as the concept of an innocent misrepresentation were all incorporated into South African law on the basis of the *exceptio doli generalis*.⁶⁶ Or in the words of Trollop J:

"The English doctrine of estoppel by representation migrated to this country on the authority of a passport that it approximated the *exceptio doli mali* of Roman Law. However doubtful the validity of that passport might originally have been ... the doctrine has become naturalised and domiciled here as part of our law..."⁶⁷

⁶⁰ For the source of this historical account (except where otherwise indicated) see Zimmermann op cit note 56 at 218 – 220 and Hutchison op cit note 57 at 215 – 217.

⁶¹ Reinhard Zimmermann *The Law of Obligations* (1990) at 546.

⁶² Zimmermann op cit note 61 at 546 – 549 traces adaptation of the *stricti iuris* contract over time. Under Justinian the traditional oral (*stipulatio*) contract was reconciled with the contemporary practice of writing contractual obligations down. The resultant hybrid was a *contractus litteris*, but also an example of a *negotia stricti iuris*. With the extension of enforceable contracts to include consensual (*bona fides*) contracts in medieval times, the *negotia stricti iuris* died out.

⁶³ Zimmermann op cit note 56 at 218 – 219.

⁶⁴ Hutchison op cit note 57 at 216.

⁶⁵ Zimmermann op cit note 56 at 236.

⁶⁶ Hutchison op cit note 57 at 218.

⁶⁷ *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) at 49A.

Apart from this justificatory function, however, the *exceptio doli generalis* remained a residual defence. It was considered by the courts to be a mere “surplusage” which was only employed when the more technical rules of contract law proved deficient.⁶⁸ And thus while the defence was referred to by the Appellate Division in establishing other rules,⁶⁹ or assumed *obiter* to apply,⁷⁰ it did not form the actual ratio of any decision. Indeed Zimmermann notes that the only case in which the *exceptio doli* was held to have been successfully invoked as an independent ground for intervention in contracts was *Rand Bank Ltd v Rubenstein*.⁷¹ This case involved a standard form deed of suretyship concluded by the defendant with the plaintiff bank.⁷² The defendant did not familiarise himself with the contents of the deed of cession, which was sufficiently widely worded to hold him liable for a separate debt, which neither party had initially intended to be covered by the agreement.⁷³ The defendant’s arguments that such reliance was precluded by the doctrines of rectification, misrepresentation or estoppel all failed.⁷⁴ The final resort of the defendant was to the *exceptio doli generalis*, arguing that the plaintiff’s reliance on the suretyship agreement was in bad faith under the circumstances.⁷⁵ Botha J concurred with this final argument and the action failed on this ground.⁷⁶

The precedent set by the *Rand Bank* case seemed to provide a measure of legitimacy to the *exceptio doli* defence, and to provide authority for good faith to serve as an independent ground for intervention in contracts. This did not last long, however. In the *Bank of Lisbon* case⁷⁷ the majority of the Appellate Division declared the *exceptio doli* defence to be dead. Joubert JA traced the historical roots of the defence (as set out above) and came to the conclusion that it had never formed part of Roman-Dutch law and was in consequence no part of South African law.⁷⁸ In his words:

⁶⁸ *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) at 607.

⁶⁹ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 (which accepted rectification into SA law).

⁷⁰ *Paddock Motors (Pty) Ltd v Igesund* supra note 56.

⁷¹ 1981 (2) SA 207 (W). See Zimmermann op cit note 56 at 234.

⁷² *Ibid* at 209.

⁷³ *Ibid* at 209, 213.

⁷⁴ *Ibid* at 213C – 214A.

⁷⁵ *Ibid* at 214.

⁷⁶ *Ibid* at 215B-H.

⁷⁷ *Supra* note 2.

⁷⁸ *Ibid* at 605H – 607A.

“All things considered, the time has now arrived, in my judgment, once and for all, to bury the exceptio doli generalis as a superfluous, defunct anachronism. Requiescat in pace.”⁷⁹

This judgment thus spelt the end for the exceptio doli as an independent ground for intervention in contracts. The device had played another role too, however. This (it will be remembered) was to legitimate the introduction of equitable remedies into South African law. Had good faith lost its creative function in South African law? In the words of Zimmermann:

“Has the crucial device for introducing equitable elements been abandoned and have the South African courts thus lost that flexibility in the evaluation of contractual rights and duties which has enabled them to adapt the law of contract to the demands of changing times by developing new or productively incorporating seemingly foreign strands of legal tradition?”⁸⁰

The end of the exceptio doli was not the end of the line for good faith in South African law, however. As noted above, the role of good faith was debated further in subsequent cases, to which this chapter must now turn.

7.3.2 Bona fides

As noted above, all contracts in Roman-Dutch law were regarded as being *bonae fidei*. As a result good faith was an informing value in the law of contract and played a role in ensuring fair performance and in interpretation. As early as 1923, the Appellate Division had relied on good faith to set aside the outcome of a rigged auction.⁸¹ Certain types of contracts, such as those for insurance, had always been recognised as requiring good faith of the parties.⁸² It was thus not outrageous for Jansen JA to base the incorporation of the doctrine of repudiation for anticipatory breach from English law on the notion that in South Africa all contracts were regarded as being *bonae fidei*:

“It could be said that it is now, and has been for some time, felt in our domain, no doubt under the influence of the English law, that in all fairness there should be a duty upon a promisor not to commit an anticipatory breach of contract, and such a duty has in fact often been enforced by our Courts. It would be consonant with the history of our law, and also legal principle, to construe this as an application of the wide jurisdiction to imply terms conferred upon a court

⁷⁹ Ibid at 607A-B.

⁸⁰ Zimmermann op cit note 56 at 236.

⁸¹ *Neugebauer & Co v Herman* 1923 AD 564.

⁸² These were referred to as involving a relationship *uberrimae fidei* (“the utmost good faith”) under the influence of English law.

by the Roman law in respect of the *judicia bonae fidei*. It would not then be inapt to say, elliptically, that the duty flows from the requirement of *bona fides* to which our contracts are subject, and that such duty is implied in law and not in fact.”⁸³

Soon after a separate concurring judgment from the Appellate Division affirmed the notion that an objective concept of good faith had been used since Roman times to develop new naturalia for contracts.⁸⁴ These terms implied by law did not constitute a *numerus clausus*, it was held, and could be added to where changing circumstances and new requirements necessitated this.⁸⁵ Thus again, good faith was used to import new terms implied by law into modern South African contract doctrine.

While the view that the concept of *bona fides* underlies our law of contract may have held sway in the Appellate Division, it was another thing entirely for it to stand as an independent ground for intervention in contracts. Thus while Jansen’s judgment in *Tuckers Land and Development Corporation v Hovis* (from which the above extract was taken) may have been a unanimous decision of the Appellate Division, his defence of the *exceptio doli* in *Bank of Lisbon* was less successful. As noted above, the majority of the court laid this defence to rest in that case. Jansen JA, however dissented. He was of the opinion that there needed to be some enforceable expression of good faith in South African law:

“In our law the requisite of good faith has not as yet absorbed the principles of the *exceptio doli* nor has the concept of *contra bonos mores* as yet been specifically applied in this field. To deny the *exceptio* right of place would leave a vacuum.”⁸⁶

The application of public policy, or its component, the *boni mores*,⁸⁷ to ensure good faith performance under contracts was a fairly new idea, as Jansen JA himself states in the above extract. Public policy as a ground for setting aside a contract had come to the fore with the decision of the Appellate Division in *Magna Alloys and Research*

⁸³ *Tuckers Land and Development Corporation v Hovis* supra note 56 at 652D-E. This was a unanimous decision.

⁸⁴ *A Becker & Co (Pty) Ltd v Becker* 1981 (3) SA 406 (A) per Van Heerden AJA at 419. The formula used for objective good faith in the original Afrikaans is “redelikheid en billikheid”.

⁸⁵ *Ibid.*

⁸⁶ *Bank of Lisbon* supra note 2 at 616C.

⁸⁷ See the judgment of Ncgobo J in *Barkhuizen* at [28], [51] & [73] where he states that public policy comprises inter alia the legal convictions of the community or the *boni mores*. See also Dale Hutchison and Chris-James Pretorius (eds) *The Law of Contract in South Africa* (2009) at 31.

(SA) (Pty) Ltd v Ellis.⁸⁸ This was a watershed case in South African law concerning restraint of trade provisions, in that it reversed the onus of proving a restraint provision was unreasonable from the employer to the employee.⁸⁹ The relevance of this case to the present discussion lies in the lengthy discussion of public policy undertaken by Rabie JA. The Appellate Division expressed the opinion in this case that restraint provisions were binding and enforceable unless the enforcement thereof would be against public policy.⁹⁰ Agreements which were against public policy were unenforceable.⁹¹ Public policy was, moreover, a variable concept, which could change from time to time.⁹² Public policy favoured the concept of *pacta sunt servanda*, but could be limited by other considerations, such as a party's right to earn a living.⁹³

This new limitation on freedom of contract was conservatively applied by the courts, however, as Lubbe points out.⁹⁴ Indeed *Magna Alloys* was ultimately a decision in favour of *pacta sunt servanda*, rather than against it.⁹⁵ This application of public policy was built upon soon after, however, to create the defence of contracts being illegal at common law due to their unconscionable nature. Indeed, within one year of the *Bank of Lisbon* case the Appellate Division did develop the public policy defence to address a situation of bad faith in *Sasfin (Pty) Ltd v Beukes*.⁹⁶ In that case, an anaesthetist had ceded all his present and future rights to receive income from his profession as security to the appellant finance company.⁹⁷ In the words of the court, he was reduced to the "position of a slave, working for the benefit of Sasfin".⁹⁸ Although public policy generally favoured the "utmost freedom of contract", it also

⁸⁸ 1984 (4) SA 874 (A). See the discussion in Zimmermann op cit note 56 at 258 – 259.

⁸⁹ Ibid at 897 – 898.

⁹⁰ Ibid at 897I.

⁹¹ Ibid at 891G.

⁹² Ibid at 891H.

⁹³ Ibid at 893H – 894C.

⁹⁴ Gerhard Lubbe "Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontrakreg" (1990) *Stellenbosch Law Review* 7 at 12 – 13.

⁹⁵ A restraint of trade agreement was now valid, as any other form of contract would be. It was only the enforceability thereof which depended on public policy, and the onus of proving a restraint provision was unenforceable was placed squarely on the party attempting to escape the provision. This was thus a decision in favour of legal certainty, since restraint agreements which had been concluded were now more reliable.

⁹⁶ Supra note 13.

⁹⁷ Ibid at 5 – 6.

⁹⁸ Ibid at 13H.

required considerations of “simple justice between man and man”.⁹⁹ The agreement between Beukes and Sasfin was, in the words of the court:

“...clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy.”¹⁰⁰

Again the court was careful to state, however, that:

“The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.”¹⁰¹

While Lubbe criticised the *Sasfin* principle as being too simplistic for its use of the “simple justice between man and man” formula,¹⁰² this approach to unconscionability in contracts was confirmed by the Appellate Division in *Botha (now Griessel) v Finanscredit (Pty) Ltd.*¹⁰³ Lubbe argued that the application of public policy in *Sasfin* was simply an expression of the good faith requirement.¹⁰⁴ Thus hope for good faith as an independent ground for intervention in contracts survived *Bank of Lisbon*. Although the idea of fairness in contracting had been resurrected under the banner of public policy, the same considerations seemed to underlie this approach.

The link between good faith and public policy was further developed in a minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO.*¹⁰⁵ In this case, the Supreme Court of Appeal was called to pronounce upon the validity of a suretyship agreement. This agreement had been signed by a frail 85 year old woman in favour of the appellant bank.¹⁰⁶ The principal debtor in this case was her favourite son, who had prevailed upon her to sign the document.¹⁰⁷ The majority of the court held that the aged surety had lacked the capacity to understand the nature and consequences of her actions at the time of signature and thus dismissed the appeal.¹⁰⁸ Olivier JA dissented from this view. He held that the surety had indeed

⁹⁹ Ibid at 9E-G.

¹⁰⁰ Ibid at 13J – 14A.

¹⁰¹ Ibid at 9B.

¹⁰² Lubbe op cit note 94 at 24.

¹⁰³ 1989 (3) SA 773 (A) at 782J – 783A.

¹⁰⁴ Lubbe op cit note 94 at 20 – 21.

¹⁰⁵ 1997 (4) SA 302 (SCA).

¹⁰⁶ Ibid at 309.

¹⁰⁷ Ibid at 331.

¹⁰⁸ Ibid at 315A-B.

been of sound mind at the time of signature, but that it had been in bad faith for the appellant bank to rely upon the consensus of an old woman who could hardly see or hear, was often confused and was clearly under the influence of her son. The fact that bank had not even explained the import of the contract to her, meant that its reliance on her consensus was in bad faith and she was accordingly not bound.¹⁰⁹

Olivier JA demonstrated through an analysis of past cases that bona fides had always been an underlying element of the South African law of contract.¹¹⁰ He then noted that since the decision in *Sasfin v Beukes* there had been a resurgence of values of fairness under the heading of public policy.¹¹¹ Olivier JA then went on to link these two developments:

“Dit kan na my mening tereg gesê word dat die *bona fide*-begrip in die kontraktereg 'n onderdeel van die algemeen-geldende openbare belang-beginsel is. Die *bona fides* word toegepas omdat die openbare belang dit vereis.”¹¹²

Olivier JA then turned to the status of the *exceptio doli* and demonstrated that while it had been buried by the *Bank of Lisbon* case, the bona fide principle remained alive, along with the principle of public policy.¹¹³ This led the judge of appeal to the following conclusion:

“Ek voel myself dus vry om die beginsels van openbare belang, wat die *bona fide*-beginsel insluit op die onderhawige feitestelsel toe te pas net soos wat dit in *Sasfin (Pty) Ltd v Beukes* en *Botha (now Griessel) v Finanscredit (Pty) Ltd* en die ander genoemde uitsprake gedoen is.”¹¹⁴

This was a bold finding indeed. It remained the minority view of a single judge in that case, however, and was thus not binding precedent. When a unanimous Supreme Court of Appeal seemed to endorse this view in an obiter dictum, however, the good faith movement really started to gain some momentum.¹¹⁵ In *Mort NO v Henry Shields-Chiat*,¹¹⁶ Davis J held that constitutional values demanded that contracts not

¹⁰⁹ Ibid at 330I – 331H.

¹¹⁰ Ibid at 320 – 321.

¹¹¹ Ibid at 321H – 322D.

¹¹² Ibid at 322D.

¹¹³ Ibid at 323H.

¹¹⁴ Ibid at 324A-B.

¹¹⁵ *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at [28].

¹¹⁶ 2001 (1) SA 464 (C).

be “oppressive, unreasonable or unconscionable”.¹¹⁷ To ensure they met this standard, contracts could be tested against the boni mores, or the legal convictions of the community as found in the law of delict.¹¹⁸ In another decision from the Cape Provincial Division, Ntsebeza AJ held in *Miller and Another NNO v Dannecker* that it would not be in good faith to enforce a contract containing a non-variation clause strictly as to its terms when an oral waiver of those terms had been proved.¹¹⁹

This was thus the backdrop against which *Brisley v Drotsky*¹²⁰ was decided by the Supreme Court of Appeal. This case involved another non-variation clause in a lease agreement. The terms of the lease required payment of the rent on the first of every month and a cancellation clause gave the lessor the right to cancel for late payment.¹²¹ From the outset, the lessee paid late every month for the first six months.¹²² Finally, in the seventh month, the lessor invoked her right to cancel the agreement.¹²³ In the subsequent ejectment proceedings, the lessee argued that an oral agreement had been reached, giving her the right to pay late for the first six months.¹²⁴ She asserted that to rely on the strict wording of the contract in the face of this was not in good faith.¹²⁵ This defence did not succeed.

The majority of the Supreme Court of Appeal stressed that good faith is not an independent ground for intervening in contracts.¹²⁶ Good faith was set up in opposition to principle of contractual certainty, as encapsulated in the phrase “pacta sunt servanda.”¹²⁷ The majority of the SCA had the following to say:

“Goeie trou is 'n grondbeginsel wat in die algemeen onderliggend is aan die kontraktereg en wat uiting vind in die besondere reëls en beginsels daarvan.”¹²⁸

¹¹⁷ Ibid at 475E.

¹¹⁸ Ibid.

¹¹⁹ 2001 (1) SA 928 (C) at [19].

¹²⁰ Supra note 11.

¹²¹ Ibid at 22 – 23.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid at 10.

¹²⁵ Ibid at 12.

¹²⁶ Ibid at [22]. Olivier JA argued in a separate concurring judgment for the inclusion of a justiciable good faith standard in South African law (at [75]), but felt that Drotsky's reliance on the non-variation clause was justified in this case (at [79]).

¹²⁷ Ibid at [22] – [23].

¹²⁸ Ibid at [22].

To this they added the following quote from an article by Dale Hutchison:

“...[G]ood faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one.”¹²⁹

As far as the judgment of Olivier JA in *Saayman* went, this was the view of a single judge and was thus not binding precedent.¹³⁰ The unanimous statement in *One Berg River Drive* was clearly obiter and thus also not binding.¹³¹ The view of the majority in *Brisley* was that Olivier JA was attempting to breathe life into the *exceptio doli generalis* and give it application under a new banner of *bona fides*.¹³²

This finding was reiterated soon after, this time by a unanimous Supreme Court of Appeal, in the case of *Afrox Healthcare Bpk v Strydom*.¹³³ In *Afrox*, an argument that the enforcement of an exemption clause was not in good faith was met by the statement that good faith was not an independent ground for intervention in contracts and hence that the court was not persuaded by this approach.¹³⁴ The findings as to the status of good faith in *Brisley* and *Afrox* were confirmed yet again in *South African Forestry Co Ltd v York Timber Ltd*.¹³⁵

Safcol v York involved a long term contract in terms of which Safcol, the owner of a plantation, was to provide York Timber with logs.¹³⁶ A price increase mechanism was included in the contract, but due to York’s manoeuvring, it managed to avoid such increases in price.¹³⁷ Safcol argued that York’s avoidance of legitimate bargaining attempts was in breach of an implied term requiring them to act in good

¹²⁹ Ibid. This quotation is taken from Dale Hutchison “Non-variation clauses in contract: any escape from the *Shifren* straitjacket?” (2001) *SALJ* 720 at 743 – 744.

¹³⁰ Ibid at [14] – [15].

¹³¹ Ibid at [16].

¹³² Ibid at [17].

¹³³ 2002 (6) SA 21 (SCA).

¹³⁴ Ibid at [31] – [32].

¹³⁵ 2005 (3) SA 323 (SCA) at [27].

¹³⁶ Ibid at 330.

¹³⁷ Ibid at 332 – 335.

faith.¹³⁸ York's reply was that this argument was against the precedent which had been established in the *Brisley* and *Afrox* cases.¹³⁹

As noted above, the Court agreed that good faith was not an independent substantive rule on which it could rely to intervene in the contract.¹⁴⁰ Good faith did, however, have a creative role to play in formulating new ex lege implied terms¹⁴¹ and in the interpretation of contracts.¹⁴² When a contract was ambiguous, the ambiguity would be resolved on the basis that the parties had negotiated with one another in good faith.¹⁴³ Safcol's rights under the price increase clauses in the contract imposed a corollary duty on York not to frustrate Safcol in the exercise of these rights.¹⁴⁴ This interpretation of the contract was strengthened by the underlying notion of good faith.¹⁴⁵ York had thus been in breach of the agreement when they frustrated Safcol's attempts to achieve price adjustment in terms of the contract¹⁴⁶ and hence Safcol had been entitled to cancel the agreement.¹⁴⁷

What the Supreme Court of Appeal has made abundantly clear in the line of cases starting with *Brisley v Drotsky*, is that the exceptio doli is dead and any attempt to resurrect the concept of good faith as an independent ground of intervention in contracts will not be accepted.¹⁴⁸ It does not thus appear that there is scope for any form of argument that bona fides stands as a rule which requires a certain standard of performance from a contracting party.¹⁴⁹ Good faith underlies the rules of contract law and that is all, although it may have a creative and controlling function to play, as was aptly demonstrated in the *Safcol* case.

¹³⁸ Ibid at [26].

¹³⁹ Ibid at [27].

¹⁴⁰ Ibid.

¹⁴¹ Ibid at [28].

¹⁴² Ibid at [30] – [32].

¹⁴³ Ibid at [32].

¹⁴⁴ Ibid at [33].

¹⁴⁵ Ibid at [34].

¹⁴⁶ Ibid at [33].

¹⁴⁷ Ibid at [38].

¹⁴⁸ See *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16 (CC) where the Constitutional Court rejected an argument that the exceptio doli generalis be reinstated. The Constitutional Court refused to entertain this argument as a court of first instance, arguing that the High Courts and the Supreme Court of Appeal should have heard the matter first (at [6]). Leave to appeal to the SCA had been denied to the applicant (at [3]).

¹⁴⁹ The question as to the exact status of good faith was, however, left open in *Barkhuizen* supra note 11 at [82].

The possibility that equitable considerations could limit the principle of *pacta sunt servanda* still remained open to parties due to the defence of unconscionability established in *Sasfin v Beukes* and the subsequent line of cases. Good faith had been limited to the role of an underlying principle, but this did not mean that a sufficiently unfair contract might not still be considered to be against public policy. It is this last bastion of objective reasonableness to which this chapter now turns.

7.3.3 Public policy

The development of the public policy principle from *Sasfin v Beukes* has been set out above, with Olivier JA holding in his minority judgment in *Saayman* that public policy encompasses good faith and that good faith could thus be applied through the medium of the public policy test. While the development of the good faith principle was cut short in *Brisley v Drotzky*, Cameron JA had the following to say in that case in a separate concurring judgment:

“The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. Public policy in any event nullifies agreements offensive in themselves – a doctrine of very considerable antiquity. In its modern guise, ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.”¹⁵⁰

Christie summed up this new development as follows:

“In the result the Supreme Court of Appeal has rejected the concept of good faith and reaffirmed the concept of public policy as an instrument for handling cases of contractual unfairness that cannot satisfactorily be handled by existing rules.”¹⁵¹

Of course the other major legal development alluded to in the extract from Cameron JA’s judgment was the introduction of a justiciable Constitution in South Africa. The Final Constitution contains the following provision at s 39(2):

¹⁵⁰ Supra note 11 at [91].

¹⁵¹ RH Christie *The Law of Contract in South Africa* (2006) at 16.

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

Also relevant is s 173:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

The Constitutional Court summarily resolved any doubt about the impact of the Constitution on the Roman-Dutch principles of the common law in the *Pharmaceutical Manufacturers* case:

“I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”¹⁵²

Thus public policy rather than good faith was to serve as the entry point for constitutional values of fairness into South African contract law.¹⁵³ Good faith as a free-floating concept had been so effectively buried by the Supreme Court of Appeal in the line of cases starting with *Brisley v Drotzky* that it would have been a major step in any event to resurrect it.¹⁵⁴ Thus an alternative path was found, in the form of the public policy requirement, which had served as an inlet for values of fairness

¹⁵² *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at [44].

¹⁵³ Gerhard Lubbe “Taking fundamental rights seriously: the Bill of Rights and its implications for the development of contract law” (2004) *SALJ* 395 at 421 identifies the major constitutional rights involved in the contracting process as “equality, freedom and dignity”. Lubbe notes, however, that these values can pull in opposite directions, either favouring contractual autonomy (the “empowerment aspect of the right to dignity”) or favouring a limitation on the parties’ autonomy (“dignity as constraint”).

¹⁵⁴ While good faith may have been buried by the SCA, the Constitutional Court left the question as to its status open in *Barkhuizen*. The new defence suggested by the majority judgment in *Barkhuizen* prompted Kerr to declare that the *exceptio doli generalis* had been revived. See AJ Kerr “The defence of unfair conduct on the part of the plaintiff at the time action is brought: the *exceptio doli generalis* and the *replicatio doli* in modern law” (2008) *SALJ* 241. This is also the view expressed in Barnard-Naudé *op cit* note 56 at 200. See also Graham Glover “Lazarus in the Constitutional Court: an exhumation of the *exceptio doli generalis*?” (2007) *SALJ* 449. Glover argues that while the defence raised in *Barkhuizen* was more or less identical in effect to the *exceptio doli*, the deliberate choice of the Constitutional Court to base this defence in public policy must spell the end for the old Roman law device.

since the *Sasfin v Beukes* decision. The issue of fairness in contracting was thus ripe for address by the Constitutional Court and this followed fairly soon after.

In *Barkhuizen v Napier*¹⁵⁵ the Constitutional Court was called upon to pronounce upon the validity of a time limitation clause in a short term insurance contract.¹⁵⁶ The applicant had been involved in a motor vehicle accident. When he claimed from his insurers the claim was repudiated.¹⁵⁷ Barkhuizen, however, only instituted action for payment after two years had passed. His standard form insurance contract stated that such a claim had to be brought within 90 days of the repudiation.¹⁵⁸ Barkhuizen challenged the sanctity of this contract under his constitutional right of access to the courts (s 34).¹⁵⁹

The Constitutional Court was thus called upon to balance a right in the Bill of Rights against the principle of *pacta sunt servanda*. The majority judgment per Ncgobo J noted that such a challenge to a term in a contract had to be brought under the banner of public policy.¹⁶⁰ The court had the following to say on the content of public policy:

“What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.”¹⁶¹

Ncgobo J embellished on this point at a later point:

“Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu.”¹⁶²

A central element of this approach seems to be a desire to achieve the ideal of fairness in contracting. This seems to be an adequate summary of the above

¹⁵⁵ Supra note 11.

¹⁵⁶ Ibid at 327.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid at 328.

¹⁶⁰ Ibid at [28].

¹⁶¹ Ibid at [29].

¹⁶² Ibid at [51].

exposition and will be used further below as the major value advocated in *Barkhuizen*. Indeed there appears to be a trend toward “fairness in contracting” in South African law as evidenced by the *Barkhuizen* case and this concept will be used below as a motivator for change. The opposing value of *pacta sunt servanda* remained important, however:

“The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.”¹⁶³

Ncgobo J finally came to the conclusion that the principle of *pacta sunt servanda* could be limited by considerations of fairness. This would necessarily involve an exercise of discretion on the part of the judge, a process which was to be informed by constitutional values:

“While it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of a time-limitation clause if it would result in unfairness or would be unreasonable. This approach requires a person in the applicant's position to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause. It ensures that courts, as the Supreme Court of Appeal put it, 'employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of "freedom of contract" while seeking to permit individuals the dignity and autonomy of regulating their own lives'.”¹⁶⁴

The ultimate decision of the majority, however, was that there was no evidence explaining why *Barkhuizen* had not complied with the time limitation clause. To refuse to enforce it under the circumstances would be contrary to the doctrine of *pacta sunt servanda*.¹⁶⁵ The appeal was thus dismissed. In a dissenting judgment, Sachs J undertook a detailed examination of the standard form contract and discussed the injustice of holding a consumer bound to such a contract where he

¹⁶³ Ibid at [57].

¹⁶⁴ Ibid at [70].

¹⁶⁵ Ibid at [85].

had not fully appreciated its implications at the time of signature.¹⁶⁶ Sachs J felt that public policy required that the time limitation clause not be enforced.¹⁶⁷

Two things seem fairly clear following the decision of the Constitutional Court in *Barkhuizen*. First, the sanctity of contracts is still an important value in South African law. But, second, public policy requires that values of fairness, as typified by the values in the Bill of Rights, be brought to bear on contracts and that courts now have an equitable jurisdiction to set aside contract terms which are manifestly unfair. The fact that the majority of the Constitutional Court declined to strike down a contractual clause which was one-sided and contained in a lengthy and difficult standard form contract is telling, however. Clearly the degree of unfairness required in order to invalidate a contract term will have to be severe. This is necessitated by the balancing which must take place between the implied right to freedom of contract¹⁶⁸ and other implied rights, such as fairness and reasonableness, required by the Constitution.

As to the continuing meaning of good faith in South African law, *Barkhuizen* is less clear. Ncgobo J stated that “the concepts of justice, reasonableness and fairness constitute good faith”.¹⁶⁹ This echoes his definition of public policy, thus failing to adequately distinguish these two concepts. What is more, O’Regan J distanced herself from this part of the judgment.¹⁷⁰ Perhaps this issue can be resolved if one views good faith as an underlying value, which is part of the public policy rule.¹⁷¹

Mr Justice Brand, a judge of the Supreme Court of Appeal, wrote recently in his private capacity on the role of good faith, equity and fairness in the South African law

¹⁶⁶ See particularly [177] – [183].

¹⁶⁷ *Ibid* at [185].

¹⁶⁸ For authority for the Constitutional right to freedom of contract see (in addition to *Barkhuizen*) *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at [15].

¹⁶⁹ *Barkhuizen* supra note 11 at [80].

¹⁷⁰ *Ibid* at [120].

¹⁷¹ These two concepts were distinguished in an earlier article by MacQueen, who argues that good faith deals with the relationship between the contracting parties, albeit applying external community standards to them, while public policy deals with more general issues in the proper administration of justice. See Hector MacQueen “Good Faith” in Hector MacQueen & Reinhard Zimmermann (eds) *European Contract Law* (2006) at 65.

of contract.¹⁷² Brand is of the view that the approach to good faith formulated by the SCA is not in conflict with the constitutional value system.¹⁷³ He notes, however, that the Constitutional Court declined to rule decisively on this issue.¹⁷⁴ Brand concludes as follows:

“If we have learnt anything from what happened in the past in South African courts, it is this: imprecise and nebulous statements about the role of good faith, fairness and equity, which would permit idiosyncratic decision-making on the basis of what a particular judge regards as fair and equitable are dangerous. They lead to uncertainty and a dramatic increase in often pointless litigation and unnecessary appeals.”¹⁷⁵

Brand’s narrow view that too wide a discretion with regard to fairness in contracting permits “idiosyncratic decision-making” is to a certain extent borne out by subsequent developments in the case law at High Court level. In *Advtech Resourcing (Pty) Ltd v Kuhn* Davis J declined to enforce an agreement in restraint of trade based on considerations of public policy.¹⁷⁶ Davis J held that post *Barkhuizen* courts should revisit the issue of onus in restraint of trade cases and revert to the position which pertained prior to *Magna Alloys*.¹⁷⁷ The implication of this judgment is that this is what the Constitution and fairness in contracting require.¹⁷⁸ A different outcome was reached by Wallis AJ in *Den Braven (SA) (Pty) Ltd v Pillay*.¹⁷⁹ Wallis AJ noted the stress which the majority in *Barkhuizen* had placed on *pacta sunt servanda* and held that there was no need to undo the judgment in *Magna Alloys*.¹⁸⁰ It should be noted that the Supreme Court of Appeal has steadfastly ignored calls for

¹⁷² FDJ Brand “The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution” (2009) *SALJ* 71.

¹⁷³ *Ibid* at 86.

¹⁷⁴ *Ibid*. Brand cites a passage from para 82 of the majority judgment in *Barkhuizen* in support of this contention.

¹⁷⁵ *Ibid* at 89 – 90. Compare the statements of the majority of the SCA in *Brisley v Drotzky* at [24].

¹⁷⁶ 2008 (2) 375 (C).

¹⁷⁷ *Ibid* at [28].

¹⁷⁸ It should be noted that Davis J has, in his personal capacity, criticised the Constitutional Court for not going far enough in *Barkhuizen* and allowing too much scope to *pacta sunt servanda*. See Dennis Davis “Private law after 1994: progressive development or schizoid confusion?” (2008) *SAJHR* 318. In the context of restraint of trade Davis J’s line of reasoning is not unique – see *Canon Kwazulu Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2005 (3) SA 205 (N).

¹⁷⁹ 2008 (6) SA 229 (D).

¹⁸⁰ *Ibid* at [33] – [35]. The disagreement between Wallis AJ and Davis J did not end there: Davis J struck back with a second judgment in favour of his position on restraint of trade in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C).

a revision of the burden of proof in restraint cases, implicitly confirming Wallis AJ's position on the issue.¹⁸¹

In a further decision, this time of the South Gauteng High Court, *Barkhuizen* was applied to prevent an unfair result from a standard form contract. In *Breedenkamp v Standard Bank of SA Ltd*¹⁸² the respondent bank had closed the applicant's bank account on the grounds that he was associated with the Mugabe regime in Zimbabwe.¹⁸³ A contractual clause gave the bank the right to close the account for any reason.¹⁸⁴ Breedenkamp sought an interdict preventing the bank from exercising this power.¹⁸⁵ Since the contention of the applicant was that the exercise of the power to close his account was unfair, the court had to consider the *Barkhuizen* case:

“*Barkhuizen v Napier* ... is authority for the proposition that a party to the contract cannot, first, impose a term on another party if it would, if applied, operate unfairly and, secondly, cannot enforce a term in a manner that is unfair.”¹⁸⁶

Jajbhay J noted that banking in South Africa was run by an oligopoly, and that if Breedenkamp's account was closed he would not be able to undertake any form of financial transaction.¹⁸⁷ The court held that it was thus oppressive under the circumstances for the applicant's bank account to be closed by the bank.¹⁸⁸

In a twist to the tale, however, Lamont J refused to confirm this finding on the return date.¹⁸⁹ Under the direction of a different judge, the South Gauteng High Court held that as a result of Breedenkamp's listing as a “specially designated national” by the relevant United States and European Union departments due to his association with the Mugabe regime, Standard Bank was entitled to cancel the banker-customer

¹⁸¹ See *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) & *Digicore Fleet Management (Pty) Ltd v Steyn* [2009] 1 All SA 442 (SCA).

¹⁸² 2009 (5) SA 304 (GSJ).

¹⁸³ *Ibid* at 306 – 307.

¹⁸⁴ *Ibid* at 309.

¹⁸⁵ *Ibid* at 311.

¹⁸⁶ *Ibid* at [48].

¹⁸⁷ *Ibid* at [60].

¹⁸⁸ *Ibid* at [67].

¹⁸⁹ 2009 (6) SA 277 (SCA).

relationship with him.¹⁹⁰ There was insufficient evidence to support a finding that Breedenkamp would not be able to obtain alternative banking facilities.¹⁹¹

The differences in opinion on display in the various High Court decisions purporting to exercise the discretion which seems to have been granted to them by *Barkhuizen* underline the need for caution in this regard as highlighted by Brand in the extract quoted above. Clearly *Barkhuizen* was a decision of major import and it will take some time for a jurisprudence to grow around the issues of public policy and fairness in contracting. The Constitution appears to have superseded the common law as a source of values for determining whether a particular contractual clause is unfair or not. The doctrinal peg on which these constitutional values have been hung is the issue of legality, as determined by public policy. While the *exceptio doli* and *bona fides* as independent grounds for intervention in contracts may have reached the end of the line, fairness in contracting is just beginning on its path to maturity in South Africa. What is now necessary is a development of the common law in line with s 39 (2) and s 173 of the Constitution to give effect to these values.

The latest development in the ongoing saga surrounding fairness in contracting is the decision of the Supreme Court of Appeal in *Bredenkamp v Standard Bank of SA Ltd.*¹⁹² In this case, counsel for the appellant argued that “*Barkhuizen* stood as authority for the proposition that fairness is a core value of the Bill of Rights and that it is therefore a broad requirement of [South African] law generally.”¹⁹³ Harms DP for a unanimous court disagreed with this view, holding that *Barkhuizen* was not authority for a general duty of fairness in the enforcement of contracts.¹⁹⁴ This value would only come into play if a “public policy consideration found in the Constitution or elsewhere is implicated.”¹⁹⁵

This reflects a negative response to fairness in contracting by the Supreme Court of Appeal. The court has cut down the broad wording of the public policy definition in

¹⁹⁰ *Ibid* at [66].

¹⁹¹ *Ibid*.

¹⁹² [2010] ZASCA 75. Harms DP noted in footnote 3 to this judgment that the incorrect spelling of Breedenkamp as “Breedenkamp” in the law reports had its origins in the initial Jajbhay J judgment.

¹⁹³ *Ibid* at [27].

¹⁹⁴ *Ibid* at [50].

¹⁹⁵ *Ibid*.

Barkhuizen to something which operates only where a Constitutional value (or some other important value) is imperilled. The disaffection for broad discretionary remedies is obvious in Harms DP's judgment. Perhaps this confirms that the views of Brand JA, although he was not party to the *Bredenkamp* decision, are the views of the Supreme Court of Appeal in general. It should also be noted that leave to appeal to the Constitutional Court was denied in this case, so for the moment, *Bredenkamp* must stand as the last word on fairness in contracting.

.Although the *Bredenkamp* case was negative about the role of fairness in contracting, one is left with the feeling that the law is in a state of flux and that the last word has not yet been spoken on this topic. The conservative viewpoint of Brand and the Supreme Court of Appeal seems to echo earlier decisions such as *Brisley* and *Afrox*, which do not go far enough in the direction of equity. While Brand makes valid points as to the importance of certainty in the law, this is outweighed by the constitutional imperative to achieve fairness in contracting. It should also be noted that if one can frame one's claim on the basis of a threat to a constitutional right, then this will pass the narrow test set by the Supreme Court of Appeal for the application of a doctrine of contractual fairness.

In the context of this thesis as a whole, it thus still seems possible post *Bredenkamp* to argue that a development of the law to accommodate changed circumstances could be made under the banner of the constitutional requirement of fairness in enforcing contracts. Before examining this possibility, however, a final avenue down which the good faith principle has travelled must be examined.

7.3.4 Legislation

Long before the landmark decision in *Barkhuizen*, there was an investigation by the South African Law Commission as to whether the question of good faith in contract should be regulated by statute.¹⁹⁶ This investigation began in 1983 and resulted in a Working Paper¹⁹⁷ in 1994, a Discussion Paper in 1996¹⁹⁸ and a Report in 1998.

¹⁹⁶ *Unreasonable Stipulations in Contracts and the Rectification of Contracts*, South African Law Commission, Project 47. For comment on this process and the outcomes of Project 47 see AJ Barnard "A different way of saying: on stories, text, a critical legal argument for contractual justice and the ethical element of contract in South Africa" (2005) *SAJHR* 278.

¹⁹⁷ Working Paper 54.

Once the views of the respondents to the Working Paper had been considered, it was decided to drop the standard of “good faith” in contracts and opt rather for one of “unconscionability”.¹⁹⁹ A proposed Unfair Contractual Terms Bill was attached to the 1996 Discussion Paper, which gave a court the power to “rescind, amend ... or make such other order” regarding a contractual provision which it felt was “unreasonable, unconscionable or oppressive”.²⁰⁰ The draft Bill was revised in the 1998 Report and was attached as a new Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms. This second Bill is far more detailed than its 1996 predecessor. There are a few notable differences as well, as Neels points out.²⁰¹ Notably, there is express provision in the 1998 Bill for a power for courts to terminate or adapt a contract struck by changed circumstances.²⁰² This provision appears to be fairly closely based on the equivalent article 6:111 of the Principles of European Contract Law.²⁰³ If enacted, the 1998 Bill would expressly deal with the problem of changed circumstances and obviate much of the discussion in this chapter which deals with common law powers to adapt or discharge contracts on this ground. In more than ten years since its proposal this draft legislation has made little progress toward enactment, however, and Project 47 has largely been superseded by developments of the common law, particularly in *Barkhuizen v Napier*.

There is a parallel legislative development in the more specific area of consumer protection. The Consumer Protection Act²⁰⁴ was promulgated in 2009 and will come into force in October 2010.²⁰⁵ This Act contains a specific prohibition on any “transaction or agreement” or any “term or condition of a transaction or agreement” which is “unfair, unreasonable or unjust”.²⁰⁶ A transaction or agreement will be unfair if (inter alia):

- (a) it is excessively one-sided against the consumer;

¹⁹⁸ Discussion Paper 65.

¹⁹⁹ Discussion Paper 65 at paras 1.49 – 1.50. Compare the discussion in Hutchison op cit note 57 at 227 – 229.

²⁰⁰ Section 1(1) of the Draft Bill.

²⁰¹ Jan L Neels “Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg” (1999) *TSAR* 684 at 701 – 703.

²⁰² Clause 4(3). See the discussion of this clause in chapter 2 above at section 2.5.

²⁰³ See chapter 6 above for a discussion of the PECL.

²⁰⁴ Act 68 of 2008.

²⁰⁵ Schedule 2 Item 2(2).

²⁰⁶ Section 48(2).

(b) its terms are so adverse to the consumer as to be inequitable.²⁰⁷

Aside from the actual terms of the agreement involved, a supplier may also not use “physical force ... , coercion, undue influence, ... unfair tactics or any similar conduct” in the “negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer”.²⁰⁸

These prohibitions, contained in sections 40 and 48 of the Act, are aimed at “suppliers” and “consumers”, which are defined terms. According to the list of definitions in s 1, a “supplier” means “a person who markets any goods or services”. “Market” is also a defined term in the Act and means “to promote or supply any goods or services”. A “consumer” is “a person who has entered into a transaction with a supplier in the ordinary course of that supplier’s business”. Section 5 limits the wide definition of consumers in section 1, since it states that the Act is intended to apply only to every transaction occurring within the Republic, and not to transactions where goods are supplied to certain consumers such as the State or a juristic person with a sufficiently high annual turnover or net asset value as determined by the relevant minister.²⁰⁹

Given the broad purpose of the Act and the broad phrasing of sections 40 and 48, it would appear as though the results which have been achieved in the *Barkhuizen* judgment now have the statutory go-ahead as well, at least in the context of consumer relations. Thus it appears that any contract which can be classed as being a consumer contract in terms of the above definition, will be subject to a prohibition on any type of unfairness. This will apply both in the drafting and implementation stages of contracting. This will require careful thought on the part of drafters of standard form contracts. It remains to be seen whether this Act will be interpreted in the light of the decision in *Barkhuizen*, or whether the sphere of application of sections 40 and 48 will cut further inroads into the principle of *pacta sunt servanda*.

²⁰⁷ Section 48(2).

²⁰⁸ Section 40(1)(c).

²⁰⁹ Section 5(1)(a) & s 5(2)(a) – (b). “Transaction” is a defined term in the Act and refers to the supply of goods or services for consideration.

Again, considered against the overall purpose of this thesis, it may be that the Consumer Protection Act does have some relevance to changed circumstances, since reliance by a supplier on performance by a consumer may be considered to be unfair if an unforeseen change of circumstances has intervened.²¹⁰ The Act applies to contract terms and the performance thereof, so there is scope to argue that it would be contrary to its provisions to demand performance under a contract struck by changed circumstances. If there is a hardship clause in a consumer contract then the application of such clause will have to be fair to the consumer.

The fact that the Consumer Protection Act is such a recent development, however, means that there has been little judicial interpretation of it so far and one must thus rely on interpretations of s 40 or s 48 suggested by academics.²¹¹ These seem to back up the very general points made above. Since the judgment in *Barkhuizen* does seem to overlap with sections 40 and 48, I will leave consideration of the Act at this point. The chapter now turns to the application of this study of good faith and fairness in contracting to the problem of changed circumstances in contract.

7.4 The problem of changed circumstances in contract law

Against this backdrop of good faith and fairness in contracting, both internationally and within South Africa, the problem of changed circumstances must now be considered. Again this discussion will begin with the suggestion put forward by Van Huyssteen and Van der Merwe under the heading “Good faith in contract: proper behaviour amidst changing circumstances.”²¹² The central thesis of these authors is that it may not be in good faith for a contracting party to enforce the literal terms of his or her agreement if that agreement has been struck by a significant and unforeseen change of circumstances. This argument assumes therefore that good faith is relevant to the enforcement of one’s rights under a contract and thus as a necessary concomitant that good faith can serve as an independent ground for

²¹⁰ Since such an instance of bad faith would be at the enforcement stage of contractual relations, it could constitute “unfair tactics” in the “enforcement of an agreement” within the meaning of s 40(1)(c) of the Consumer Protection Act.

²¹¹ See for example Tjakie Naudé “The consumer’s ‘right to fair, reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” (2009) *SALJ* 505 and Evert van Eeden *A Guide to the Consumer Protection Act* (2009) at 180 – 188.

²¹² Van Huyssteen & Van der Merwe op cit note 1.

intervention in contracts. If this were not the case, good faith could not serve as an enforceable basis for the type of rule suggested by Van Huyssteen and Van der Merwe.

What has been shown above is that according to the Supreme Court of Appeal, good faith, at least by that name, does not exist as an independent ground for intervention in contracts.²¹³ The recent case law from the Supreme Court of Appeal states that good faith underlies the law of contract, but is not free-floating: it must find expression through one of its established rules.²¹⁴ Even the *Barkhuizen* decision avoided the contention that good faith had any role beyond this in contract law.²¹⁵

This is not to say that altruist²¹⁶ ideals have no role to play in the South African law of contract. Indeed, since the introduction of the democratic Constitutions, it can safely be said that this country has entered an era of egalitarian values and a concern for one's fellow human being. That is the purpose behind the Bill of Rights in chapter two of the Final Constitution. As has been illustrated above, these rights apply not only in a constitutional law setting between the State and its citizens, but also horizontally between private parties.²¹⁷ This means that even contracts are subject to the Constitution and the common law of contract must be developed to give effect to the rights in the Bill of Rights.²¹⁸ Just such an endeavour was undertaken by the Constitutional Court in *Barkhuizen v Napier*. Although there is no specific right to fairness in contracting, the altruist ideals of chapter two were brought squarely to bear on a contract and were held by the majority to stand as a limitation on a self-serving and one-sided exercise of contractual powers. As such the values of fairness in contracting limited the right to contractual autonomy, a right which is also

²¹³ See for authority the discussion of the *Brisley* and *Afrox* cases supra.

²¹⁴ *Brisley v Drotzky* supra note 11 at [22].

²¹⁵ *Barkhuizen* supra note 11 at [79] – [83]. It should be noted that the Constitutional Court left the question as to the exact role of good faith open in *Barkhuizen*. Compare the argument of Glover op cit note 152 who makes the point that the Constitutional Court deliberately chose to ground its doctrine of fairness in public policy. For a contrary view see Barnard-Naudé op cit note 56 at 195 – 196 who argues that good faith and public policy are both open norms and to privilege public policy at the expense of good faith on the basis of lack of precision makes little sense.

²¹⁶ Compare the use of this term in Kennedy op cit note 20 at 1717 who sets up “altruism” as the antithesis of “individualism” and premises the notion upon the belief that one should not preference one's own interests over the interests of others.

²¹⁷ See s 8 of the Constitution.

²¹⁸ Section 39(2).

implied in the Constitution.²¹⁹ While the majority in the *Barkhuizen* case were careful not to completely do away with the value of contractual autonomy, it does seem clear now that unfair contract terms will be unenforceable. It thus seems clear that there is now an independent ground of fairness in contracting which can limit the exercise of contractual powers.

This brings us back to the argument of Van Huyssteen and Van der Merwe. The major fault in their approach is the use of “good faith” terminology. If one were to rephrase their argument and state that it might be unfair and against constitutional values to insist on performance of a contract following an unforeseen and fundamental change of circumstances, this would seem to accord fully with *Barkhuizen*. Essentially the difference is thus merely one of semantics.²²⁰

This type of approach leaves something to be desired, however. To allow repudiation of one’s contractual obligations on good faith grounds alone, would lead to an ad hoc development of the law and would not necessarily do justice in every case.²²¹ A better worked out theory to deal with changed circumstances is required. Rather than relying on fairness in contracting directly each time, this general principle should rather serve as the justificatory basis for a new doctrine, specially designed to serve the needs of a contract struck by changed circumstances. The content of such a rule would have to still be worked out, but there are many international examples, such as frustration, Wegfall der Geschäftsgrundlage or the model rules of PECL or Unidroit’s PICC. South African courts could be guided by such examples and formulate their own theory to accommodate changed circumstances.²²² As to the role of fairness or good faith, one is reminded of the words of Dale Hutchison cited in *Brisley v Drotzky*:

“Good faith thus has a creative, a controlling and a legitimating or explanatory function.”²²³

²¹⁹ See authority in the text above. The rights to dignity (s 10) and free trade (s 22) are sometimes used to justify this type of argument. Compare also the argument of Lubbe op cit note 153 at 421.

²²⁰ Cf Barnard-Naudé op cit note 56 at 195 – 196.

²²¹ Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law* (1998) at 535 argue that a tendency to decide cases of changed circumstances based on good faith should be resisted. Rather there should be emphasis on the contract between the parties and the express allocation of risk. The task of the courts these authors argue is then to fill the gap left in the contract by parties who did not foresee the type of event in question.

²²² A possible suggestion in this regard will be put forward in chapter 8.

²²³ *Brisley* supra note 11 at [22].

Much like the role good faith plays in German law, values of fairness in contracting, by whatever name, could serve as the underlying rationale, or aanknopingspunt, for a new contractual doctrine to deal with changed circumstances.²²⁴

7.5 Conclusion

This brief examination of the law on good faith should make a number of things clear. First good faith, or fairness in contracting, is a cornerstone of most Western systems of contract law. In civil law countries like Germany it plays an important role as a free-floating doctrine which can be used either for direct intervention in contracts, or as a underlying rationale to justify new developments in the law. The English common law system recognises no independent role for good faith, but it underlies several equitable rules and remedies. Other common law and civil law systems tend to be placed on a continuum between the extremes of the German and the English positions. South Africa as a mixed legal system displays elements of both the English law role for good faith and the broader civil law role. Second, within South Africa, good faith has had a lengthy history, but was never really an independent ground for intervention in contracts. Good faith did, however, justify the incorporation of several equitable remedies and thus the development of new residual rules. It can also be said to underlie our law of contract.

Third, the status of good faith in South Africa seems to have changed under the Constitution, although it is now no longer referred to as good faith. According to the *Barkhuizen* decision, the Constitution requires the altruist notion of fairness in contracting and may justify equitable intervention in contracts found to be unfair. Fourth, good faith has always had a creative function to play in South African law. This occurred first in its guise as the *exceptio doli*, but also occurred under the heading of *bona fides* and continues today under the latest descriptions of the role of

²²⁴ For authority for the use of an objective concept of good faith (“redelikheid en billikheid”) as basis on which to incorporate a new term implied by law, see *A Becker & Co (Pty) Ltd v Becker* 1981(3) SA 406 (A) at 419. See also: Tjakie Naudé “The function and determinants of the residual rules of contract law” (2003) *SALJ* 820 at 829 – 830 raises a similar argument. Naudé argues that good faith has a creative function to play in South African law and can be used to develop new residual rules in contract law. This would provide judges with a basis on which to found a new doctrine and would answer critics who feel that fairness in contracting is too loosely defined a term to apply within the concrete setting of this specific problem.

good faith emanating from the Supreme Court of Appeal. This creative function was expressly recognised in *Brisley v Drotsky* and played a big role in the case of *Safcol v York*, where the outcome of the case rested on an interpretation of the contract based on good faith.²²⁵

The logical deduction which should follow from the above points is that provided fairness requires that the problem of changed circumstances in contract law be addressed, there is ample scope for arguing that this can be done in terms of the Constitution. This would lead the courts to develop our law in terms of s 39(2) to give effect to the requirements of fairness and reasonableness implied in the Bill of Rights. Such a development should be in the form of a crystallised rule, rather than simply to invoke fairness in contracting per se on an ad hoc basis. There are many international models to follow in this regard.

The overall purpose of this chapter in the greater scheme of things is to show that good faith can serve as a doctrinal peg, or aanknopingspunt, in South African law on which to base a new doctrine of changed circumstances. Such a development would be entirely in keeping with the history of good faith in this country as well as with the Constitutional mandate contained in s 39(2). Good faith would remain a principle underlying our law of contract, rather than a rule which can be directly relied upon in its own right.

With this foundation in place it is now possible to attempt to break new ground and plot possible solutions to the problem of changed circumstances in South African law. Chapter eight suggests a possible way forward for this country.

²²⁵ This is in line with the argument of Naudé mentioned above at note 224.

Chapter 8: The way forward

8.1 What has been learned from the comparative studies

This thesis has examined the law on changed circumstances in contracting both historically and in several jurisdictions. The *clausula rebus sic stantibus* was seen to make provision for changed circumstances in medieval law, but to have been a rather vague and lax doctrine. It is not surprising that this undeveloped device fell out of favour with the rise of commercialism in the nineteenth century. The notion that contracts cannot always be absolute in the face of changed circumstances lives on, however. The United States, Germany and the Netherlands have all been seen to make provision for the problem of changed circumstances in their municipal law to a greater or lesser extent. To this list can be added Italy, Spain, Greece, Portugal, Austria – in short, most of the countries of Western Europe.¹ Furthermore, hardship is recognised by the Unidroit Principles of International Commercial Contracts, the Principles of European Contract Law and the Draft Common Frame of Reference.² Indeed of the countries examined in this thesis, only France and South Africa lack a doctrine to deal with hardship³ and in English law the narrow ambit of the doctrine of frustration probably excludes hardship.

8.2 What is different about South Africa?

This lacuna in South African law has not escaped the attention of our local authorities on contract. Some commentators maintain a conservative stance on the question of change of circumstances. Christie states in his textbook on contract that the *clausula rebus sic stantibus* is a potentially dangerous inroad into the concept of *pacta sunt servanda* and that it is difficult to raise any enthusiasm for it.⁴ He does, however, note that in other jurisdictions the position is different.⁵ Christie suggests that a tacit term or condition may be able to accommodate hardship or, alternatively,

¹ Ole Lando & Hugh Beale (eds) *Principles of European Contract Law – Parts I & II* (2000) at 328. This is also the conclusion of Denis Tallon “Hardship” in Hartkamp et al (eds) *Towards a European Civil Code* (2004) 499 at 502.

² See chapter 6 above.

³ It should be noted that this is also the approach in Belgium and Luxembourg. Lando & Beale op cit note 1 at 328.

⁴ RH Christie *The Law of Contract in South Africa* (2006) at 473.

⁵ Ibid.

that a purposive construction of the contract combined with the public policy rule should achieve a just result.⁶ Thus even someone who favours contractual certainty, such as Christie, has recognised the problem at hand and suggests ways of solving it. Indeed in a different context (a comparison of South African law and the Unidroit PICC) Christie has stated that the lack of a doctrine to deal with changed circumstances “leaves a gap in our law”.⁷ He maintains his conservative stance in this discussion by expressing the opinion that South Africa would be unlikely to adopt rules similar to the PICC.⁸

Other writers, such as Lubbe and Murray, suggest that there may be a need to develop our law to bring it in line with other jurisdictions.⁹ These authors suggest bona fides – or public policy – as the appropriate tool with which to effect change.¹⁰ Kerr is even more open to change. His textbook does not use the conventional heading of “impossibility of performance”, but rather uses the title “absence during the currency of the contract of the circumstances necessary for its operation”.¹¹ The ensuing discussion makes it clear that Kerr envisages discharge for a broader range of reasons than mere impossibility. He claims that *Williams v Evans*¹² is an example of a case where his rule applies and that this case was correctly decided.¹³ Kerr further argues that the operation of the principle in *Krell v Henry*¹⁴ can be supported in South African law.¹⁵ In comparison to other writers, Kerr’s views are fairly radical. It is at best debatable whether the concept of the supposition in futuro, or the analogous doctrine of frustration of purpose, form part of South African law at present.¹⁶

⁶ Ibid.

⁷ RH Christie “Our law of contract and the modern lex mercatoria” in Graham Glover (ed) *Essays in honour of AJ Kerr* (2006) at 71.

⁸ Ibid at 73.

⁹ Gerhard Lubbe & Christina Murray *Farlam & Hathaway Contract – Cases, Materials, Commentary* (1988) at 773 – 774.

¹⁰ Ibid.

¹¹ AJ Kerr *The Principles of the Law of Contract* (2002) at 545.

¹² 1978 (1) SA 1170 (C).

¹³ Kerr op cit note 11 at 547 – 548.

¹⁴ 1903 (2) KB 740 (CA).

¹⁵ Kerr op cit note 11 at 551.

¹⁶ See the argument in chapter 2 above.

Von Alvensleben, who wrote a Masters thesis on the topic of “Fundamental change of circumstances and the principle of *causa finalis*”, argued that the doctrine of frustration (by which he appears to mean the concept of frustration of purpose) became “part and parcel of the South African law regarding supervening impossibility”.¹⁷ This argument was based largely on the cases discussed in chapter two of the present thesis which advocated the incorporation of the concept of frustration of purpose into South African law. The basis for such an incorporation would not be good faith, but rather the concept of *causa finalis*, or the common purpose of the parties.¹⁸ Von Alvensleben asserts that the doctrine of *iusta causa* should form part of South African law and the principle of reciprocity which it embodies can underlie the notion of equivalence in exchange necessary to do justice in a situation of changed circumstances.¹⁹ Von Alvensleben’s approach is different to that advocated here, where good faith has been relied on as the underlying rationale for a doctrine of changed circumstances. His conclusion as regards the incorporation of frustration of purpose into the South African common law is at variance with the finding in the present thesis in chapter two and the authority which Von Alvensleben cites for this conclusion is at best tenuous.²⁰ What is relevant, however, is that Von Alvensleben also recognises that there is a lacuna in South African law with regard to changed circumstances, which needs to be addressed.

For several reasons a change in our law is required. The basis for such a change may be considerations of fairness,²¹ or it may be economic considerations based on the appropriate allocation of risk under a contract, such as who is the superior insurer or risk bearer.²² This thesis advocates fairness as the underlying motivator for change.²³ While law and economics scholars make a justifiable claim for addressing the problem of changed circumstances on economic grounds, there are

¹⁷ Philipp Carl Von Alvensleben *Fundamental change of circumstances and the principle of causa finalis* (unpublished LLM thesis, University of Stellenbosch 2001).

¹⁸ *Ibid* at 206.

¹⁹ *Ibid* at 209 (paraphrased).

²⁰ Compare the analysis of cases like *Kok v Osbourne* 1993 (4) SA 788 (SECLD) and *African Realty Trust Ltd v Holmes* 1922 AD 389 in chapter 2 above.

²¹ Compare the argument advanced in chapter 7.

²² Compare the discussion of law and economics in chapter 4.

²³ As set out in chapter 7, the concepts of “fairness” and “fairness in contracting” are used as a summary of the approach set out in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) with regard to the impact of public policy on the relationship between contracting parties. As argued earlier, the traditional notion of good faith forms a subsidiary element of this approach.

worrying discrepancies in their theories, which would make this type of approach difficult to implement. Economic considerations could in any event inform the exercise of a discretion as to whether to allow redress for changed circumstances on the basis of fairness.

The experience of other jurisdictions shows that it is not just to dogmatically insist on the principle of *pacta sunt servanda* following a significant change of circumstances, since this places the burden of the change unfairly on one party alone. The argument to be advanced here is that under appropriate circumstances the burden of increased expense following a change in circumstances should be split between the parties, by operation of law and on the basis of good faith, rather than allocated by default to one party alone. This is similar to the argument advanced by Fried, who states that in a situation of frustration a gap is created in a contract by the occurrence of an unexpected event.²⁴ In order to fill this gap there must be a resort to a process of sharing resultant losses and gains.²⁵

Thus an expansion of our narrow concept of impossibility must be allowed, to accommodate a doctrine of changed circumstances.²⁶ The concern of writers such as Christie for the concept of *pacta sunt servanda* should not fall by the wayside, however. The experience of countries such as Germany shows that even where there is a strong good faith discretion allowed to judges to adjust contracts affected by an unforeseen change of circumstances, the pendulum has swung back in favour of legal certainty as the relevant doctrine of changed circumstances has been allowed to mature.²⁷ Issues of the proper allocation of risk must thus be brought to the foreground when dealing with cases of hardship.

²⁴ Charles Fried *Contract as Promise* (1981) at 69 – 70. See Sarah Howard Jenkins “Exemption for non-performance: UCC, CISG, Unidroit Principles – A comparative assessment” (1998) 72 *Tulane Law Review* 2015 at 2019, where she notes that Fried’s theory based on fairness is an alternative to the economic theory of Posner and Rosenfield (see chapter 4 at section 4.3.5 above) which seeks to allocate loss based on economic efficiency. The major difference between these two approaches is that in Fried’s the losses are shared between the parties. See also Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law* at 535 – 536.

²⁵ *Ibid.* Zweigert & Kötz *op cit* note 24 at 536 also argue that a judge must fill a gap in this type of case. These authors suggest that such a gap should be filled “in accordance with the standards developed by reputable commercial men for contracts of that type.”

²⁶ The exact manner in which this should be effected will be discussed in the following section.

²⁷ See chapter 5 above.

In addition this chapter will discuss the question of what the appropriate method is to allocate the losses caused by a change of circumstances between the parties. Before this can occur, however, the question of which types of changes in circumstances will be covered by the new rule must be answered. Furthermore there is a need to establish a general threshold test which a change in circumstances will have to meet before any type of remedy is considered. The comparative studies have shown that there is a divergence here between countries such as England, which allow only for discharge and countries such as Germany and the Netherlands which allow for judicial adaptation of the contract in addition to the remedy of discharge. Admittedly the concept of judicial revision of contracts is, in South Africa, very far removed from the present status quo, a fact which Christie noted in a recent discussion.²⁸ Despite difficulties in introducing this type of remedy, even by legislation,²⁹ the question needs to be answered as to whether this is not a more appropriate means of dealing with the problem of changed circumstances.

The goal of this chapter is thus to examine ways in which a doctrine of changed circumstances could be adopted in South Africa and then also the form which it could possibly take. The ultimate question is whether there can be an application of the lessons learned from the foreign jurisdictions and supranational model rules discussed in this thesis in mapping the way forward for our own country.

8.3 Basis for change: fairness in contracting

A central part of the argument advanced here is that it is not *fair* to allocate the burden of a change of circumstances on one party alone due to the random operation of chance. As Tallon notes, “[h]ardship is a typical daughter of good faith”.³⁰ This means that the principle of fairness must underlie any possible change in the law which is to take place. While such a defence has not yet been tested in the context of changed circumstances, it is conceivable that a defendant could plead for discharge of an agreement struck by changed circumstances on the ground of

²⁸ Christie op cit note 7 at 72.

²⁹ Ibid at 73.

³⁰ Tallon op cit note 1 at 503.

fairness in contracting.³¹ If such a defendant were to invoke the Bill of Rights in his defence, he might well call upon the value of equality³² to the effect that it would be unjust for him alone to bear the burden of an unforeseen change of circumstances. Alternatively a party may invoke the right to dignity.³³ Although the right to dignity has been said to shore up freedom of contract and contractual certainty, it also holds that the contracting process should “enhance, rather than diminish” a party’s self-respect and dignity.³⁴ Further support could be found in the constitutional value of fairness itself, which seems to be implied by the majority decision in *Barkhuizen*.³⁵ Indeed in an appropriate case a defendant might even argue that it would be unconscionable to enforce an agreement against him due to hardship.³⁶

Public policy or constitutional values would thus play the role of *aanknopingspunt*, or doctrinal peg, rather than being the direct basis for a decision to permit discharge for changed circumstances.

Such a development could essentially be along the following lines: due to the recognition of an expanded role for public policy and fairness in *Barkhuizen*, the courts should now recognise that constitutional values demand that the impact of changed circumstances should not fall on one party to a contract alone. Thus there must be a development of the common law rules of South African contract law to accommodate the problem of changed circumstances.³⁷ This would be an exercise by the courts of their powers under s 39(2) and s 173 of the Constitution. If an

³¹ The idea that fairness in contracting constitutes a new ground for review of contracts does not coincide with the more conservative view of Brand (FDJ Brand “The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution” (2009) *SALJ* 71 at 89 – 90), discussed in chapter 7. As stated there, however, this view is too narrow as fairness in contracting is now an enforceable right of a party to a contract following the decision in *Barkhuizen* supra note 23.

³² Section 9.

³³ Section 10.

³⁴ Gerhard Lubbe “Taking fundamental rights seriously: the Bill of Rights and its implications for the development of contract law” (2004) *SALJ* 395 at 420 – 421.

³⁵ Although there is no such right in the Bill of Rights, arguably it is implied by the other values listed there. See *Barkhuizen v Napier* at [29], where the majority held that public policy was informed by constitutional values, read with [51] to [52], where the majority held that public policy was informed by notions of justice and fairness.

³⁶ Along the lines of the finding in *Barkhuizen v Napier* or the judgment of Jajbhay J in *Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304 (GSJ).

³⁷ Cf Tjakie Naudé “The function and determinants of the residual rules of contract law” (2003) *SALJ* 820 at 827 – 830.

objection were to be raised that such a development would be contrary to the established principles of our Roman-Dutch common law, one could point to the dictum of Lord Tomlin in *Pearl Assurance Co v Union Government*.³⁸

“[Roman-Dutch] law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.”

Thus it is a development of the common law which is advocated here, and it is the form which this development must take to which this chapter now turns.

8.4 A doctrine to deal with changed circumstances in South African contract law

The conceptualisation of a doctrine to deal with changed circumstances is slightly different in every jurisdiction where this defence is recognised. This emerges from the different wording used in the various municipal codes or supranational rules. The broad categories into which the various classes of cases of changed circumstances fall, however, remain more or less constant from jurisdiction to jurisdiction. For ease of reference, the American terminology will be adopted here. Thus following the Second Restatement of Contracts, cases of changed circumstances can be divided into the categories of impossibility (including legal impossibility), impracticability and frustration of purpose.³⁹

Impossibility is already recognised as a ground for discharge in South Africa and has been discussed above in chapter two. This chapter will thus focus on the question of whether the further categories of impracticability and frustration of purpose can be accommodated in our law. Not all countries recognising discharge for changed circumstances allow discharge on the basis of frustration of purpose and impracticability. English law in particular recognises the defence of frustration of purpose, but seldom allows discharge on this ground, and does not recognise the

³⁸ 1934 AD 560 at 563. See also *Blower v Van Noorden* 1909 TS 890 at 905: “There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.”

³⁹ Second Restatement of Contracts at §§ 261 – 265.

doctrine of impracticability.⁴⁰ Since both these grounds of discharge are permitted in the majority of the jurisdictions studied in this thesis, however, the possibility of an expansion to accommodate both will be analysed here.

8.4.1 Frustration of purpose

Frustration of purpose occurs where the value of the performance under a contract to the buyer of goods or services is greatly diminished following a change of circumstances.⁴¹ The client's obligation to pay money is still possible, as is the supplier's obligation to supply. Merely the purpose – or common foundation – of the contract (for both parties) has fallen away. In the common law jurisdictions, this doctrine is known by the name of “frustration of purpose” and the same class of cases falls under the more general wording of the German and Dutch codes.⁴²

The conclusion of chapter two was that the English doctrine of “frustration” has never been validly incorporated into South African law, although there was limited case authority in favour of this proposition.⁴³ South African law does recognise the concept of the supposition, however, which makes the continued operation of a contract contingent upon the existence of a particular state of affairs.⁴⁴ This statement must be treated with caution though - in *Van Reenen Steel (Pty) Ltd v Smith NO* the Supreme Court of Appeal ruled that even a supposition relating to a present fact cannot have any effect on a contract unless it is a term of that contract, otherwise it remains an irrelevant motive in contracting, even if commonly held.⁴⁵ The supposition as to a future state of affairs was held to be “indistinguishable from a condition” or “an ordinary term of the contract”.⁴⁶

⁴⁰ See chapter 4 above at sections 4.2.4.2 – 4.2.4.3. Aside from the seminal *Krell v Henry* [1903] 2 KB 740, Guenter Treitel *Frustration and Force Majeure* (2004) notes that frustration of purpose has scarcely ever been applied since (at 346). There are several dicta in leading English cases against the doctrine of impracticability, such as *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495 at 510 and *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166 at 185.

⁴¹ Cf Treitel op cit note 40 at 309; Christoph Brunner *Force Majeure and Hardship under General Contract Principles – Exemption for Non-Performance in International Arbitration* (2009) at 411.

⁴² Cf § 313 (1) of the BGB: “If circumstances which became the basis of a contract have significantly changed since the contract was entered into...” and Article 6:258 (1) of the BW: “...the court may modify the effects of a contract or may set it aside ... on the basis of unforeseen circumstances...”.

⁴³ See chapter 2 at section 2.2.2.2.

⁴⁴ *Van Reenen Steel (Pty) Ltd v Smith NO* 2002 (4) SA 264 (SCA) at [8] – [9].

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at [8].

The supposition in futuro may be an existing avenue for an expansion of South African law to accommodate the doctrine of frustration of purpose. The supposition in futuro as encapsulated in *Williams v Evans*⁴⁷ would terminate a contract if the occurrence or continuation of a state of affairs which had been the commonly held basis of a contract between the parties did not eventuate. In other words if the common foundation of the transaction between the parties fell away, rendering as a result the value of the performance greatly decreased for the recipient, then the contract would be terminated. Arguably this is merely a different way of stating the frustration of purpose defence.

The declaration by the Supreme Court of Appeal that the supposition in futuro does not exist is a great blow to the possibility of recognising the doctrine of frustration of purpose in South Africa. The Supreme Court of Appeal's finding that this device does not exist in our law was directly based on the reasoning that the failure of even a commonly held motive should have no effect on a contract.⁴⁸ Since by definition frustration of purpose operates in the realm of motives rather than actual impossibility, the *Van Reenen Steel* dictum should preclude the operation of this doctrine. This does not, however, address the unfairness in allowing the loss consequent upon an unforeseen change in circumstances to fall upon the client alone.

It was argued in chapter two, however, that since the finding in *Van Reenen Steel* prevented only motivating factors that were not elevated to the status of terms of a contract from being considered, a supposition in futuro could thus circumvent this prohibition if it were framed as a tacit resolutive condition. Seen in this light, the facts surrounding the negotiations of the parties involved might imply that the continued existence of a contract was contingent upon the existence of a future state of affairs. This contingency might even extend to an unforeseen change in circumstances, since the tacit condition could be imputed to the parties concerned

⁴⁷ 1978 (1) SA 1170 (C).

⁴⁸ The judgment in *Van Reenen Steel* supra note 44 refers to the classic dictum in *African Realty Trust Ltd v Holmes* 1922 AD 389 at 403 to this effect.

even if they never foresaw it.⁴⁹ Thus there might be scope within the *Van Reenen Steel* judgment itself for a recognition of the supposition in futuro, provided the test for a tacit term was met.

This approach would answer the objections of critics of the supposition in futuro, since now the doctrine would not operate merely in the realm of motives, but would be concretised as an actual term of the contract. Such an approach would have to answer to Vorster's criticism of the conventional curious bystander and business efficacy tests used to determine the existence of a tacit term in this country, however.⁵⁰ Vorster argues that these tests mask the use of policy decisions by the courts relevant to a particular case, which should rather be developed in a more coherent (and openly acknowledged fashion) through the other existing methods of determining the existence of an implied or tacit term.⁵¹ Following Vorster it might be preferable to leave the tests for subjective intention aside and rely rather on an objective test for an ex lege term to deal with the problem of frustration of purpose.

This begs the question as to whether expansion to accommodate the supposition in futuro – or the doctrine of frustration of purpose – is the appropriate way to deal with this problem in this country. Several case examples of frustration of purpose have been cited in previous chapters, these include: a contract to view a procession from a particular room, which was frustrated by the cancellation of the procession;⁵² a contract to lease a neon advertising sign, which was frustrated when legislation prevented the illumination of such signs at night⁵³ and a contract to supply a consignment of out-dated drills for use in the mines of East Germany, which was frustrated by trade barriers preventing the importation of West German goods, since there was no market for the drills elsewhere.⁵⁴ It is true that the potential loss in this class of cases is limited to the contract price, yet is it just to allocate the risk of loss

⁴⁹ *Van den Berg v Tenner* 1975 (2) SA 268 (A) at 277; *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136 – 137.

⁵⁰ JP Vorster "The bases for the implication of contractual terms" (1988) *TSAR* 161.

⁵¹ *Ibid* at 179 – 180.

⁵² *Krell v Henry* [1903] 2 KB 740.

⁵³ *20th Century Lites v Goodman* 149 P 2d 88 (1944).

⁵⁴ "The pneumatic drill case" BGH MDR 1953, 282.

due to changed circumstances in this type of case solely on the recipient of goods or services?

The proper allocation of contractual risks looms large in a normative discussion of whether to permit discharge or revision of a contract struck by frustration of purpose. Factors such as the foreseeability of the ultimate change in circumstances, whether it was beyond the control of the parties, or whether the disadvantaged party assumed the risk of the frustrating event are highly relevant in such a determination. Hence it is not entirely satisfactory to argue for the resolution of a dispute based on frustration of the purpose of the contract based on a tacit term, since this grounds the inquiry only in the subjective consensus of the parties, which does not make provision for the above considerations. Naudé has argued for implied terms (including tacit terms) to be viewed as forming a continuum from those terms wholly based on the actual but unexpressed intention of the parties to those which are determined normatively (by law).⁵⁵ Since the argument to be advanced here is that normative considerations of fairness should underpin a new doctrine of changed circumstances and that certain policy considerations should underpin its application, it seems more appropriate to place the desired doctrine to deal with frustration of purpose at the ex lege end of the spectrum.⁵⁶

A possible reconciliation of the supposition in futuro with the suggested ex lege device to deal with frustration of purpose, could be along the lines suggested by Lubbe and Murray:

“Whether or not a supposition [in futuro] ... is actually incorporated into a contract will usually depend on whether the test for the existence of a tacit term is satisfied. This means that where the parties are convinced of the existence of the state of affairs, one is concerned with an imputed rather than an actual consensus. Resort to such a fiction leaves one but a step away from holding that it is a naturale of contractual obligations that liability depends on the existence of the matrix of facts which motivated the contract. A further development would make the obligation depend on the continued existence of that matrix of facts.”⁵⁷

⁵⁵ Tjakie Naudé “The relationship between the different types of terms implied into contracts” (Part I) (2003) 24(2) *Obiter* 283 at 287.

⁵⁶ Compare the distinction between ex lege and tacit terms in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D – 532D.

⁵⁷ Lubbe & Murray op cit note 9 at 446.

The question remains, however, as to whether this is the appropriate method for dealing with the problem of frustration of purpose? As Lubbe and Murray note, one may choose here between a subjective approach relying on a tacit term and operating in the realm of a legal fiction, or an ex lege term making the continued operation of the contract dependant on the continuation of a given set of facts. Is it necessary to impute a consensus to the parties at the time of conclusion of the contract? Surely it is better to determine ex post facto based on the available facts whether discharge should be permitted? Such a determination could take policy considerations into account such as the appropriate weight to be attached to the concept of *pacta sunt servanda* versus the nature and effect of the frustrating event. Rather than a legal fiction an express rule of contract law should be formulated.

Several models for such a rule have been examined in this thesis. The wording of these provisions varies from one set of rules to the next, but certain common themes tend to reoccur. As to the threshold test for when a change in circumstances will warrant intervention in a contract, slight variations exist. The US and German models rely on the motives in contracting. The US rule on frustration of purpose states that the non-occurrence of the event should have been “a basic assumption on which the contract was made”.⁵⁸ The German model uses a comparable formula.⁵⁹ The Dutch model expressly makes the determination of the continuing validity of the contract contingent upon a good faith (“redelijkheid en billijkheid”) inquiry.⁶⁰ The supranational rules found in the PICC rely on a fundamental alteration in “the equilibrium of a contract”,⁶¹ the PECL on whether the change in circumstances has become “excessively onerous” and the DCFR on whether there has been an “exceptional” change of circumstances which makes it “manifestly unjust” that the debtor continue to be bound to its obligation.⁶²

⁵⁸ Second Restatement of Contracts § 265.

⁵⁹ BGB § 313(1): “If circumstances which became the basis of the contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change...”

⁶⁰ BW art 6:258(1).

⁶¹ PICC art 6.2.2.

⁶² PECL art 6:111(2) & DCFR at Book III, art 1:110(2).

Since the approach advocated here involves a shift away from imputed consensus, the German and US models should be avoided. Likewise the Dutch model is to be discarded, since good faith is already advocated as the underlying rationale for the proposed test. To say that the determination as to whether discharge should be permitted also depends on good faith takes the inquiry no further. Admittedly these faults, particularly with regard to the German and Dutch models are minor, but it should be borne in mind that these rules have been developed within the broader context of the codes and case law of these countries and thus it is more difficult to transpose these rules to another country without also replicating the fuller features of the original system. One major distinction between both the German and Dutch models and the model rules of the PICC, the PECL or the DCFR, is that there is no duty to renegotiate placed upon the parties. While Busch et al argue with regard to the Dutch context that the general good faith provisions could require this, it is an important improvement which has been made in the model rules and is a credible reason for preferring their approach to changed circumstances.⁶³

The choice of the South African Law Commission in this regard has already been discussed in previous chapters. When the SALC proposed legislation to deal with the problem of changed circumstances it was largely based on the equivalent provision in the PECL.⁶⁴ As noted in chapter two, however, no justification was given by the commission for this choice. As argued in chapter six, since this thesis advocates that the common law be developed to address this problem, the exact formulation of the proposed rule is less important than if legislation was to be suggested. Again, as argued previously, the specificity of the PICC provision lends itself to the formulation of a common law rule. For ease of reference the threshold test for the invocation of this provision is reproduced:

“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

(e) the events occur or become known to the disadvantaged party after the conclusion of the contract;

⁶³ Danny Busch, Harriet Schelhaas et al (eds) *The Principles of European Contract Law and Dutch Law* (2002) at 289.

⁶⁴ See clause 4 of the Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms (1998) attached to the Report on Project 47.

- (f) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (g) the events are beyond the control of the disadvantaged party; and
- (h) the risk of the events was not assumed by the disadvantaged party.”⁶⁵

This threshold test sets out that there must have been some upset of the equivalence in exchange between the parties and that both situations of impracticability (increase in the cost of performance) and frustration of purpose (decrease in the value of performance) will be covered. The guidelines set out at (a) – (d) further make explicit the limits which will be placed on the exercise of a discretion to award redress.

Since this is to be a common law rule, however, there is no reason why the PICC provision should not be read with the other provisions in the PECL or the DCFR. Thus in deciding whether the threshold test has been met, a court could also have regard to whether or not the change of circumstances is exceptional and causes manifest injustice (as per the DCFR) or whether the impact of the change is to make performance excessively onerous on the disadvantaged party (as per the PECL).

This basic framework will now be applied to two leading cases by way of example. In *Krell v Henry* (referred to above) the illness of the King was possibly foreseeable, particularly since he was over 60 at the time of the proposed Coronation,⁶⁶ but ultimately this consideration was not taken into account by the parties. This raises the question as to whether the question should be a subjective one (“actually foreseen”) or an objective one (“reasonably foreseeable”). This is a question of policy. Since the advocated approach here is generally an objective one (what is fair all things considered) rather than dealing in the realms of motive (what was the actual/ imputed consensus of the parties) the test should probably be one of *foreseeability*. This would ensure greater protection for the doctrine of *pacta sunt servanda* and allow greater scope for courts to deny discharge for the failure of a mere motive to materialise. Would it then have been proper to require the lessee to pay an exorbitant rental to watch the ordinary London traffic? Perhaps, but as Treitel

⁶⁵ PICC art 6.2.2.

⁶⁶ Treitel op cit note 40 at 316.

points out, the lessor could charge an increased rental again when the postponed procession did indeed take place, providing him with a windfall gain.⁶⁷

Perhaps when examining the facts of our own South African locus classicus on frustration of purpose, *Williams v Evans*, one feels less sympathy for the disadvantaged party. In that case the common purpose of the contract was that Evans would purchase and operate a dairy owned by Williams's son. This required capital, however, which could only be raised by a bank overdraft. Williams agreed to furnish security so that Evans could obtain an overdraft, but the bank in question nevertheless refused to grant the overdraft. Thus the purpose with which Evans had entered the contract for the purchase of the dairy was frustrated, since he would now not be able to finance the operation of it without the loan capital. It was entirely foreseeable that the bank would not furnish an overdraft, the parties had merely been short-sighted in not considering this possible outcome of their conduct. Perhaps this should be seen as the underlying basis why the discharge of Evans's liability by Broeksma J in this case has been so heavily criticised, since the threat to the concept of *pacta sunt servanda* is too great where the frustrating event is merely unforeseen.

Thus in sum: frustration of purpose should be incorporated into South African law, since it is a vital aspect of the change of circumstances problem. This is best achieved by means of a common law rule, formulated along the lines of article 6.2.2 of the PICC, read with the PECL and the DCFR, as set out above. It is important from a point of view of the allocation of risk under a contract that mere motives are not permitted to discharge an obligation, thus the criterion should not be a subjective one, inquiring merely whether the subjective consensus of the parties was that circumstances should remain unchanged. Rather the criterion should be objective, inquiring *ex post facto* whether the frustrating event has upset the equilibrium of the contract, subject to certain important provisos, such as that the event should not have been reasonably foreseeable; should be beyond the control of the disadvantaged party and that it should not have assumed the risk thereof.

⁶⁷ Treitel *op cit* note 40 at 322.

As to the consequences of a finding that frustration of purpose is present, possible outcomes are discharge of the contract, or alternatively, renegotiation or judicial revision of the contract. The question as to what is the appropriate remedy will be dealt with below once impracticability has been considered.

8.4.2 Impracticability

Impracticability is the converse of frustration of purpose, in that it affects the supplier of goods or services rather than the client. Instead of a decrease in the value of the performance, there is an increase in the costs associated with supplying the performance under the contract.⁶⁸ This may be due to a severe shortage of raw materials or of supplies due to war, embargo, crop failure or similar events.⁶⁹ While performance is not strictly speaking impossible, the increased difficulty of performance means that in certain jurisdictions (notably the United States as well as – for example – Germany and the Netherlands) discharge is considered the just outcome. As noted in previous chapters this is not the position in England, where the courts refuse to discharge a contract for impracticability. Likewise in South Africa there are several authoritative dicta which rule out the possibility of discharge on this ground.

The inclusion of this doctrine in the more progressive jurisdictions, as well as in most of the supranational rules of international trade is indicative of the fact that it forms a vital part of change of circumstances doctrine. While the potential loss in cases of frustration of purpose is limited to the contract price, in cases of impracticability the potential loss is (in theory) infinite and is limited only by the continuing solvency of the debtor. While perhaps the law may expect a debtor to be prepared to face bankruptcy, to place the consequence of insolvency on a debtor due to an unforeseen change of circumstances beyond his control seems – as with frustration of purpose – to be unjust. A strong argument could be made that it is unconscionable to place economic ruin upon one party because of impracticability consequent upon an unforeseen change of circumstances, although considerations as to whether the supplier expressly or impliedly assumed the risk of a change of

⁶⁸ Compare Treitel *op cit* note 40 at 262 – 263. See also Second Restatement of Contracts at § 261.

⁶⁹ Compare Second Restatement of Contracts: Official comment (d) to § 261.

circumstances may apply. In our own South African context it may well be that fairness in contracting demands that a debtor be discharged under an appropriate situation of impracticability.

Consider the following statement in a leading South African contract textbook:

“Die maatstaf by die bepaling of prestasie moontlik of onmoontlik is, is ’n verkeersmaatstaf. ...Dit is fisies moontlik om ’n spoorstaaf wat in die see geval het op te diep en te lewer, maar in die verkeer moet dit as onmoontlik beskou word omdat die koste daaraan verbonde buite elke verhouding met die waarde van prestasie staan.”⁷⁰

Van der Merwe et al translate the concept of a “verkeersmaatstaf” as a “pragmatic standard”.⁷¹ These authors develop upon the concept as follows:

“While an absolute ‘physical’ impossibility will satisfy the test, a performance that might conceivably be rendered will nevertheless be impossible if insistence on its performance would be unreasonable in the circumstances.”⁷²

In a footnote to this passage, Van der Merwe et al add that factors such as “practical and economic expediency and fairness” play a role in such a determination.⁷³ A noteworthy factor in this discussion is that De Wet and Van Wyk give no authority for their concept of a verkeersmaatstaf, nor is there any support provided for the example of a valuable object falling into the sea and therefore being “impossible” to recover. There is a corresponding absence of authority in the discussion of Van der Merwe et al, who cite only De Wet and Van Wyk. Authority for this proposition does exist, however, albeit in foreign jurisdictions. Treitel cites the English case of *Moss v Smith*⁷⁴ where a very similar proposition was accepted, as well as the German textbook writer Larenz,⁷⁵ who includes a similar example.⁷⁶

If the standard really is a flexible one, and particularly if considerations of fairness play a role, would it really be such a big step to stretch the definition of impossibility to include impracticability? The case studies, particularly in the United States where

⁷⁰ JC De Wet & AH Van Wyk *Kontraktereg* (1992) at 85 – 86.

⁷¹ Schalk van der Merwe et al *Contract – General Principles* (2007) at 188.

⁷² *Ibid.*

⁷³ *Ibid* at 188n18.

⁷⁴ (1859) 9 CB 94 at 103.

⁷⁵ Karl Larenz *Schuldrecht* 14th ed (1987) Vol I at 99.

⁷⁶ Treitel *op cit* note 40 at 264 – 265.

this doctrine is most famously recognised, indicate that discharge for impracticability is not something to be invoked lightly – only the most severe increases in expense, in the order of several hundred per cent meet the threshold test. The threshold test for redress advocated under the discussion of frustration of purpose is phrased so as to accommodate both instances of frustration of purpose and impracticability, so it could be implemented with minimal tweaking. Once again, the above listed factors such as foreseeability of the change of circumstances causing the rise in prices can be used to limit the availability of this defence. Opponents of impracticability might argue that it is merely “subjective” impossibility,⁷⁷ but it is conceivable that increased expense due to a general phenomenon such as war or embargo justify discharge nevertheless.

In sum, there is some academic authority that the standard of impossibility in South Africa is a flexible one depending on practical standards of social expectation.⁷⁸ While increased difficulty in performance has not been recognised in the case law as a ground for discharge as yet, this is at variance with international trends. The justification for a possible expansion of the impossibility defence to include drastic instances of impracticability are already present, given this flexible standard. It would thus not be a big jump from the present common law position of impossibility to a new regime where redress was allowed in situations of impracticability.

Applying this reasoning to the South African cases considered under the heading of impracticability in chapter two, reflects that perhaps the dicta in which this defence has been denied were pronounced in cases where discharge would probably not have been the appropriate remedy. In *MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd*⁷⁹ an argument that the respondent was no longer obliged to take over the business of the appellant on the grounds that a slump in the coal market had made this “commercially impossible” was rejected.⁸⁰

⁷⁷ Van der Merwe et al op cit note 71 at 189. Van der Merwe et al do however note that difficulty in performance might lead to such economic or other hardship that the applicable standard demands discharge for objective impossibility.

⁷⁸ In a different chapter of their book, Van der Merwe et al op cit note 71 translate “verkeersmaatstaf” as a “standard of society” (at 542).

⁷⁹ 1924 AD 573.

⁸⁰ Ibid at 606.

It is submitted that ordinary market related price shifts are foreseeable in the normal course of business, particularly by a party who trades within that market. Thus the Appellate Division was correct to reject this ground of appeal. In *Hersman v Shapiro*⁸¹ a middleman dealer in corn contracted to supply a certain quantity of a particular grade of corn to another dealer. A further contract selling this corn in advance on the overseas market had already been entered into by the second dealer. Crop failure due to heavy rains intervened and the first dealer argued that it was impossible to supply the required corn.⁸² It was held that this defence was bad in law, since it was not impossible, but merely more difficult to supply the corn.⁸³ Again this was the correct decision, since the resultant change was foreseeable. The dealer was a middleman and the transaction was essentially speculative. It can thus be argued that he had assumed the risk of the resultant change of circumstances and should have diversified his sources or at least obtained insurance in case of crop failure.

Finally in *Unibank Savings and Loans (formerly Community Bank) v ABSA Bank*⁸⁴ the appellant bank had been placed under curatorship and the curator had cancelled the employment contracts of two employees.⁸⁵ This bank sought to justify this cancellation on various grounds, including that it was impossible to continue to use the employee's services.⁸⁶ The court held that impossibility was not present, the decision had merely been based on the business operations of the bank.⁸⁷ Thus the impossibility was related to the expense of hiring the employees, which was minimal compared to the total operation costs of a bank. Deteriorations in the profitability of the company had been foreseeable at the time of conclusion of the contract of employment and the change of circumstances did not discharge the contract.⁸⁸ Again the reasoning of the court cannot be faulted in this case. Not only was the change of circumstances foreseeable in this case, but the consequences of holding the bank bound to its contract was limited to the payment of the salaries of two

⁸¹ 1926 TPD 367.

⁸² *Ibid* at 371.

⁸³ *Ibid* at 375 – 377.

⁸⁴ 2000 (4) SA 191 (W).

⁸⁵ *Ibid* at 194.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* at [9.2].

⁸⁸ *Ibid* at [9.3.1].

employees. Furthermore it is hardly unconscionable to expect an employer to honour its contracts of employment and the argument raised as to impossibility here appears slightly frivolous.

It does not seem too radical to argue for a recognition of impracticability in South African law, provided this defence is limited to situations where the appropriate test for impracticability, as formulated above, are met. A mere increase in price will have to be unforeseeable, which will be hard to prove with a market related price increase. The seminal US case of *Mineral Park Land Co v Howard*⁸⁹ provides an example of the type of situation in which discharge for impracticability would be justified. It will be recalled from chapter four that this is the case which established the defence of impracticability in America. The defendant had agreed to take all the gravel it needed for a particular building project from the plaintiff's land. After about half the agreed quantity had been removed, it was discovered that the remainder was below the water table and could only be extracted at 10 to 12 times the price. In addition, building would be delayed while the gravel was dried. The obligation of the defendant was held to have been discharged by impracticability.⁹⁰ Following an unforeseen rise in price of this magnitude, it would arguably be unconscionable to nevertheless insist on performance.

As to the threshold level of increase to be met before permitting discharge, it is worth reiterating the suggestion of Brunner discussed in chapter six that in a situation of impracticability the margin of increase in cost should be 100 to 125 per cent of the contract price before discharge is permitted.⁹¹ This puts in concrete terms what magnitude of increase will constitute unconscionability. The recent Belgian decision in *Scaform International BV v Lorraine Tubes SAS*⁹² also refers here, however. There an unforeseen rise in the cost of supplying goods under an international contract of sale in the order of 70 per cent was held to "fundamentally disturb the contractual balance" and renegotiation was enforced on the buyer.⁹³

⁸⁹ 156 P 458 (1916).

⁹⁰ *Ibid* at 459.

⁹¹ Brunner *op cit* note 40 at 432.

⁹² 19 June 2009 Belgian Court of Cassation [Supreme Court]. Translation available at <http://cisgw3.law.pace.edu/cases/090619b1.html> (last accessed 8 February 2010).

⁹³ *Ibid*.

The South African cases in which the existence of a defence of “commercial impossibility” has been denied have been ones where discharge for impracticability should not in any event have been allowed as the threshold of sufficiently severe impracticability was not met. In a case of sufficiently severe rise in cost, public policy can be used to justify a defence of impracticability and this should occur by broadening the definition of impossibility. If one accepts the view of De Wet and Van Wyk and Van der Merwe et al that the standard required for discharge is a “verkeersmaatstaf”, then this should not be too unfathomable, nor too alien to our accepted law.

8.5 Consequences of a finding of frustration of purpose or impracticability

The first remedy envisaged by the PICC, the PECL and the DCFR for a contract struck by hardship is in the form of a non-judicial ability of the disadvantaged party to request renegotiation.⁹⁴ If this proves unsuccessful, a court may discharge the contract or adapt it to restore the equilibrium.⁹⁵ In South Africa the traditional remedy for supervening impossibility has always been discharge. To extend this to changed circumstances would be less difficult than to attempt to enforce renegotiation, or even less likely, to allow for judicial adaptation of the contract. Christie has argued that the introduction of hardship provisions by the South African courts along the lines of those found in the supranational model rules, particularly because of the nature of the remedies offered there, would be to usurp the power of the legislature.⁹⁶ He is of the further opinion that the legislature is unlikely to introduce such rules, given the hostile climate in this country to discharge for change of circumstances.⁹⁷ This is a conservative stance and is at variance with the argument advanced in the previous section of this chapter. The question which thus needs to be asked is whether South African law is really so hostile to enforced renegotiation or judicial adaptation?

⁹⁴ PICC art 6.2.3; PECL art 6:111(2)-(3); DCFR III 1:110(2); BGB § 313; BW art 6:258.

⁹⁵ *Ibid.*

⁹⁶ Christie *op cit* note 7 at 73.

⁹⁷ *Ibid.*

The principle of *pacta sunt servanda* may be under attack in the new constitutional dispensation, but it remains one of the cornerstones of contractual doctrine in South Africa. The initial decline of good faith in South Africa was largely due to the competing value of contractual autonomy and it will not be easy to persuade courts to allow even discharge for changed circumstances, let alone renegotiation. Chapter four demonstrated that in England there is likewise a strong following for the concept of *pacta sunt servanda* and there even under the more permissive doctrine of frustration, there is an all-or-nothing approach to remedying changes in circumstances.

The question remains, however, as to whether renegotiation is not the preferable remedy. A strong argument can be raised that renegotiated performance is likely to be preferable to the parties to no performance at all. It might thus be desirable to attempt to force the parties to renegotiate themselves, before a court actively intervenes in the contract. In this regard, the recent jurisprudence surrounding the duty to negotiate in good faith in South Africa is worth mentioning. In *Southernport Developments (Pty) Ltd v Transnet Ltd*⁹⁸ the Supreme Court of Appeal enforced a duty to negotiate in good faith on the parties before it.⁹⁹ Here the parties had entered into an agreement to negotiate a further agreement contingent upon whether the appellant's application for a casino licence succeeded or failed.¹⁰⁰ A clause in this bridging agreement stated that should the parties fail to reach agreement in this second round of negotiations, an arbitrator could be consulted.¹⁰¹ The Supreme Court of Appeal held that the inclusion of the arbitration clause distinguished this agreement from a bare "agreement to agree" and hence enforced the duty to negotiate in good faith on the respondent.¹⁰²

The court in *Southernport Developments* was careful to state, however, that it was not making a new agreement for the parties, but simply enforcing their declared consensus.¹⁰³ Hence while this case is authority for enforcing a duty to negotiate on

⁹⁸ 2005 (2) SA 202 (SCA).

⁹⁹ *Ibid* at [17].

¹⁰⁰ *Ibid* at [2] – [3].

¹⁰¹ *Ibid*.

¹⁰² *Ibid* at [17].

¹⁰³ *Ibid*.

the parties before it, it does not stretch beyond implementing their own consensus. What if, however, the duty to renegotiate was an *ex lege* term of the agreement? Surely then there would be scope for enforcing a duty to renegotiate and this would not be too far removed from the *Southernport Developments* precedent? A court might even go further and suggest its view of what a fair solution would be and send the parties away to return at a future date with their own negotiated settlement. Should consensus between the parties prove impossible, the court's version would stand.

In the event of a breakdown of good relations between the parties, some sort of court ordered revision may also prove necessary, although the dangers of this are illustrated by the American case of *Aluminum Co of America v Essex Group, Inc*¹⁰⁴ discussed above in chapter four.¹⁰⁵ In this vein, the DCFR cautions against ill-considered judicial adaptation of contracts:

“Any modification must only be such, however, as will make the obligation reasonable and equitable in the new circumstances. It would not be reasonable and equitable if the effect of the court's order were to introduce a new hardship or injustice.”¹⁰⁶

Is judicial adaptation of contracts really so far removed from the present position in South Africa? Consider the concept of restraint of trade. At one stage the so-called “blue pencil” test applied with regard to partial enforcement of restraint agreements which were too widely phrased. If the offending portions could be severed to leave an intelligible and coherent residue, partial enforcement could be awarded, if not, the contract would not be enforced.¹⁰⁷ In *National Chemsearch (SA) Pty Ltd v Borrowman*¹⁰⁸ Botha J held that this was an “artificial, ill-defined, and ‘internally inconsistent’” approach.¹⁰⁹ Rather a judge could, under appropriately limited circumstances, formulate a new agreement for the parties which partially enforced

¹⁰⁴ 499 F Supp 53 (1980).

¹⁰⁵ In that case the trial court substituted a complex pricing mechanism negotiated by the parties for one of its own creation. The parties reached settlement before this matter could be determined on appeal.

¹⁰⁶ Comment E to DCFR III 1:110.

¹⁰⁷ See the discussion in *Roffey v Catterall Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N) at 507C-D.

¹⁰⁸ 1979 (3) SA 1092 (T).

¹⁰⁹ *Ibid* at 1115D.

the restraining provision.¹¹⁰ This approach was confirmed by the Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.¹¹¹ Thus it is not entirely alien to South African contract law for a judge to revise a validly concluded contract. Admittedly with partial enforcement of restraint agreements, the judge merely limits the application of the agreement, rather than formulating something entirely new, but it would not be a big jump from this practice to making slight amendments to agreements struck by supervening circumstances.

A final consideration is that the Legislature could introduce a statute which defined hardship and made provision for courts to have the power to adjust frustrated contracts. As noted above, Christie felt that such an occurrence was unlikely. Any calamitous change in a country's circumstances can upset what appeared likely in a national legal system. Furthermore if the arguments of the rest of this chapter are accepted, then it is necessary, even in the absence of a national calamity, for the problem of changed circumstances to be addressed. So far only a development of the common law under s 39(2) and s 173 of the Constitution has been discussed. It is foreseeable that the same result could be achieved by the Legislature. A comparable power of the courts in this regard is the power to strike down unfair conduct or contract terms under s 52 of the Consumer Protection Act.¹¹² As the discretionary power to strike down contract terms on the basis of fairness already exists, both under the Consumer Protection Act and at common law, following *Barkhuizen v Napier*, it takes only a small conceptual step to extend this discretion to the discharge of a contract for hardship based on the unfairness of enforcing it after a fundamental change of circumstances. Eventually a jump could be made from discharge to the further remedies of enforced renegotiation or judicial modification. To extend the power of the courts in this manner would better equip them to deal instances of frustration and would better serve the underlying rationale of fairness in contracting. International practice evidences that this type of remedy is the way forward.

¹¹⁰ Ibid at 1116D – 1117G.

¹¹¹ 1984 (4) SA 874 (A) at 896E. See also *CTP Ltd v Argus Holdings Ltd* 1995 (4) SA 774 (A) at 787E-F.

¹¹² Act 68 of 2008. Of course this Act would not provide much aid to business to business contracts, a more general statute would have to be enacted to achieve that result.

8.6 Enrichment issues following a termination of a contract due to a supervening change of circumstances

If South African law is to be broadened to allow a change of circumstances to discharge a contract, the question which remains is what will become of money or property transferred during the existence of that contract. English law has dealt with this issue by the enactment of the Law Reform (Frustrated Contracts) Act discussed above in chapter four.¹¹³ This statute requires the return of payments or non-monetary benefits transferred to the other party prior to the frustrating event.¹¹⁴ This rule is subject to the proviso that reliance expenses incurred during the existence of the contract may be set off against payments received prior to frustration at a court's discretion.¹¹⁵ South African law maintains that where a contract comes to an end due to supervening impossibility a benefit transferred to the other party may be claimed by a common law enrichment action.¹¹⁶

In South African law there is as of yet no general action for unjustified enrichment, although the Supreme Court of Appeal has strongly indicated that this may be recognised in the future.¹¹⁷ Thus there must be a reliance on one of the separate condictiones. The leading case on the enrichment consequences of a contract which has failed due to supervening impossibility is *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*.¹¹⁸ There it was held that the appropriate cause of action in this type of case is the *condictio ob causam finitam*, which is a narrower instance of the broader *condictio sine causa specialis*.¹¹⁹ The majority of the court stated that sometimes it is "suggested" that the *condictio causa data causa non secuta* is the appropriate action, but noted that there was criticism of the use of this action.¹²⁰ The

¹¹³ See chapter 4 section 4.2.6

¹¹⁴ Sections 1(2) & (3).

¹¹⁵ *Ibid.*

¹¹⁶ *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at [15].

¹¹⁷ *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at [8] – [10].

¹¹⁸ *Supra* note 116.

¹¹⁹ *Ibid* at [15].

¹²⁰ *Ibid.* The criticism noted is Robin Evans-Jones "The claim to recover what was transferred for a lawful purpose outwith contract (*condictio causa data causa non secuta*)" (1997) *Acta Juridica* 139. Here the author argues that this action has been incorrectly employed by the House of Lords in the context of Scots law to give a remedy where there has been enrichment consequent upon a frustrated contract. Evans-Jones argues that this action has a more limited sphere of application to transfers operating outside of a contractual relationship. See *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co* 1923 SC (HL) 105; 1923 SLT 624.

court went on to hold, however, that precise resolution of this point was not necessary, since the requirements of proof of both conditiones were the same.¹²¹

Visser states that the *condictio ob causam finitam* is the generally accepted action in South African law following supervening impossibility.¹²² Although Scots law employs the *condictio causa data causa non secuta* in this context, Evans-Jones convincingly demonstrates that this is due to a confusion between the civilian and common law sources and that this action is not correctly used in this context.¹²³ If a general enrichment action were to be recognised this would obviate the need to distinguish between the different conditiones and the focus would shift instead to the identifying of the general elements of the action.¹²⁴

In the context of discharge of a contract due to changed circumstances, the same position as per supervening impossibility should pertain in South African law. This is because essentially one is still dealing with a contract that existed at one time, but has now been terminated due to supervening events. The same enrichment considerations pertain, the only difference being that the grounds of discharge in contract law have been broadened. Thus if parties to a contract which has been struck by hardship are unable to renegotiate successfully, there should be a disgorgement of benefits using the *condictio ob causam finitam*. Should a general enrichment action one day come to pass, this would then become the appropriate cause of action in this context.

A final point on this topic is due to the status of the defence of loss of enrichment. Visser states that in this context a party which is sued for return of a benefit under a contract discharged due to supervening impossibility may successfully raise the defence that the enrichment no longer exists.¹²⁵ Thus the risk of loss lies with the party who makes performance.¹²⁶ Visser submits that the defence of loss of enrichment should be withdrawn in this context and that a party should be liable to

¹²¹ *Kudu Granite* supra note 116 at [16].

¹²² Daniel Visser *Unjustified Enrichment* (2008) at 481.

¹²³ Evans-Jones op cit note 120 at 174 – 175.

¹²⁴ *McCarthy Retail* supra note 117 at [10].

¹²⁵ Visser op cit note 122 at 498.

¹²⁶ *Ibid.*

restore a benefit she has received, or failing this, the value thereof.¹²⁷ This places the risk on the party in possession of the benefit, who is best able to manage that risk, by (for instance) insuring the item in question.¹²⁸

8.6 Hardship Clauses

As noted at the outset in chapter two, parties to an agreement are always free to include a hardship clause of their own design in their contract.¹²⁹ This would achieve a consensual regulation of the impact of possible future hardship causing events. Since the approach to hardship advocated in this thesis is the introduction of a residual common law rule by the courts to regulate the sharing of losses and gains consequent upon the occurrence of an unforeseen event, it is logical that the inclusion of a hardship clause by the parties should exclude the operation of a rule of the type envisaged here. The justification for this exclusion of the doctrine is that to interfere with an agreement already regulated by a hardship clause *ex post facto* would be to upset a carefully negotiated allocation of contractual risks.

8.7 Conclusion

A comparison of South African law with the foreign jurisdictions examined in this thesis confirms the impression that this country is lagging behind the rest of the world in terms of dealing with the problem of changed circumstances. Our lack of a doctrine to accommodate a situation of hardship does indeed leave a gap in our law. South African parties trading in the international arena may thus wish to rather submit their disputes to arbitration and agree to have their contracts governed by the PICC. Within our municipal jurisdiction, however, our current approach provides no solution to the problem. The insistence of our courts upon the concept of *pacta sunt servanda* flies in the face of international norms and is clearly an outdated approach.

There are signs that the granite concept of contractual sanctity is starting to crack in places, however, most notably at the instance of fairness in contracting. The

¹²⁷ Ibid at 499 – 500.

¹²⁸ Ibid at 500 – 501.

¹²⁹ See chapter 2 section 2.2.1.

Barkhuizen decision is a clear indication, sanctioned by the Constitutional Court itself, that courts are now justified in limiting *pacta sunt servanda* in the interests of justice. What exactly the interests of justice are would vary from context to context, but in the present area of changed circumstances justice calls for a splitting of the impact of an unforeseen event, so that the hardship caused by the change is not born by one party alone. Justification for the equity of such loss-sharing could be found in constitutional values of dignity and equality, as well as the implied value of fairness, which inform the concept of public policy.¹³⁰ Public policy should not be applied in an *ad hoc* manner, however, rather it should form the underlying rationale for grafting a new doctrine onto our law. This doctrine should take the form of a rule of contract law (which the parties may exclude or vary by agreement). This rule should set the threshold at which redress will be granted for changed circumstances and provide appropriate remedies. A good guide as to the ideal content of such a rule can be found in the PICC articles on hardship, read with those of the PECL and the DCFR.

This change could be made through a development of our common law by the courts. Fairness in contracting would underlie the introduction of this new rule and it would introduce a definition of hardship to cover frustration of purpose and impracticability. Policy considerations, such as the importance of maintaining the sanctity of contracts could be accommodated through the conditions placed on the operation of such a rule. Since such a change is needed to give effect to constitutional values, the courts would merely be exercising their powers in terms of s 39(2) and s 173 of the Constitution.

Alternatively change could be brought about through legislation. This would codify our law and would provide the necessary impetus for a new approach to be adopted. The legislature has a higher democratic pedigree than the courts in order to effect what would be a fairly major policy shift in the existing law. Such a remedy could

¹³⁰ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at [91]. See also: AJ Barnard-Naudé “‘Oh what a tangled web we weave...’ Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract” (2008) 1 *Constitutional Court Review* 155 at 196; Lubbe *op cit* note 34 at 421.

also then provide for the controversial solution of renegotiation or judicial revision of contracts struck by hardship.

The Legislature seems paralysed with indecision, however. The South African Law Commission Bill from over ten years ago was never enacted and developments in the area of fairness in contracting had to be undertaken by the Constitutional Court. The rules on hardship should thus be formulated as part of the common law of contract. Prudent parties are still able to include force majeure and hardship clauses in their contracts to regulate their own balancing of the risk of an unforeseen change of circumstances. In this way more sophisticated parties could manage their own risks, and avoid the uncertainty of relying on judicial intervention in their contract. Parties of lesser sophistication would have the gaps in their contracts filled by the common law.

The way forward is thus to develop our South African law to take account of changed circumstances. This would not be an abandonment of contractual certainty – as the comparative studies have demonstrated – rather it would simply achieve a more equitable allocation of the risk of the occurrence of an unforeseen event.

Bibliography

Primary Sources

- Bartolus de Saxoferrato *Veteris partem commentaria* (1515 – 1516) Lugduni: J Sacon.
- Cicero *De Officiis* (Loeb edition) (Translated Miller, W) (1913) London: William Heinemann.
- Grotius, Hugo *De Iure Belli ac Pacis* (Molhuysen (ed)) (1919) Lugduni Batavorum: AW Sijthoff.
- Grotius, Hugo *On the Law of War and Peace* (Translated Kelsey, F) (1925) Oxford: Clarendon.
- Kelsey, F *On the law of war and peace: three books* (1925) Oxford: Clarendon.
- Lessius, L *De Iustitia et Iure caeterisque Virtutibus Cardinalibus* (3rd ed) (1612) Antwerp: Plantiniana.
- Leyser, A *Meditationes ad Pandectas* (1772) Halae: Ioannis Ioach. Beyeri.
- Molina, L *De Iustitia, Tomus Secundus de Contractibus* (1602) Moguntiae: Balthasarus Lippius.
- Mommsen, T, Krueger, P & Watson, A *The Digest of Justinian* (Vol I) (1985) University of Pennsylvania Press.
- Plato *The Republic* (Translated Lee, H) (1955) Harmondsworth, Middlesex: Penguin Books.
- Pothier, R *A Treatise on the Law of Obligations* (Translated Evans, W) (1853) Philadelphia: Robert Small.
- Pufendorf, S *Of the Law of Nature and Nations* (3rd ed) (Translated Kennett, B) (1717) London.
- Seneca *Moral Essays* (Vol III) (Loeb edition) (Translated Basore, J) (1935) London: Heinemann.
- Thomas Aquinas *Summa Theologiae* (Vol 41) (Translated O'Brien, T) (1972) London: Eyre & Spottiswoode.
- Van Bynkershoek, C *Opera Omnia – Tomus Primus* (1767) Lugduni Batavorum: Luchtmans.

Secondary Sources

- Abas, P *Rebus sic stantibus* (1989) Deventer: Kluwer
- Barnard, A “A different way of saying: on stories, text, a critical legal argument for contractual justice and the ethical element of contract in South Africa” (2005) *SAJHR* 278.
- Barnard-Naudé, A “‘Oh what a tangled web we weave...’ Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract” (2008) 1 *Constitutional Court Review* 155.
- Beale, H, Hartkamp, A, Kötz, H & Tallon, D *Cases, Materials and Text on Contract Law* (2002) Oxford: Hart.
- Beatson, J *Anson’s Law of Contract* (2002) OUP.
- Bhana, D & Pieterse, M “Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited” (2005) *SALJ* 865.
- Bonell, M *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (2004) Ardsley: New York: Transnational Publishers.
- Brand, F & Brodie, D “Good faith in contract law” in Zimmermann, Visser & Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2005) Cape Town: Juta.
- Brand, F “The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution” (2009) *SALJ* 71.
- Brandsma, F “Some remarks on Dutch private law and the *ius commune* (2007) Vol. 11 *Electronic Journal of Comparative Law* www.ejcl.org
- Bringmann, Klaus *A History of the Roman Republic* (2007) Cambridge: Polity. Translation by WJ Smyth.
- Brownsword, R “Positive, negative, neutral: the reception of good faith in English contract law” in Brownsword, Hird & Howells (eds) *Good Faith in Contract – Concept and Context* (1999) 13.
- Brunner, C *Force Majeure and Hardship under General Contract Principles* (2009) The Hague: Kluwer.
- Busch, D, Schelhaas, H et al *The Principles of European Contract Law and Dutch Law – A Commentary* (2002) The Hague, London, New York: Kluwer.

- Carter, J & Peden, E "Good faith in Australian contract law" (2003) *Journal of Contract Law* 155.
- Christie, R *The Law of Contract in South Africa* (2006) Cape Town: Butterworths.
- Christie, R "Our law of contract and the modern lex mercatoria" in Glover (ed) *Essays in Honour of AJ Kerr* (2006) Durban: Lexis Nexis Butterworths.
- Cockrell, A "Substance and form in the South African law of contract" (1992) *SALJ* 40.
- Cohn, E "Frustration of contract in German law" (1946) 28 *Journal of Comparative Legislation and International Law* 15.
- Dannebring, R & Kaser, M *Roman Private Law* (1984) Pretoria: University of South Africa.
- Dawson, J "Effects of inflation on private contracts: Germany, 1914 – 1924" 33 *Michigan Law Review* 171 (1934 - 1935)
- Dawson, J "Judicial revision of frustrated contracts" (1982) *Juridical Review* 86.
- Dawson, J "Judicial revision of frustrated contracts: Germany" (1983) 63 *Boston University Law Review* 1039.
- Dawson, J "Judicial revision of frustrated contracts: the United States" (1984) 64 *Boston University Law Review* 1.
- De Vos, W "Solutio indebiti en eiendomsoorgang" (1976) *TSAR* 79.
- De Wet, J *Die Ou Skrywers in Perspektief* (1988) Durban: Butterworths.
- De Wet J & Van Wyk, A *Kontraktereg* (1992) Durban: Butterworths.
- Diesselhorst, M *Die Lehre des Hugo Grotius Vom Versprechen* (1959) Cologne & Graz: Bohlau Verlag.
- DiMatteo, L et al (eds) *International Sales Law – A critical analysis of CISG jurisprudence* (2007) CUP.
- Dworkin, R "The model of rules" 35 *University of Chicago Law Review* 14 (1967 – 1968).
- Dworkin, R *Taking Rights Seriously* (1977) London: Duckworth.
- Ebke, W & Steinhauer, B "The doctrine of good faith in German contract law" in Beatson & Friedmann (eds) *Good faith and fault in contract law* (1995) Oxford: Clarendon.
- Eiselen, S "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1999) *SALJ* 323.

- Eiselen, S & Bergenthal, S “The battle of forms: a comparative analysis” (2006) *The Comparative and International Law Journal of Southern Africa* 214.
- Encyclopedia Britannica Online available at: www.search.eb.com.
- Evans-Jones, R “The claim to recover what was transferred for a lawful purpose outwith contract (condictio causa data causa non secuta)” (1997) *Acta Juridica* 139.
- Farnsworth, E “Good faith in contract performance” in Beatson & Friedmann (eds) *Good faith and fault in contract law* (1995) Oxford: Clarendon.
- Feenstra, R “Impossibilitas and clausula rebus sic stantibus” in Alan Watson (ed) *Daube Noster* (1974) Edinburgh: Scottish Academic Press.
- Felemegas, J (ed) *An international approach to the interpretation of the United Nations Convention on contracts for the international sale of goods (1980) as uniform sales law* (2007) Cambridge University Press.
- Fried, C *Contract as Promise* (1981) Massachusetts: Harvard University Press.
- Furmston, M “Drafting of force majeure clauses – some general guidelines” in McKendrick (ed) *Force Majeure and Frustration of Contract* (1995) Lloyd’s of London Press.
- Gergen, M “A defense of judicial reconstruction of contracts” (1995 – 1996) 71 *Indiana Law Journal* 45.
- Glover, G “Lazarus in the Constitutional Court: an exhumation of the exceptio doli generalis?” (2007) *SALJ* 449.
- Gordley, J “Natural Law Origins of the Common Law of Contract” in Barton, J (ed) *Towards a General Law of Contract* (1990) Berlin: Duncker & Humblot.
- Gordley, J *The philosophical origins of modern contract doctrine* (1991) Oxford: Clarendon.
- Grundmann, S & Mazeaud, D *General Clauses and Standards in European Contract Law* (2006) The Hague: Kluwer.
- Hahlo, H & Khan, E *The South African Legal System and its Background* (1968) Cape Town: Juta.
- Hartkamp, A “The binding force of contract in Dutch law” in Harmathy, A (ed) *Binding Force of Contract* (1991) Budapest: Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences.

- Hartkamp, A & Tillema, M *Contract Law in the Netherlands* (1995) The Hague: Kluwer.
- Hawthorne, L “The principle of equality in the law of contract” (1995) *THRHR* 157.
- Hawthorne, L “Public policy and the micro lending – has the unruly horse died?” (2003) *THRHR* 116.
- Hawthorne, L “The end of bona fides” (2003) *SA Merc LJ* 271.
- Hawthorne, L “Closing of the open norms in the law of contract” (2004) *THRHR* 294.
- Hay, P “Frustration and its solution in German law” (1961) 10 *The American Journal of Comparative Law* 345.
- Hesselink, M “Good Faith” in Hartkamp et al (eds) *Towards a European Civil Code* (1998) The Hague: Kluwer.
- Hesselink, M “The ideal of codification and the dynamics of Europeanisation: the Dutch experience” in Vogenauer & Weatherill (eds) *The Harmonisation of European Contract Law* (2006) Oregon: Hart.
- Hudson, A “Exemptions and impossibility under the Vienna Convention” in McKendrick, E (ed) *Force Majeure and Frustration of Contract* (1995) London: Lloyd’s.
- Hutchison, D “Good faith in the South African law of contract” in Brownsword, Hird & Howells (eds) *Good Faith in Contract: Concept and Context* (1999) England: Dartmouth; USA: Ashgate.
- Hutchison, D “Non-variation clauses in contract: any escape from the *Shifren* straitjacket?” (2001) *SALJ* 720.
- Hutchison, D & Pretorius, C-J (eds) *The Law of Contract in South Africa* (2009) Cape Town: Oxford University Press.
- Inwood, B *Reading Seneca – Stoic Philosophy at Rome* (2005) Oxford: Clarendon.
- Janzen, A “Unforeseen circumstances and the balance of contract: a comparison of the approach to hardship in the UNIDROIT principles and the German law of obligations” (2006) 22 *Journal of Contract Law* 156.
- Jenkins, S “Exemption for non-performance: UCC, CISG, UNIDROIT Principles – a comparative assessment” (1997 – 1998) 72 *Tulane Law Review* 2015.
- Kennedy, D “Form and substance in private law adjudication” 89 *Harvard Law Review* (1975 – 1976) 1685.

- Kerr, A “Impairment of premises let; Implied contractual provisions; Standing of Pothier” (1987) *SALJ* 550.
- Kerr, A *The principles of the law of contract* (2002) Durban: Butterworths.
- Kerr, A “The defence of unfair conduct on the part of the plaintiff at the time action is brought: the exceptio doli generalis and the replicatio doli in modern law” (2008) *SALJ* 241.
- Kessedjian, C “Competing approaches to force majeure and hardship” (2005) 25 *International Review of Law and Economics* 415
- Kötz, H “Towards a European civil code: the duty of good faith” in Cane & Stapleton (eds) *The Law of Obligations – Essays in Celebration of John Fleming* (1998) OUP.
- Lee, R “Frustration of contract in the Union of South Africa” (1946) 28 *Journal of Comparative Legislation and International Law* 5.
- Legrand, P “What ‘Legal Transplants’?” in Nelken & Feest (eds) *Adapting Legal Cultures* (2001) Oxford: Hart.
- Lehmann, K “The United Nations Convention on Contracts for the International Sale of Goods: should South Africa accede?” (2006) *SA Merc LJ* 317.
- Lorenz, W “Contract modification as a result of change of circumstances” in Beatson & Friedmann (eds) *Good Faith and Fault in Contract law* (1995) OUP.
- Lubbe, G & Murray, C *Farlam and Hathaway: Contract: Cases, Materials and Commentary* (1988) Cape Town: Juta.
- Lubbe, G “Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg” (1990) *Stell LR* 7.
- Lubbe, G “Taking fundamental rights seriously: the Bill of Rights and its implications for the development of contract law” (2004) *SALJ* 395.
- MacKendrick, P *The Philosophical Books of Cicero* (1989) London: Duckworth.
- MacQueen, H “Good faith” in MacQueen and Zimmermann (eds) *European Contract Law* (2006) Edinburgh University Press.
- Markesinis, B, Unberath, H & Johnston, A *The German law of Contract – A comparative treatise* (2006) Oregon: Hart.
- Maskow, D “Hardship and force majeure” (1992) 40 *American Journal of Comparative Law* 657.

- Mason, A “Contract, good faith and equitable standards in fair dealing” (2000) LQR 66.
- McKendrick, E “Force Majeure and Frustration – their relationship and a comparative assessment” in McKendrick (ed) *Force Majeure and Frustration of Contract* (1995) Lloyd’s of London Press.
- McKendrick, E *Contract Law* (2003) Hampshire: Palgrave MacMillan.
- McKendrick, E “Discharge by frustration” in HG Beale (ed) *Chitty on Contracts Vol I* (2008) London: Thomson Reuters.
- Meyerson, D *Essential Jurisprudence* (2006) Coogee, Oxford, New York: Routledge – Cavendish.
- Naudé, T “The function and determinants of the residual rules of contract law” (2003) SALJ 820.
- Naudé, T “The relationship between the different types of terms implied into contracts” (Parts 1 & 2) (2003) 24 (2) *Obiter* 283 & (2004) 25 (1) *Obiter* 34.
- Naudé, T “The consumer’s ‘right to fair, reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” (2009) SALJ 505.
- Naudé, T “Termination of obligations” in Dale Hutchison & CJ Pretorius (eds) *The Law of Contract in South Africa* (2009) Cape Town: Oxford University Press.
- Neels, J “Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg” (1999) TSAR 684.
- Nehf, J “Impossibility” in Joseph Perillo (ed) *Corbin on Contracts* (Vol 14) (2001) Matthew Bender & Co: Newark NJ, San Francisco CA.
- Nicholas, B *The French Law of Contract* (1992) Oxford: Clarendon.
- Otto, JM & Otto, R-L *The National Credit Act Explained* (2010) Durban: LexisNexis.
- Perillo, J “Force majeure and hardship under the Unidroit principles of international commercial contracts” (1997) *Tulane Journal of International and Comparative Law* 5.
- Perillo, J *Calamari and Perillo on Contracts* (2009) New York: Thomson West.
- Posner, R & Rosenfield, A “Impossibility and related doctrines in contract law: an economic analysis” (1977) 6 *Journal of Legal Studies* 83.
- Posner, R *Economic Analysis of Law* (1998) New York: Aspen.
- Pretorius, C & Floyd, T “Mistake and supervening impossibility of performance” (1994) 57 *THRHR* 325.

- Pretorius, C “The basis of contractual liability in Dutch law” (2004) *Comparative and International Law Journal of Southern Africa* 377.
- Proculus Redivivus “South African law at the crossroads” (1965) *SALJ* 17.
- Ramsden, W *Supervening Impossibility of Performance in the South African Law of Contract* (1985) Cape Town: Juta.
- Ramsden, W “Could performance have been impossible in *Kok v Osborne & Another*” (1994) 6 *SA Merc LJ* 340.
- Rimke, J “Force majeure and hardship: Application in international trade practice with specific regard to the CISG and Unidroit Principles of International Commercial Contracts” (1999 – 2000) *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* 193 – 243.
- Robbers, G *An introduction to German Law* (2003) Baden-Baden: Nomos Verlagsgesellschaft.
- Robinson, O, Fergus, T & Gordon, W *European Legal History* (2000) London: Butterworths.
- Rösler, H “Hardship in German codified private law – in comparative perspective to English, French and International Contract Law” (2007) *European Review of Private Law* 483.
- Schlechtriem, P “The German Act to modernize the law of obligations in the context of common principles and structures of the law of obligations in Europe” (2002) *Oxford U Comparative L Forum* 2 at www.ouclf.iuscomp.org.
- Schmitthoff, C “Hardship and intervener clauses” (1980) *Journal of Business Law* 82.
- Scholtz, H “Pacta sunt servanda en verandering van omstandighede na kontraksluiting” (1976) *Responsa Meridiana* 153.
- Schultz, Fritz *Principles of Roman Law* (Translated Wolff, M) (1936) Oxford: Clarendon.
- Sharrock, R *Business Transactions Law* (2007) Cape Town: Juta.
- Stein, P *Roman law in European history* (1999) Cambridge University Press.
- Summers, R “Good faith in general contract law and the sales provisions of the Uniform Commercial Code” (1968) 54 *Virginia Law Review* 195.
- Summers, R “The conceptualisation of good faith in American contract law” in Zimmermann & Whittaker (eds) *Good Faith in European Contract Law* (2000) CUP.

- Swadling, W "The judicial construction of force majeure clauses" in Ewan McKendrick (ed) *Force Majeure and Frustration of Contract* (1995) Lloyd's of London Press.
- Tallon, D "Hardship" in Hartkamp et al (eds) *Towards a European Civil Code* (2004) The Hague: Kluwer.
- Teubner, G "Legal irritants: good faith in British law or how unifying law ends up in new divergences" (1998) 61 *Modern Law Review* 11.
- Thomas, Ph *Introduction to Roman Law* (1986) Roodepoort: Digma.
- Thomas, Ph "Bona fides, Roman values and legal science" (2004) *Fundamina* 188.
- Treitel, G *The Law of Contract* (1999) London: Sweet and Maxwell.
- Treitel, G *Frustration and Force Majeure* (2004) London: Sweet and Maxwell.
- Trimarchi, P "Commercial impracticability in contract law: an economic analysis" (1991) *International Review of Law and Economics* 63.
- Vamvoukos, A *Termination of treaties in international law: the doctrines of rebus sic stantibus and desuetude* (1985) Oxford: Clarendon.
- Van der Merwe, S & Van Huyssteen, L "*Hare's Brickfields v Cape Town City Council*" (1985) *THRHR* 469.
- Van der Merwe, S; Van Huyssteen, L; Reinecke, M & Lubbe, G *Contract – General Principles* (2007) Cape Town: Juta.
- Van der Walt, A "Normative pluralism and anarchy: reflections on the 2007 term" (2008) *Constitutional Court Review* 77.
- Van Dunne, J "The changing of the guard: Force majeure and frustration in construction contracts: The foreseeability requirement replaced by normative risk allocation" (2002) 19(2) *International Construction Law Review* 162.
- Van Eeden, E *A Guide to the Consumer Protection Act* (2009) Durban: LexisNexis Butterworths.
- Van Heerden, C "Over-indebtedness and reckless credit" in Scholtz, J et al *Guide to the National Credit Act* (loose leaf binder) (2009) Durban: LexisNexis.
- Van Huyssteen, L & Van der Merwe, S "Good faith in contract: proper behaviour amidst changing circumstances" (1990) *Stell LR* 244.
- Van Zyl, D *Justice and Equity in Cicero* (1991) Pretoria: Academica.
- Visser, D *Unjustified Enrichment* (2008) Cape Town: Juta.

- Vogenauer, S & Kleinheisterkamp, J (eds) *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* (2009) OUP.
- Von Alvensleben, P *Fundamental change of circumstances and the principle of causa finalis* (2001) Unpublished LLM thesis: University of Stellenbosch.
- Von Mehren, A and Gordley, J *The civil law system* (1977) Boston and Toronto: Little, Brown and Co.
- Vorster, JP "The influence of English law on the implication of terms in the South African law of contract" (1987) *SALJ* 588.
- Vorster, JP "The bases for the implication of contractual terms" (1988) *TSAR* 161.
- Wagner, G "In defense of the impossibility defense" (1995) *27 Loyola University of Chicago Law Journal* 55.
- Watson, A *Legal Transplants* (1974) Edinburgh: Scottish Academic Press.
- Whittaker, S & Zimmermann, R "Good faith in European contract law: surveying the legal landscape" in Zimmermann & Whittaker (eds) *Good Faith in European Contract Law* (2000) Cambridge University Press.
- Wieacker, F *A History of Private Law in Europe* (Translated by Weir, T) (1995) Oxford: Clarendon.
- Zimmermann, R *The Law of Obligations* (1990) Cape Town: Juta.
- Zimmermann, R "'Heard melodies are sweet, but those unheard are sweeter...' – *Conditio tacita*, implied condition und die Fortbildung des europäischen Vertragsrechts" (1993) *193 Archiv für die civilistische Praxis* 121.
- Zimmermann, R "Good faith and equity" in Zimmermann & Visser (eds) *Southern Cross* (1996) Cape Town: Juta.
- Zimmermann, R & Whittaker, S *Good Faith in European Contract Law* (2000) Cambridge University Press.
- Zimmermann, R *Roman law, contemporary law, European law: The civilian tradition today* (2001) OUP.
- Zimmermann, R "Ius commune and the Principles of European Contract Law: contemporary renewal of an old idea?" in MacQueen & Zimmermann (eds) *European Contract Law – Scots and South African Perspectives* (2005) Edinburgh University Press.
- Zweigert, K & Kötz, H *An Introduction to Comparative Law* (Translated Weir, T) (1998) Oxford: Clarendon.

Legislation

(i) South African Legislation

Consumer Protection Act 68 of 2008

(ii) South African Law Reform Commission Proposed Legislation

Unfair Contractual Terms Bill (1996) – Attached to Discussion Paper 65 on Project 47 (“Unreasonable Stipulations in Contracts and the Rectification of Contracts”) of the South African Law Reform Commission.

Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms (1998) – Attached to the Report on Project 47.

(iii) English Legislation

Law Reform (Frustrated Contracts) Act 1943

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contracts Regulations 1999

(iv) US Legislation & Model Rules

Uniform Commercial Code 1979

Restatement (Second) of Contracts 1981

(v) French Legislation

The French Civil Code (Translated Cachard, H) (1930) Paris: Lecram.

(vi) German Legislation (including historic codes)

Codex Maximilianeus Bavaricus Civilis (1756) Munich: J Bötter.

Allgemeines Landrecht für die Preussischen Staaten von 1794 (1970) Frankfurt am Main: Alfred Metzner.

Bürgerliches Gesetzbuch (the “BGB”) translation taken from the website of the Bundesministerium der Justiz available at www.gesetze-im-internet.de/englisch_bgb.

(vii) Dutch Legislation

The Civil Code of the Netherlands translation by Warendorf, H, Thomas, R & Curry-Sumner, I (2009) The Netherlands: Kluwer.

(viii) International Model Rules

Lando, O & Beale, H (eds) *Principles of European Contract Law – Parts I & II* (2000) The Hague: Kluwer.

Unidroit Principles of International Commercial Contracts (2004)

Von Bar, C et al (eds) *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (2009) Munich: Sellier.

(ix) International Conventions

United Nations Convention on Contracts for the International Sale of Goods (1980)

Case List

(i) South African Cases

A Becker & Co (Pty) Ltd v Becker 1981 (3) SA 406 (A)

Advtech Resourcing (Pty) Ltd v Kuhn 2008 (2) SA 375 (C)

African Realty Trust Ltd v Holmes 1922 AD 389

Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)

Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A)

Algoa Milling Co v Arkell & Douglas 1918 AD 145

Automotive Tooling Systems (Pty) Ltd v Wilkens 2007 (2) SA 271 (SCA)

Bank of Lisbon and South African Ltd v De Ornelas 1988 (3) SA 580 (A)

Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd 1982 (4) SA 650 (D)

Barkhuizen v Napier 2007 (5) SA 323 (CC)

Barnabas Plein & Co v Sol Jacobson & Son 1928 AD 25

Bayley v Harwood 1953 (3) SA 239 (T)

Bayley v Harwood 1954 (3) SA 498 (A)

Benjamin v Myers 1946 CPD 655

Bischofberger v Van Eyk 1981 (2) SA 607 (W)
Botha (now Griessel) v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A)
Bredenkamp v Standard Bank of SA Ltd [2010] ZASCA 75
Breedenkamp v Standard Bank of SA Ltd 2009 (5) SA 304 (GSJ)
Breedenkamp v Standard Bank of SA Ltd 2009 (6) SA 277 (GSJ)
Brisley v Drotsky 2002 (4) SA 1 (SCA)
Canon Kwazulu Natal (Pty) Ltd t/a Canon Office Automation v Booth 2005 (3) SA 205 (N)
Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T)
Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd 2008 (4) SA 16 (CC)
CTP Ltd v Argus Holdings Ltd 1995 (4) SA 774 (A)
Den Braven (SA) (Pty) Ltd v Pillay 2008 (6) SA 229 (D)
Dickinson Motors (Pty) Ltd v Oberholzer 1952 (1) SA 443 (A)
Digicore Fleet Management (Pty) Ltd v Steyn [2009] 1 All SA 442 (SCA)
Dithaba Platinum (Pty) Ltd v Erconovaal Ltd 1985 (4) SA 615 (T)
Dutch Reformed Church Council v Crocker 1953 (4) SA 53 (C)
Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO 1997 (4) SA 302 (SCA)
Farmer's Co-operative Society v Berry 1912 AD 343
Fienberg v Jardine 1915 NPD 439
Fourie v CDMO Homes (Pty) Ltd 1982 (1) SA 21 (A)
Grobbelaar NO v Bosch 1964 (3) SA 687 (E)
Hare's Brickfields Ltd v Cape Town City Council 1985 (1) SA 769 (C)
Hay v The Divisional Council of King William's Town (1880) 1 EDC 97
Haynes v King William's Town Municipality 1951 (2) SA 371 (A)
Hersman v Shapiro 1926 TPD 367
Jajbhay v Cassim 1939 AD 537
Kok v Osborne 1993 (4) SA 788 (SECLD)
Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193 (SCA)
Lanificio Varam SA v Masurel Fils (Pty) Ltd 1952 (4) SA 655 (A)
MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd 1924 AD 573

Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)
McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA)
Miller and Another NNO v Dannecker 2001 (1) SA 928 (C)
Morgan & Ramsey v Cornelius & Hollis (1910) 31 NLR 447
Mort NO v Henry Shields-Chiat 2001 (1) SA 464 (C)
Mozart Ice Cream Franchises (Pty) Ltd v Davidoff 2009 (3) SA 78 (C)
National Chemsearch (SA) Pty Ltd v Borrowman 1979 (3) SA 1092 (T)
NBS Boland Bank Ltd v One Berg River Drive CC; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd 1999 (4) SA 928 (SCA)
Neugebauer & Co v Herman 1923 AD 564
New Heriot Gold Mining Co Ltd v Union Government 1916 AD 415
Niemand v Okapi Investments (Edms) Bpk 1983 (4) SA 762 (T)
North Vaal Mineral Co Ltd v Lovasz 1961 (3) SA 604 (T)
Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG 1996 (4) SA 1190 (A)
Osman v Standard Bank National Credit Corporation Ltd 1985 (2) SA 378 (C)
Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A)
Peters, Flamman and Co v Kokstad Municipality 1919 AD 427
Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)
Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA)
Roffey v Catterall Edwards & Goudré (Pty) Ltd 1977 (4) SA 494 (N)
Rossouw v Haumann 1949 (4) SA 796 (C)
Sasfin v Beukes 1989 (1) SA 1 (A)
Schlengemann v Meyer Bridgens & Co 1920 CPD 494
Sonarep (SA) (Pty) Ltd v Motorcraft (Pty) Ltd 1981 (1) SA 889 (N)
South African Forestry Co Ltd v York Timber Ltd 2005 (3) SA 323 (SCA)
Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 (SCA)
Techni-Pak Sales (Pty) Ltd v Hall 1968 (3) SA 231 (W)
Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA)
Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 1190 (SCA)
Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A)
Unibank Savings and Loans Ltd v Absa Bank Ltd 2000 (4) SA 191 (W)

Van den Berg v Tenner 1975 (2) SA 268 (A)
Van Reenen Steel (Pty) Ltd v Smith NO 2002 (4) SA 264 (SCA)
Weinerlein v Goch Buildings Ltd 1925 AD 282
Wilkins NO v Voges 1994 (3) SA 130 (A)
Williams v Evans 1978 (1) SA 1170 (C)
World Leisure Holidays (Pty) Ltd v Georges 2002 (5) SA 531 (W)

(ii) English Cases

Amalgamated Investment & Property Co Ltd v John Walker & Son Ltd [1977] 1 WLR
 164
Appleby v Myers (1867) LR 2 CP 651
Atkinson v Ritchie (1809) 10 East 530
Baily v De Crespigny (1869) LR 4 QB 180
Blakely v Muller & Co [1903] 2 KB 760
Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd [1952] All ER
 497
Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1977] 1 Lloyd's
 Rep 133
Brewster v Kitchell (1691) 1 Salk 198
British Movietonews Ltd v London and District Cinemas [1952] AC 166
Cantiere San Rocco v Clyde Shipbuilding and Engineering Co 1923 SC (HL) 105;
 1923 SLT 624
Chandler v Webster [1904] 1 KB 493
Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd
 [1945] AC 221
CTI Group Inc v Transclear SA [2008] EWCA Civ 856.
Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696
Denny, Mott & Dickson Ltd v Fraser (James B) & Co Ltd [1944] AC 265
Edwinton Commercial Corporation, Global Tradeways Limited v Tsavlis Russ
(Worldwide Salvage & Towage) Ltd (The "Sea Angel") [2007] EWCA Civ 547.
Ertel Bieber & Co v Rio Tinto Co Ltd [1918] AC 260
Fibrosa Spolka Akcyjna v Fairbairn, Lawson Combe Barbour Ltd [1943] AC 32
Griffith v Brymer (1903) 19 TLR 434

Herne Bay Steamboat Co v Hutton [1903] 2 KB 683
Interfoto Library Ltd v Stiletto Ltd [1988] 2 WLR 615
J Lauritzen AS v Wijsmuller BV [1990] 1 Lloyd's Rep 1
Jackson v Union Marine Insurance Co Ltd (1874) LR 10 CP 125
Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd [1942]
 AC 154
Krell v Henry [1903] 2 KB 740
J Lauritzen AS v Wijsmuller BV [1990] 1 Lloyd's Rep 1 ("The Super Servant Two")
Lebeaupin v Richard Crispin & Co [1920] 2 KB 714
Leiston Gas Co Ltd v Leiston-cum-Sizewell Urban District Council [1916] 2 KB 428
Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] AC 524
Matsoukis v Priestman & Co [1915] 1 KB 681
Metropolitan Water Board v Dick Kerr and Co [1918] AC 119
Morgan v Manser (1947) 2 All ER 666
Moss v Smith (1859) 9 CB 94
Ocean Tramp Tankers v V/O Sovfracht [1964] 2 QB 226 (The Eugenia)
Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] 1 AC 854
Paradine v Jane (1647) Aleyn 26
Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724
Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592
Staffordshire Area Health Authority v South Staffordshire Waterworks Co [1978] 1
 WLR 1387
FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd [1916] 2
 AC 397
WJ Tatem Ltd v Gamboa [1939] 1 KB 132
Taylor v Caldwell 3 B&S 826
Tennants (Lancashire) Ltd v CS Wilson & Co Ltd [1917] AC 495
Tsakiroglou & Co Ltd v Noble Thorl GmbH [1962] AC 93
Union Eagle Ltd v Golden Achievement Ltd [1997] 2 All ER 215 (PC)
Walford v Miles [1992] 2 AC 128

(iii) US Cases

20th Century Lites v Goodman 149 P 2d 88 (1944)

Alfred Marks Realty Co v Hotel Hermitage Co 156 NYS 179 (1915)
Aluminum Co of America v Essex Group, Inc 499 F Supp 53 (1980)
American Trading & Production Corp v Shell International Marine 453 F 2d 939
 (1972)
Bumby & Stimpson Inc v Peninsula Utilities Corp 169 So 2d 499, 501 (Fla App
 1964).
Canadian Industrial Alcohol Co v Dunbar Molasses Co 258 NY 194 (1932)
CNA International Reinsurance Co v Phoenix 678 So 2d 378 (Florida Appeal Court
 1996)
Doherty v Monroe Eckstein Brewing Co 191 NYS 59 (1921)
Eastern Airlines Inc v Gulf Oil Corp 415 F Supp 429 (1975)
Gold v Salem Lutheran Home Association 53 Cal 2d 289 (1959)
Industrial Development and Land Co v Goldschmidt 206 P 134 (1922)
Ingram-Day Lumber Co v McLouth 275 US 71 (1928)
Iowa Electric Light & Power Co v Atlas Corp 467 F Supp 129 (ND Iowa 1978)
Mineral Park Land Co v Howard 156 P 458 (1916)
Missouri Public Service Co v Peabody Coal Co 583 SW 2d 721 (Mo App 1979)
Northern Corporation v Chugach Electric Association 518 P 2d 76 (1974)
R & R Construction v Junior College District No 529 55 Ill App 3d 115, 370 NE 2d
 599 (1977)
Red River Commodities, Inc v Eidsness 459 NW 2d 805 (ND 1990)
Shanghai Power Co v Delaware Trust Co 316 A 2d 589 (Del Ch 1974)
Transatlantic Financing Corp v United States 363 F 2d 312 (1966)
Wills v Shockley 157 A 2d 252 (1960)

(iv) Australian Cases

Hughes Aircraft Systems International v Airservices Australia (1997) 146 ALR 1
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR
 234

(v) French Cases

Civ 6 Mar 1876, *Canal de Craponne*, DP 1976.1.193

(vi) German Cases

Decisions of the Reichsgericht

RGZ 57, 116 (23/2/1904)

RGZ 86, 397 (4/5/1915)

RGZ 88, 71 (4/2/1916)

RGZ 88, 172 (21/3/1916)

RGZ 90, 102 (27/3/1917)

RGZ 100, 129 (21/9/1920)

RGZ 100, 134 (22/10/1920)

RGZ 103, 177 (29/11/1921)

RGZ 103, 328 (3/2/1922)

RGZ 107, 78 (28/11/1923)

Decisions of the Bundesgerichtshof

BGH JZ 1952, 145 (23/10/1951)

BGH MDR 1953, 282 (16/1/1953)

BGH NJW 1976, 565 (13/11/1975)

BGH JZ 1978, 235 (8/2/1978)

BGH NJW 1984, 1746 (8/2/1984)

(vii) Dutch Cases

HR 9 February 1923, NJ 1923, 676

HR 8 January 1926, NJ 1926, 203

HR 19 May 1967, NJ 1967, 261

(viii) Belgian Cases

19 June 2009 Court of Cassation [Supreme Court] (*Scaform International BV v Lorraine Tubes SAS*)