

**J Coetzee**

---

## **The case for economic hardship in South Africa: Lessons to be learnt from international practice and economic theory**

### **Summary**

Although most leading legal systems provide for some form of legal relief in the case of economic hardship, South African law still does not address the issue of changed circumstances beyond that of objective impossibility or where the parties have provided for these instances contractually. Scholars have argued for an expansion of the doctrine of supervening impossibility in exceptional cases. However, the courts have to date not made any pronouncements in this regard. This article argues that a new default rule should be adopted that will reduce transaction costs and facilitate international trade. It is suggested that such a rule should build on the existing requirements set for the doctrine of supervening impossibility, but at the same time fuse international practice with the rules of economic theory.

### **Die saak vir ekonomiese ongerief in Suid-Afrika: lesse te leer by internasionale praktyk en ekonomiese teorie**

Alhoewel die meeste prominente regstelsels wel voorsiening maak vir een of ander vorm van regshulp waar prestasie ekonomies ongerieflik word, spreek die Suid-Afrikaanse reg, buiten vir gevalle waar prestasie objektief onmoontlik word of waar die partye kontraktueel daarvoor voorsiening gemaak het, steeds nie die kwessie van veranderende omstandighede aan nie. Sommige skrywers argumenteer dat die leerstuk van onmoontlikwording wel in uitsonderlike gevalle uitgebrei kan word om vir hierdie omstandighede voorsiening te maak. Tot op datum het die hof egter nog nie hieroor uitspraak gelewer nie. Hierdie artikel doen aan die hand dat 'n nuwe verstekreël ontwikkel word om transaksiekostes te verminder en internasionale handel te fasiliteer. So 'n reël kan bou op die bestaande vereistes vir die leerstuk van onmoontlikheid van prestasie, maar terselfertyd ook internasionale praktyk en die beginsels van die ekonomiese analise teorie daarby betrek.

## 1. Introduction

Where a commercial contract is to be performed over the course of months or years, circumstances which existed at the time of conclusion may change to the extent that performance can become impossible or simply far more burdensome for one of the parties. In some instances, a change in circumstances is not foreseeable at the time of contracting. In others, the risk of a fundamental change in circumstances is so remote that the parties do not consider such contingencies, or the transaction costs of allocating a remote risk simply outweigh the benefits of providing for it contractually.

This article departs from the premise that commercial contracts are concluded to advance the economic interests of the parties thereto. A change in circumstances can affect the parties' interests to the extent that the transaction is no longer economically viable for one of them. Where costs of labour or material suddenly and unexpectedly rise so that the agreed upon contract price no longer provides any profit, performance becomes unduly onerous for the seller and it no longer makes economic sense to deliver the goods. It can also happen that the demand for certain types of goods or commodities, or even their market price, suddenly drops, which devalue the performance to the extent that it is no longer in the interest of a merchant buyer to take delivery of the goods. In the absence of any express stipulation regulating situations of hardship,<sup>1</sup> it is not always easy, or even possible, to provide legal relief for the aggrieved party.

A typical example of a long-term contract affected by a fundamental and unforeseen contingency is found in the Sishen Supply Agreement which made financial headlines during February 2010, when Sishen Iron Ore Company ("SIOC") notified Arcelor Mittal South Africa Ltd ("AMSA") that with effect from 1 March 2010, SIOC would no longer supply iron ore from the Sishen Mine to AMSA at a price of cost plus three per cent.<sup>2</sup>

---

1 This article refers to "hardship" as a blanket term which includes all situations where, as a result of unexpected and unforeseen events which are not attributable to any of the parties to the contract and which are not provided for by means of agreement, the circumstances underlying contract performance change to the extent that performance does not become impossible but extremely onerous for a party to the contract. Terminology used for these situations differs, depending on the applicable law. For example: change of circumstances, alteration of the contractual foundation, mistaken assumptions, economic impossibility, commercial impracticability, frustration, *Störung der Geschäftsgrundlage*, *clausula rebus sic stantibus* and *imprévision*. See Flambouras 2001:277.

2 The contract price was determined by the Sishen Supply Agreement which had been in effect since 2001 and was part of the unbundling of ISCOR, the predecessor of AMSA. It provided that by virtue of AMSA's ownership of a 21.4 per cent undivided share of the mineral rights to the Sishen Mine, SIOC had to contract mine at the Sishen Mine on behalf of AMSA and supply them with 6.25 million tonnes of iron ore per annum, representing AMSA's share of production from the mine. Sergeant 2010.

SOIC offered, however, to sell the iron ore to AMSA on commercial terms. Because of a remarkable, but for the industry an unforeseen, increase in the market price of seaborne iron, the contract price no longer made economic sense for SIOC.<sup>3</sup> The contract itself provided no escape clause or an opportunity to renegotiate the price. Although SIOC did not base its argument on hardship, but on AMSA's failure to convert its old order mining right in respect of its 21.4 per cent undivided share of the mineral rights to iron at Sishen Mine, it is not difficult to imagine what triggered SIOC's real unhappiness.

In the absence of a doctrine of changed circumstances in South African law, the question is how would a court address the issue of performance becoming substantially more burdensome than originally anticipated for a party to a long-term contract such as the one under the Sishen Supply Agreement?

Our law is far from clear on this subject. According to the maxim *impossibilium nulla obligatio est*, a contract can be terminated where performance becomes objectively impossible. Where performance merely becomes more burdensome for one of the parties it does not give rise to any legal effect or relief. Internationally, however, some legal systems acknowledge doctrines of hardship or changed circumstances; either as a ground for terminating the contract<sup>4</sup> or as an exemption from liability. In some, these circumstances may even provide grounds for renegotiation of the contractual terms.<sup>5</sup>

This article argues that South African law is in need of a doctrine of changed circumstances. Such a doctrine can be developed with reference to examples from international law. This article will discuss a number of doctrines applied in the common law and civil law, namely the doctrine of frustration as applied under English law, the doctrine of impracticability as provided by the American Uniform Commercial Code, as well as developments under the revised German law of obligations. Reference will also be made to article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and article 6.2.2 of the UNIDROIT Principles of International Commercial Contracts (PICC). Note should furthermore be taken of a groundbreaking decision on hardship under the CISG, delivered in 2009 by the Belgian Supreme Court in *Scafom International BV v Lorraine Tubes SAS*,<sup>6</sup> and the degree to which international practice has influenced the court in its decision. It is concluded that our law should take cognisance of both international

---

3 When delivery was suspended, it was expected that the global price of iron ore could rise by 50 per cent during 2010.

4 For example, France, Belgium, the Czech Republic, Denmark, England, Ireland, Scotland and Slovenia. Cenini *et al.* 2009:footnote 14.

5 Austria, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Portugal, Spain and Sweden. Cenini *et al.* 2009:footnote 15.

6 19 June 2009 [C.07.0289.N]. English translation available from the CISG Database <http://cisgw3.law.pace.edu/cases/090619b1.html> (accessed on 26 October 2011).

developments as well as economic theory to develop the existing law in this regard.

## 2. The rationale for a doctrine of changed circumstances

By virtue of the principle of sanctity of contract a party will not be excused from his contractual obligation if performance simply becomes unreasonable or burdensome. A number of theoretical explanations have been suggested for why there should be legal relief available in situations where changed circumstances give rise to undue hardship for one party to a contract.

Termination of a contract due to economic impracticability of performance or hardship has been justified on the basis of the absence of agreement. Contracts are concluded in order to satisfy certain objectives or purposes. In the case of commercial contracts these objectives are of an economic nature. If both parties have equal bargaining power they will reach agreement when the benefits of the contract outweigh the costs for both. In the process the parties will weigh up the risks inherent to such a contract. When the risks are foreseen, they are either apportioned contractually or assumed if the likelihood of the contingency materialising is too remote to justify the transaction costs.<sup>7</sup> However, when a contingency that is totally outside the contemplation of the parties occurs, the question has to be asked whether there was really agreement. If the event was contemplated, the parties might have allocated the risk contractually, or at least considered the risk and weighed up the costs of allocating it against assuming it. When an unexpected event happens that creates a radical change in the nature of the performance to the extent that the contract does not generate any gain for the parties, would performance of the contract still be part of their intent? A court may then fill such a gap by means of contractual interpretation.<sup>8</sup> In the case of commercial contracts, considerations of public policy and commercial efficiency would often dictate that the court implies a tacit term with the effect that if there were a radical change in circumstances the contract could be terminated.

The filling of gaps by means of implied or tacit terms depends on the attitude of a particular legal system towards implying terms in the absence of express agreement. Common law systems have always been more reluctant to imply terms and are to a large extent still conservative in their approach towards implied terms, whilst continental courts are more prepared to apply notions of good faith and fairness in contracting.

---

7 Cenini *et al.* 2009:18.

8 See Kim (2008:47) who argues that changed circumstances can be effectively addressed through a method of dynamic contract interpretation which focuses on different facets of intent and is not limited to the pre-contractual phase. The subjective intent of the parties is then balanced by public policy concerns to determine whether it is in the interest of society to enforce a particular contract.

Some scholars, however, argue that the problem should be approached independently from the parties' intentions. Such an approach prevents the problems connected with imputed intentions. Economic theory forms the basis of this approach. In terms of economic analysis theory, efficient contracts are instruments which generate wealth and at the same time benefit society at large.<sup>9</sup> Although contracts shift scarce economic resources into the hands of those who value them most, contracts also involve risks. The classic economic rationale concerning risk allocation is that risk should be allocated to the superior risk bearer; that is the party who can reduce risk most effectively by taking precautions to decrease the probability of risk materialising or who can best spread risk by taking out insurance.<sup>10</sup>

However, this approach has been criticised as not providing an effective basis for the problem of hardship situations. Firstly, the approach is characterised by uncertainty as it is not always certain who the best risk bearer is. Secondly, hardship situations deal with contingencies that are by definition unforeseeable and unexpected and, therefore, none of the parties will have any incentive to take precautions to reduce the risk. Moreover, these risks are not calculable and the contingencies that give rise to hardship are events that are often not insurable; therefore chances are slim that one of the parties will insure against such risk.<sup>11</sup>

Despite these criticisms, the basic principles of economic efficiency can provide direction for dealing with changed circumstances. Economic efficiency requires that a contract should maximise value and thereby generate wealth.<sup>12</sup> Based on this premise, all contracts are concluded with a view to maximise value. Contracts are concluded when the parties reach a balance between the cost and value of their respective performances. In the case of an economically efficient contract, this balance will be achieved when the foreseeable risks connected to the transaction are apportioned between the parties and economic resources are allocated to its maximum value.<sup>13</sup> Once extraordinary and unforeseeable circumstances upset the economic equilibrium of the contract to the extent that the contract becomes economically inefficient, the equitable solution would be to terminate the contract, otherwise one party can become unjustly enriched by receiving a windfall gain at the cost of another party.<sup>14</sup> Termination is, however, not always the only, or the best, solution. If, in the original contract, resources were allocated efficiently and the parties spent time and money in the performance of the contract, the parties should be given

---

9 Posner 2003:9-10.

10 Aksoy & Schäfer 2009:8, 10; Cenini *et al.* 2009:3-4.

11 Cenini *et al.* 2009:4-5.

12 Posner 2003:3-5, 10-12.

13 This is in line with the classic notion of a contract being a mutual bargain between two parties where both have taken the cost and risk of performance into consideration and that these factors are reflected in the contract price. This is of course on the premise that both parties have equal bargaining power.

14 Aksoy & Schäfer 2009:16-20.

the opportunity to renegotiate the terms of the contract to rebalance their economic interests.<sup>15</sup>

This article submits that, where the transaction costs of risk allocation outweigh the probability of the risk materialising, the law should allocate the risk by means of a default rule based on the principles of economic efficiency.<sup>16</sup> Such a rule should provide for termination if the contingency results in a net loss, or renegotiation where the contract is still capable of providing a net profit.

### 3. South African law on impossibility and hardship

In pursuance of Roman and Roman Dutch law, South African law acknowledges the doctrine of impossibility as based on the maxim *impossibile nulla obligatio est*. If performance of an obligation becomes wholly impossible after the contract has been entered into through no fault of any of the parties, all parties are discharged from their obligations. This rule has been adopted in South African law by a number of authorities, starting with the decision in *Peters, Flamman & Co v Kokstad Municipality*.<sup>17</sup> The rule requires that the supervening event must be beyond the control of the parties, so-called *vis maior* or *casus fortuitus*.<sup>18</sup> Furthermore, it is required that performance should be “objectively” impossible or that the impossibility should be “absolute”.<sup>19</sup> Performance which has become merely inconvenient, costly, difficult or risky does not suffice.<sup>20</sup>

However, that does not mean that the doctrine only covers cases where the goods have perished or performance was prevented absolutely. Policy considerations can sometimes dictate that performance will become legally impossible although it is physically still possible. Scholars opine that, if the costs of performance are disproportional to the value of the performance, the doctrine of supervening impossibility would still

---

15 Cenini *et al.* 2009:5.

16 Aksoy & Schäfer 2009:11.

17 1919 AD 427; *Schlegemann v Meyer Bridgens & Co Ltd* 1920 CPD 494: 500; *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573: 600-611; *Hersman v Shapiro & Co* 1926 TPD 367: 371-373; *Lucerne Asbestos Co Ltd v Becker* 1928 WLD 311; *Wilson v Smith* 1956 1 SA 393 W: 396; *Oerliken SA (Pty) Ltd v Johannesburg City Council* 1970 3 SA 579 A: 585; *Bekker NO v Duvenhage* 1977 3 SA 884 E: 889; *Bischofberger v Van Eyk* 1981 2 SA 607 W: 610-611.

18 Ramsden 1985:48-51.

19 Ramsden 1985:59-63.

20 Ramsden 1985:64. Overall, it seems that a separate doctrine of frustration is not recognised in South African law and that legal relief will only be granted if a given situation meets the requirements for supervening impossibility. In *Kok v Osborne & anor* 1993 4 SA 788 SEC: 802, the court was prepared to recognise commercial impracticability as a form of supervening impossibility. However, this decision has been criticised on several occasions. See Floyd & Pretorius 1994:328; Ramsden 1994:342. Since the case dealt with mistake, it is uncertain whether supervening impossibility applied at all.

find application.<sup>21</sup> Factors such as practical and economic expediency and fairness can thus provide exceptions to the general rule. Emphasis is placed on two aspects, namely the cost and risk of performance, on the one hand, and the value of the performance, on the other.

How is cost and value of performance to be determined? Scholars do not elaborate much on this aspect. Normally the cost of performance will be determined by calculating the total cost of rendering the performance for the promisor. Unforeseen risks which were not taken into account during negotiations will increase the costs. For example, due to an unexpected rise in the market price of a particular product a supplier suffers a loss in profit. He would not immediately be entitled to legal relief as an exception to the principle of *pacta sunt servanda*. Policy considerations would only allow an exception if the cost and risk of a performance outweigh or are disproportional to its value.

As regards the value of performance, it has been said that value refers to commercial value.<sup>22</sup> This would mean that value which cannot be commercially determined, such as sentimental value, should not be taken into account. From the perspective of economic efficiency, it is submitted that a court should not look at the position of only one party to the contract, but that the contract should be regarded as an economic unit aimed at maximising value. Value should, therefore, be calculated with reference to the overall economic purpose of the contract, which is to generate a net surplus. In the case of commercial contracts, the contract price is normally determined by taking into account the costs and risks as well as the market price of the goods or services to be rendered. If, due to unforeseen circumstances, the cost of performance outweighs the contract price, that would not immediately mean that the contract as an economic unit generates a net loss. If the market value of the goods were to exceed the cost of performance, the contract would still be fulfilling its initial economic purpose, namely to generate a net surplus, albeit in this case for the promisee. Value is therefore to be determined through an objective yardstick, namely that of market value or commercial value. If the costs outweigh the market value of the performance, principles of fairness will dictate that the contractual obligation is to be discharged.

If one is to apply the cost-value argument to the contract between SIOC and AMSA, the court will compare the cost of mining and delivering the iron ore to the market price of iron ore. Unless the costs of performance exceed

---

21 De Wet & Van Wyk 1992:85-86; Van der Merwe *et al.* 2007:201-202; Ramsden 1985:59, 64; Lubbe & Murray 1988:302 paragraph 3. The classic example here is of goods that are lost at sea during a storm. Although performance is not objectively impossible, the costs of salvaging the goods become disproportional to the value of the goods. Cf. also Van Niekerk & Schulze (2000:64) who hold that commercial impossibility may suffice where unforeseen contingencies prevent the attainment of the commercial purpose that the parties had in mind when they concluded the contract. See also Hutchison 2010:420-421.

22 Van der Merwe *et al.* (2007:201 n 18) compares the cost of performance with the commercial value of such performance.

the market price, the contract will not generate a net loss. However, if the costs outweigh the market value of the iron ore, a court will be entitled to terminate the contract on grounds of economic efficiency and fairness. On the facts, this was not happening here. The contract definitely generated a net surplus for the promisee, but in light of the unexpected rise in the market price of iron-ore the promisor's margin of profit decreased significantly from its original expectations. Although performance was objectively still possible, it had become economically unfeasible for the supplier who was locked into a long-term contract with no expectation of real economic gain. In this situation the promisor had to contemplate whether breach of his contractual obligations would be more efficient compared to performance. If the promisor were to fail to perform, the rise in the market value of the product would immediately influence the amount of contractual damages the promisee would be entitled to if he were to sue for loss in profits, and breach would not be an efficient option.<sup>23</sup> Could this situation be addressed through an expanded interpretation of the doctrine of supervening impossibility?

None of the scholars who advocate legal relief in exceptional circumstances requires that the costs must exceed the value of performance. They state that practical and economic expediency and fairness will favour termination of the contractual obligation where the cost of performance outweighs *or is disproportional* to the value of performance. It would, therefore, seem that discharge of the contractual obligation could be ordered if the cost of performance is disproportional to the value of performance. Judicial discretion will play a role if such an exception is to be made to the traditional rule. However, such an approach will not be totally new to South African law. Judicial discretion is already exercised in the context of orders for specific performance. Although there are no strict guidelines available in this context, it is unlikely that such an order will be granted if performance has become excessively burdensome for the promisor.

However, if South African law is to expand the doctrine of objective supervening impossibility on the principles of public policy and expediency of contract, the only remedy available would be termination of the contractual obligation. Termination is the ideal remedy in the text book examples referred to by scholars, namely where cost exceeds value. However, termination is not always the most efficient solution to the problem of changed circumstances, especially not where the contract can still generate a net profit. Should South African law restrict remedial relief for changed circumstances to termination of the obligation, or should a court compel the parties to renegotiate the terms of a contract where circumstances have changed unexpectedly and without fault of the parties?<sup>24</sup> The question is subsequently addressed by seeking guidance from the international position on changed circumstances.

---

23 Aksoy & Schäfer 2009:11-15.

24 Where the increase in costs was due to an unforeseen event and the contract still generates a net surplus after the change in circumstances, but the contract price is very low when compared to the overall cost of performance and the



## 4. Examples from other legal systems

Both civil law and common law legal systems support the doctrine of *pacta sunt servanda*. In terms of this doctrine, the parties to a contract should be bound to its terms, even if the circumstances that existed when they initially reached agreement or the assumptions they made of the future and on which they based their agreement have changed over time.

### 4.1 Common law

For a long time, English common law upheld the principle of sanctity of contract by stating that a contract should be performed irrespective that performance has become impossible as a result of a supervening event.<sup>25</sup> It was not until the second half of the nineteenth century that supervening impossibility arising without the fault of either party was seen to excuse both parties from performance. In English law, the doctrine of frustration was for the first time introduced in *Taylor v Caldwell*.<sup>26</sup> This doctrine regards the contract as terminated when it is frustrated by some extraordinary and unforeseeable event so that neither party is under any liability to the other, as is the case where goods perish due to a natural disaster. Under English common law, a contract for the sale of specific goods may be frustrated by any event which destroys the whole basis of the contract and radically alters the obligations of the parties, provided that the event occurs before the property and the risk passes.<sup>27</sup>

Section 7 of the *Sale of Goods Act* 1979 supports the common law inasmuch as it provides that the agreement will be avoided “[w]here there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer.” Although the *Act* requires the goods to have perished, which implies that they should be lost or destroyed, it seems that it would suffice if the goods merely “have been so altered in nature by damage or deterioration that they have become for business purposes something other than that which is described in the contract.”<sup>28</sup>

---

receiver’s net surplus, it can be argued that the contract price does not reflect the risk of cost increases which are usually allocated to the supplier and hence are worked into the contract price. In such cases, economic considerations would also suggest a renegotiation of the contractual terms. Aksoy & Schäfer 2009:20.

25 Treitel 2004:chapter 1.

26 1863 3 B & S 826, 122 ET 309. It was furthermore established through a line of cases known as the “Coronation cases”. The doctrine is based on the theory of the implied condition.

27 Guest 2006b:paragraph 6-034; Atiyah *et al.* 2005:361-362.

28 Guest 2006b:paragraph 6-035. However, if the contract becomes unprofitable, it is not enough for the contract to become frustrated. Guest 2006b:paragraph 6-045; Diamond 1995:259-261.

English courts have over the years addressed other events besides destruction in the context of frustration.<sup>29</sup> The doctrine is not restricted to physical destruction and includes instances of illegality or frustration of purpose. Also, where subsequent legislation makes performance illegal, the contract is rendered impossible of performance and therefore frustrated, such as where an import or export embargo is placed on goods.<sup>30</sup>

Originally, the English doctrine of frustration was based on an implied condition of the continued existence of a particular person or thing. Today it finds application in situations where circumstances render performance of the contract radically different from what was undertaken at conclusion of the contract. In the context of changed circumstances, English courts have held that performance must be more than merely more onerous but that it must be “positively unjust”.<sup>31</sup> Although hardship is not acknowledged *per se*, these cases are covered by the notion of frustration if they amount to performance becoming something radically different from what was originally contemplated. It is, therefore, understandable that relief for hardship situations will be provided as the exception rather than the rule.<sup>32</sup>

American courts show a more liberal approach towards the doctrine of frustration inasmuch as the standard is not necessarily strict impossibility of performance but merely some form of unforeseen, severe hardship. The doctrine has subsequently developed into an “impracticability” standard.<sup>33</sup> The Restatement (Second) of Contracts delineates the distinction between impossibility (“impracticability”) and frustration more clearly but calls for the same requirements. Section 261 states that, when a party’s performance becomes impracticable without his fault, his obligation to perform is discharged if the non-occurrence of such event was a basic assumption on which the contract was made. Section 265 tracks the same language for the frustration doctrine and simply replaces the reference to “impracticability” with the word “frustrated”. In the context of the sale of goods, section 2-613 of the American Uniform Commercial Code (UCC) provides that the contract can be avoided if “the goods suffer casualty without fault of either party before the risk of loss passes to the buyer”

---

29 Guest 2006b:paragraphs 6-045 - 6-046. E.g. *Société Cooperative Suisse des Céréales et Matières Fouragères v La Plata Cereal Co SA* 1947 80 Ll L Rep 530-543.

30 E.g. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 HL; *Re Badische Co Ltd* [1921] 2 Ch 331. See also the *Law Reform (Frustrated Contracts) Act 1943* which prevents unjust enrichment in these cases.

31 *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* 1964 2 QB 226 238.

32 Rösler 2007:497-498.

33 Nehf (2001:2-6, 29-30) indicates that in English law, “frustration” generally covers both the doctrines of impossibility of performance and frustration of purpose, whilst in the United States, “frustration” is typically used in situations where it would be possible to perform the contract but performance would be pointless. In American law, the term “impossibility” is also used to describe performances that are extraordinarily difficult to fulfil although they would objectively still be possible to perform. This type of impossibility is labelled “impracticability”. Courts, however, do not apply these terms uniformly or consistently. See also Digwa-Singh 1995:313.

or where goods, of which their continued existence is presupposed by the agreement, are destroyed without fault of either party. The buyer is relieved from his obligation but may at his own option take the surviving goods at a fair adjustment in price to allow for the deterioration.

Although English law does not recognise instances of mere hardship, section 2-615 UCC provides for commercial impracticability. If performance was made impracticable because of an unforeseen contingency or event, and the non-occurrence of that contingency was a basic assumption of the contract, a party will be excused from non-performance.<sup>34</sup> Financial and economic difficulties can afford a contracting party an excuse only if they amount to “a marked increase in cost” or if a shortage in supply due to an unforeseen contingency “altogether prevents the seller from securing supplies necessary to his performance”.<sup>35</sup> No provision is made for renegotiation of the contractual terms.

The Suez Canal cases<sup>36</sup> present examples where American and English courts differ in their approaches towards situations where performance becomes commercially impracticable although the goods have never perished. The House of Lords held that the closure of the canal did not frustrate the CIF contracts for the sale of Sudanese groundnuts to European buyers, despite the fact that the only alternative route was via the Cape of Good Hope. English courts declined hardship as an excuse for non-performance because it is not recognised by the doctrine of frustration. The American courts reached the same conclusion but through different reasoning. They refused to excuse the parties, not because hardship is not acknowledged as an excuse, but because on the facts of the case, the hardship was not excessive or unreasonable so as to provide an excuse.<sup>37</sup>

## 4.2 Civil law

Under German law, section 275(1) of the German Civil Code (BGB) provides that the seller is released from his obligation to perform if performance becomes impossible due to an event of accidental nature for which neither the seller nor the buyer has to accept liability, except if it is a sale for goods in kind. At the same time he will lose his right to claim the purchase price according to section 326(1) BGB.<sup>38</sup> Section 275 covers instances where impossibility is of a physical or a legal nature.

---

34 For a general discussion on the operation of commercial impracticability, see Digwa-Singh 1995:305 ev; Treitel 2004:chapter 6; Nehf 2001:51-74.

35 Official Comment 4 UCC (2003). Also see Crystal & Giannoni-Crystal 2010:5-6. Market changes and changes in financial position of the parties are normally not excused unless they amount to impracticability.

36 These cases were the result of the closure of the Suez Canal during the 7-day war between Israel and Egypt. For example, *American Trading & Production Corp v Shell International Marine Ltd (The Washington Trader)* 1972 1 Lloyd's Rep 463.

37 Digwa-Singh 1995:315-317.

38 Markesinis *et al.* 2006:409-410.

Initially, the courts applied the basic principles of impossibility which they extended to include instances of economic impossibility (so-called *wirtschaftliche Unmöglichkeit*). This doctrine, however, had its limitations. After the First World War, the doctrine of the *Wegfall der Geschäftsgrundlage* was formulated for instances where performance was rendered more onerous due to changed circumstances created by the war.<sup>39</sup> According to this doctrine, every contract has a basic aim. If the aim (or basis) of the contract is lacking, the contract is terminated. In time the doctrine was applied in accordance and in conjunction with the notions of good faith as contained in the BGB. The result was that where the contractual aim is not fulfilled due to changed circumstances, the judge is not only allowed to terminate the contract, but he can also change or adapt its terms on strength of the notion of good faith.<sup>40</sup> The doctrine of changed circumstances can, therefore, address situations of economic hardship.<sup>41</sup> The revised BGB, section 313(1), now codifies this well-established case law doctrine of contractual adaptation in cases where the circumstances forming the contract have changed dramatically after its conclusion to the extent that the party cannot reasonably be held to its obligation.<sup>42</sup>

## 5. Guidance to be sought from international instruments

### 5.1 The UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles (PICC) are a codification of general principles applicable to commercial contracts. The PICC will only govern a contract if the parties agree to the use of general principles of law or the *lex mercatoria*,<sup>43</sup> and insofar as they are not superseded by mandatory applicable law that would otherwise govern the contract. Arbitral tribunals are more inclined to apply the PICC as an autonomous supranational legal system that governs a contract than national courts would.<sup>44</sup>

---

39 In 1921, the doctrine was for the first time formulated by Oertman *Die Geschäftsgrundlage ein neuer Rechtsbegriff*. Ramsden (1977:81) explains that, in essence, the doctrine was a modernised form of the medieval *clausula rebus sic stantibus*. See also Rösler 2007:487.

40 Rösler 2007:488; Rimke 1999-2000:207-208. *Reichtsgesicht* 24 March 1922 106 ERG (Z) 218; *W v K Reichtsgesicht* 3 February 1922 103, ERG (Z) 328, 332 (1922); *Reichtsgesicht* 10 November 1923 107 ERG (Z) 151.

41 On the development of this doctrine in German law, see in general Ramsden 1976: 361-378 and 1977: 68-81.

42 Rösler 2007:489-491.

43 Flambouras 2001:290-291.

44 Flambouras 2001:291-292.

Article 6.2.2 of the PICC defines hardship as situations 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 performance a party receives has diminished. The disadvantaged party will be entitled to legal relief if these events have been beyond his control as well as unforeseen at the time of conclusion of the contract and, hence, could not reasonably have been taken into account or the risk of them occurring could not have been assumed. Legal relief can amount to termination of the contract but also to renegotiation of the contractual terms.<sup>45</sup>

## 5.2 European Principles of Contract Law and the Draft Common Frame of Reference

Although the European Principles (PECL) are not *per se* "international" rules, they still play an important role in the international context and are often used to interpret gaps in the CISG.<sup>46</sup> Commentators have suggested that the Draft Common Framework Rules (DCFR) might act as the predecessor of a uniform European Civil Code. At the very least it functions as a toolbox for the development of a harmonised European law.<sup>47</sup> Both these instruments provide for legal relief in the instance of economic hardship.

Under PECL, the parties are obliged to renegotiate the terms of the contract when performance has become excessively onerous,<sup>48</sup> failing which the court may terminate the contract or adapt its terms to restore the contractual balance.

The Draft Common Frame of Reference (DCFR) deals with changed circumstances in Book III article 1:110. The threshold test requires that performance must have become "so onerous because of an exceptional change of circumstances that it is manifestly unjust to hold the debtor to the obligation".<sup>49</sup> In addition there are further limitations similar to those in the PECL and PICC. Once again, renegotiation is the preferred remedy.<sup>50</sup>

## 5.3 The United Nations Convention on Contracts for the International Sale of Goods

Article 79 is the only provision of the United Nations Convention on Contracts for the International Sale of Goods (CISG) that deals with the

---

45 Article 6.2.3 PICC states that the disadvantaged party can request renegotiations. If the parties fail to reach agreement, the court can terminate the contract or can adapt the contractual terms to restore the equilibrium.

46 Lindström 2006:20.

47 See e.g. Bonell 2008:13.

48 Article 6.1.1.1 (2) PECL.

49 DCFR III article 1:110 (2).

50 Article 1:110 (2) – (3) DCFR.

notion of changed circumstances. It provides for an exemption in situations where the failure to perform was due to an impediment beyond the control of the party in default, which he could not reasonably have been expected to have taken into account at the conclusion of the contract, or to have avoided or overcome its consequences. The effect of this provision is not to discharge the obligation, but only to exempt the defaulting party from a claim for damages. However, if the failure to perform amounts to a fundamental breach, remedies for breach of contract, such as avoidance and a claim for substitute performance, remain available.<sup>51</sup>

The situation regarding hardship under the CISG is far from certain. Recent developments in this regard might, however, be instructive for the South African law on hardship.

The drafting history of article 79 seems to be inconclusive on whether it was the intention of the drafters to include hardship under the notion of an “impediment”.<sup>52</sup> The majority opinion appears to be against such an interpretation.<sup>53</sup> Scholars and case law also differ on the scope and application of article 79. Some argue that “impediment” only covers situations of *vis maior* or *force majeure* where events outside the control of the parties to the contract render performance objectively impossible. Until the *Scafom* judgement, courts have generally refused to grant exemption from liability in cases where performance is still possible but simply has become more onerous. In most of these cases, it was held that the event which has given rise to the impediment (or hardship situation) was reasonably foreseeable and avoidable. Rising and falling markets and rapid changes in exchange rates are considered part of the general challenges of international trade and hence foreseeable. Since the requirements for a successful claim to an exemption are not met, recourse to article 79 necessarily has to fail. Other cases have held that hardship is not covered by the Convention and relief is to be sought in domestic law on grounds of an external gap.<sup>54</sup> However, recourse to national law is often made without considering the possibility of an internal gap and the application of the gap-filling mechanism of article 7(2).

In 2007, the CISG-Advisory Council produced an extensive opinion on the issue of exemption from liability for damages. Insofar as hardship is concerned it concluded that “[a] change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous (‘hardship’), may qualify as an ‘impediment’ under article 79(1)”.<sup>55</sup> According to this opinion, hardship may be invoked as an exemption from liability under article 79, and more

---

51 Article 79(5) CISG.

52 Garro 2005:paragraph IV.9.

53 Flambouras 2002:paragraph 3.

54 Lindström 2006:21-22; Rimke 1999-2000:225-227. Parties are, therefore, advised to provide for these instances contractually, such as through hardship or *force majeure* clauses.

55 CISG AC-Opinion No. 7 Exemption of Liability for Damages under Article 79 of the CISG:paragraph 3.1.

specifically an exemption from a claim for damages. However, paragraph 3.2 of the Advisory Council Opinion provides additional relief in that “[i]n a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based”.

It is against this background that the *Scafom* case should be considered. The judgement of the Supreme Court (Court of Cassation) of Belgium in the case of *Scafom International BV v Lorraine Tubes SAS*,<sup>56</sup> was given on appeal against a previous judgement of the Court of Appeal of Antwerpen,<sup>57</sup> which in turn was given on appeal against a decision of the Commercial Court of Tongeren.<sup>58</sup>

The dispute arose from a number of contracts concluded between Lorraine Tubes (“the Seller”) and Scafom (“the Buyer”). Subsequent to the conclusion of the transaction, the price of steel unforeseeably increased by 70 per cent. The contracts contained no clause for adaptation of the price. Early in 2004, the Seller pointed out to the Buyer that there was an unforeseen rise in the price of steel and that he was forced to review his prices for deliveries in April 2004. The Buyer, however, refused to renegotiate the terms. The Seller interpreted this rejection as a breach of the good faith principle underlying all contracts. He subsequently demanded specific performance and claimed damages in the amount of the suggested contract price as compensation for breach of contract. The Buyer, in turn, denied breach and averred that the goods that were to be delivered had already been in stock and, hence, could be delivered at no additional cost. In the end, the Buyer instituted proceedings to force the Seller to deliver against the agreed price.

Because Seller and Buyer, respectively, had their places of business in France and the Netherlands, the CISG applied as the governing law of the contract. The unforeseeability of the price increase was undisputed throughout the proceedings and therefore there were no factual issues in dispute. The case merely turned on the legal argument and the question whether situations of hardship can be addressed by article 79 of the CISG.

The Court of First Instance held that the CISG does not settle the situation of hardship (or *imprévision* as it is called in French law). It then proceeded to apply the doctrine of *imprévision* and concluded that a price adaptation was to be refused. The Appellate Court held that the Court of First Instance was correct in its first ruling, but that it was wrong in rejecting the price revision on the grounds of the doctrine of *imprévision*. The Court of First Instance failed to first establish the governing law of the contract, which was the CISG. The CISG contains no rules on price adaptation and therefore French law should apply. French law does not acknowledge the doctrine of *imprévision* as an independent source of law

---

56 19 June 2009. <http://cisgw3.law.pace.edu/cases/090619b1.html> (accessed on 26 October 2011).

57 29 June 2006 and 15 February 2007.

58 Commercial Court of Tongeren dated 25 January 2005.

but nevertheless allows renegotiation as an application of the good faith principle. The Buyer appealed against this judgement.

In its judgement, the Supreme Court of Cassation of Belgium held that the Appellate Court was wrong in finding that French law was applicable since this was a violation of article 7(2) CISG. National law may only be resorted to if there are no general principles available with which an internal gap in the Convention can be filled. The Supreme Court ruled that the gap should be filled in a manner that facilitates uniformity and should be sought in “the general principles which govern the law of international trade”. It proceeded to state that the general principles of international trade are “*inter alia*” incorporated into the UNIDROIT Principles of International Commercial Contracts. The Principles provide that in cases where changed circumstances fundamentally disturb the contractual balance, the party who invokes such circumstances is entitled to claim renegotiation of the contract.<sup>59</sup> On this basis, the Court held that the Buyer must renegotiate the contractual conditions.

This decision is regarded as a landmark decision in Belgium. One commentator reacted to the decision as follows:

This is a landmark decision for two reasons. First, the court went out on a limb in accepting hardship under Article 79. Internationally, this is a significant precedent. Second, for the first time in its history, the Supreme Court made reference to the UNIDROIT Principles of International Commercial Contracts to resolve a dispute. **This indicates that its judges are up to date with recent economic and legal developments in international trade.**<sup>60</sup> (my emphasis)

The concluding remark is important for purposes of the present research. Where existing legal doctrine does not provide any relief or compensation, judges need to take international economic and legal developments into consideration when they decide cases of hardship, especially when it comes to international contracts.<sup>61</sup> It is not the purpose of this article to evaluate the decision of the court in the context of CISG jurisprudence, but to use it as an example where a court, for the first time, not only acknowledges legal relief for a situation of hardship, but also hands down a pragmatic decision providing for renegotiation of the contractual terms. Although it is possible to criticise the decision on technical grounds of interpretation,<sup>62</sup> the result is fair and ensures that the CISG remains a

---

59 See 5.1 *supra*.

60 Hansebout 2010.

61 Rösler (2007:513) argues that there is not only a need for a European harmonisation, but that the rules on hardship should be universally unified to increase predictability of the law applicable to international contracts.

62 One can, for example, criticise the court's decision insofar as it expanded the notion of general principles as envisaged by article 7(2) CISG to include principles extraneous to the CISG, whilst itself only refers to general principles on which the Convention is based and, hence, are to be found “within the four corners” of the Convention. Furthermore, the UNIDROIT Principles were formulated after the CISG was already in operation and they can, therefore, not



dynamic international sales law keeping pace with modern developments in international trade and does not become a mere static monument of the past. At the same time, this decision can act as an (inspirational) example for other courts, where instances of hardship have not yet been judicially addressed.

## 6. A proposed doctrine of changed circumstances for South African law: Fusing existing law with international principles of law and economic theory

In the absence of a doctrine providing for commercial frustration or hardship in South African law, what are the options available to an aggrieved party? One possibility is to repudiate the contract and seek to compensate the buyer through damages. This would be a consideration if the opportunity exists of selling to another buyer against a price that exceeds the market price. In this case, breach would serve the purpose of allocating resources to its maximum value. However, this will not always be the case, especially not if the seller has limited reserves or stock or where the claim for damages exceeds all potential profit.

The discussion has shown that the doctrine of supervening impossibility can, on grounds of fairness and economic expediency, be expanded to cases where the cost of performance outweighs or is disproportional to the value of performance.<sup>63</sup> However, even if those conditions are met, the only relief available would be termination of the contractual obligation. The principles of economic efficiency dictate that, where circumstances change so that performance becomes burdensome to the extent that the net value of the contract amounts to a total loss, as in the case of supervening impossibility, the contract should be terminated, but where the contract can still generate a net profit, a default rule of the substantive law should award the parties the opportunity to renegotiate the terms. To cater for these situations, existing legal doctrines and notions should either be expanded to include situations of hardship or an independent doctrine of changed circumstances should be introduced.

In a well-reasoned article, Andrew Hutchison<sup>64</sup> has recently addressed this issue. He suggests that a new rule on changed circumstances should take the form of a common law doctrine instead of legislation. He prefers a common law doctrine since it can be developed and adapted by the courts over time and will not be dependent on the restrictions of legislative interpretation. Up to now, the only exceptions to the doctrine of supervening impossibility could theoretically be made on grounds of practical and economic expediency or notions of fairness. Judgements in

---

act as a source for the general principles on which the Convention is based. See, in general, Slater 1998:257-260.

63 See the discussion under 3 *supra*.

64 Hutchison 2010:419-420.

the cases of *Brisley v Drotsky*,<sup>65</sup> *Barkhuizen v Napier*<sup>66</sup> and *Bredenkamp v Standard Bank of South Africa Ltd*<sup>67</sup> have highlighted the controversial nature of the good faith doctrine, but have also evidenced a shift from contractual certainty towards fairness in contracting.<sup>68</sup> The notion of fairness could provide a foundation for such a new doctrine. However, he rejects a solution that is to take the form of a general judicial discretion based on fairness and proposes that such a discretion should be exercised along clear guidelines.

Hutchison's proposed rule on changed circumstances is to operate where the parties have failed to fill the gap by means of contractual arrangement in the form of a hardship clause. First of all, a threshold test is to be met that requires "a fundamental alteration in the equilibrium of the contract, which is to be judged with reference to whether performance has become excessively onerous for one party".<sup>69</sup> In addition, the hardship should have occurred after the conclusion of the contract, and should not have been foreseeable at the time of contracting. Furthermore, it should not have been self-created or within the sphere of the contracting party's assumed risk.<sup>70</sup> If these conditions are met, a party should be entitled to request renegotiation of the contract, which request may not be rejected by the other party because of the notion of good faith. If all attempts at renegotiation fail, discharge or renegotiation may be ordered by a court. Renegotiation should be the first prize, and only if that fails, the contract should be terminated.<sup>71</sup>

Hutchison's doctrine is modelled on article 6.2.2 of the UNIDROIT Principles. This solution is similar to what the Belgian Supreme Court suggested in the *Scafom* case, although derived through a different route. Hutchison favours this approach because of the generality of the PICC formulation which represents the best of various domestic rules,<sup>72</sup> making

---

65 2002 4 SA 1 SCA.

66 2007 5 SA 323 CC.

67 2010 4 SA 468 SCA.

68 The relevance of *pacta sunt servanda* in the context of modern international commercial contracts is being questioned increasingly. Some scholars are advocating a departure from the classical notion of sanctity of contract based on the will of the parties to a position where the judge plays a more active role in shaping the agreement by balancing legal certainty with the notion of fairness. See Rösler 2007:509.

69 Hutchison 2010:423.

70 Hutchison 2010:424. These conditions are already part of the South African doctrine of supervening impossibility.

71 Hutchison 2010:425.

72 The elements required by Article 6.2.2 of the PICC are found in all national systems that provide some form of legal relief for changed circumstances. They are, therefore, simply a codification of general international principles applicable to situations where circumstances change to the extent that the contractual equilibrium is fundamentally upset. Cf, however, Rösler (2007:505), who is of the opinion that the Principles "try to find the best solution". He questions, however, whether the solution provided by the PICC "really represents a common international understanding".

it the ideal model for a new South African rule on changed circumstances. Although contract modification is not something that courts will attempt lightly, especially in light of the principle of freedom of contract, Hutchison makes out a case for contract modification based on the example of judicial adaptation of contracts in restraint of trade.<sup>73</sup>

In suggesting such an approach, Hutchison, in effect, urges courts to take the best international practices derived from comparative study into account when they decide hardship cases. Such an approach is to be commended. However, the rule he proposes is not without problems of its own. Although it provides a judge with a threshold test, which will certainly curb a free reigned discretion, it can be argued that a threshold test requiring a fundamental change in the contractual balance is in itself open to interpretation and, hence, subject to a judicial discretion of some sorts. The threshold test Hutchison proposes makes the fundamental alteration of the contractual balance dependent on the contract becoming excessively onerous for one party. But what precisely is meant by “excessively onerous”? It is clear that an economic change that does not amount to a fundamental disturbance of the equilibrium of the contract will not be addressed. However, that still does not define a fundamental disturbance. The Comments to the 1994 edition of the UNIDROIT Principles provided for a guideline of at least a 50 per cent deviation in value.<sup>74</sup> But even if a guideline is provided, it still only remains a guideline. Depending on the circumstances, a deviation of less than 50 per cent might be considered excessive in a particular market or trade sector. On the other hand, examples from domestic law have shown that a deviation of 100 per cent and more are sometimes not enough to warrant legal relief.<sup>75</sup> However, the 2004 revision of the UNIDROIT Principles refrains from stating any guidelines, which now leaves the issue solely to be decided at the discretion of the judge or arbitrator.

Although legal certainty might call for a benchmark, the circumstances of the case will determine the outcome as it will be impossible to provide any exhaustive definition due to the varying nature and content of contractual performances. To prevent the test from being derogated to a mere subjective discretion, objective considerations such as the nature of the transaction, market conditions in a particular trade and international

---

73 Hutchison 2010:426-427. See also Rösler (2007:509) who refers to a so-called “new contract law model” where the judge plays a more significant role in balancing the interests of the parties to a contract. In the context of contract interpretation, see *BP Southern Africa v Mahmood Investments* [2010] 2 All SA 295 (SCA) paragraph 11 and *Ekurhuleni Metro v Germiston MRF* 2010 2 SA 498 A paragraph 13 where the Supreme Court of Appeal applied “a commercially sensible interpretation” in interpreting the terms of the contract. This is an indication that our courts are prepared to make value judgements when interpreting contracts in order to promote greater commercial efficiency.

74 Comment to article 6.2.2 PICC (1994).

75 Schwenger (2008:715-717) points out that domestic markets tend to require a 100 per cent deviation and some systems even 150-200 per cent.

commercial custom applying to that trade sector can be used as guidelines for exercising such a discretion.<sup>76</sup>

The PICC definition has much in common with the economic efficiency approach which this article uses as a point of departure for providing legal relief in cases of hardship.<sup>77</sup> South African scholars have always stated that legal relief will be available where the cost of performance is disproportional to the value of performance. What is required is a fundamental change in the equilibrium of the contract due to extraordinary and unforeseeable circumstances. Relief is thus aimed at restoring the contractual balance and hence the economic efficiency of the contract. When such balance cannot be restored and the contract generates a net loss, the contract is to be terminated. In cases where renegotiation of the terms of the contract can restore the equilibrium, that should be the appropriate form of relief. That is also the form of relief that the Belgian Supreme Court provided in the *Scafom* case.

To avoid a threshold test based on subjective considerations of a judge or arbitrator, it is suggested that a doctrine on changed circumstances should be tied to the economic foundations underlying economically efficient contracts. This way the test can present itself as a truly objective yardstick. The fundamental alteration in the equilibrium of the contract is to be determined with reference to the net value of the contract as an economic unit and not merely in light of the lost value for either one of the parties to the contract. At the time of contracting the parties reached an equilibrium as regards their respective costs and risks in proportion to the expected profit and the commercial value of the performance. The court can determine the degree to which the contractual balance has been distorted by comparing the cost of performance in relation to the market value of performance at the time of contracting to the same set of factors after the circumstances have changed. Where the equilibrium of the contract is significantly altered, the exchange of performance is economically speaking inefficient. However, where through renegotiation of the contractual terms the equilibrium can be restored so that the contract can still generate a net profit, a court should compel the parties to renegotiate the contract before discharge is to be ordered. The other conditions, namely that the change in circumstances should be beyond the control of the parties and unforeseeable, so that it would make it impossible to provide for such changes contractually, will place additional limitations on the application of such a doctrine.

The advantage of such a rule, compared to the expanded doctrine of supervening impossibility, is that it provides for renegotiation of the contractual terms in situations where the burdened party is not necessarily looking for discharge of its obligations but merely for adaptation of the

---

76 Rösler 2007:508.

77 See section 2 *supra*.

contract price in light of the unexpected change in circumstances.<sup>78</sup> Renegotiation is in line with the notion of *pacta sunt servanda*, which is an additional reason why it should be supported as the remedy of first instance instead of discharge.

Another challenge would, however, be to formulate the revised terms. It would be preferable that the parties renegotiate these terms themselves, and through their negotiations restore the contractual equilibrium. However, the parties will not always come to an agreement on the content of the modified contractual terms easily. Opportunistic buyers could also take advantage of these situations. To prevent exploitation of the renegotiations and to ensure that equitable rebalancing takes place, the burdened party must have the right to ask for termination of the contract.<sup>79</sup> Where the parties fail to reach agreement, the courts or tribunals should be in a position to restore the contractual equilibrium. Although judges, and to a lesser extent arbitrators, are not always well acquainted with commercial values, market forces and the costs and benefits of the contract,<sup>80</sup> that should not be reason enough for rejecting a doctrine of changed circumstances altogether. There are already other areas of contract law where judges have to make similar calls based on a judicial discretion, for example in claims for specific performance following breach of contract. Judges will be led by counsel's arguments supported by expert evidence, policy considerations, notions of fairness and simple common sense.

## 7. Conclusion

South Africa is increasingly positioning itself to become an international market player.<sup>81</sup> As this role increases, the need for legal rules that can regulate international commerce effectively and efficiently increases. It is time that we overhaul those areas of contract law that have become out of step with that of the major trading nations of the world, and in doing so, take note of developments in international practice, especially when it comes to contracts that regulate international trade. A doctrine of changed circumstances based on international principles and economic efficiency will not only reduce transaction costs but also facilitate international trade.

---

78 By this time, the parties have spent time and money on the performance of the contract, and there may be other benefits to the contract which could be preserved. Cenini *et al.* 2009:5.

79 Aksoy & Schäfer 2009:20-22; Cenini *et al.* 2009:5-6. The principle of good faith can also be used to avoid opportunistic behaviour. See the unreported decision of the Constitutional Court delivered on 17 November 2011 in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* CCT 105/10, [2011] ZACC 30 as regards the notion of good faith in the context of contract law and especially contract negotiations.

80 Cenini *et al.* 2009:6.

81 This position is facilitated through numerous trade agreements, such as those concluded with the UE, USA, Brazil, India, Russia and China.

## Bibliography

AKSOY HC AND SCHÄFER H-B

2009. Economic impossibility in Turkish law from the perspective of law and economics. *German Working Papers in Law and Economics*. 2009(8). <http://www.bepress.com/gwp> (accessed on 26 February 2011).

ATIYAH PS, ADAMS JN AND

MACQUEEN H

2005. *The sale of goods*. 11<sup>th</sup> ed. Essex: Pearson.

BONELL MJ

2008. The CISG, European contract law and the development of a world contract law. *American Journal of Comparative Law* 56:1-27.

CENINI M, LUPPI B AND PARISI F

2009. The comparative law and economics of frustration in contracts. *University of Minnesota Legal Research Paper Series Research Paper No. 09-20*. <http://ssrn.com>. abstract=1418035 (accessed on 26 February 2011).

CRYSTAL NM AND GIANNONI-CRYSTAL F

2010. Contract enforceability during economic crisis: legal principles and drafting solutions. *Global Jurist (Advances)* 10(3):Article 3. <http://www.bepress.com/gj/vol10/iss3/art3> (accessed on 20 October 2011).

DE WET JC AND VAN WYK AH

1992. *Die Suid-Afrikaanse kontraktereg en handelsreg I*. 5<sup>th</sup> ed. Durban: Butterworths.

DIAMOND A

1995. Force majeure and frustration under international sales contracts. In E McKendrick (ed) 1995:257-266.

DIGWA-SINGH S

1995. The application of commercial impracticability under Article 2-615 of the Uniform Commercial Code. In E McKendrick (ed) 1995:305-331.

FLAMBOURAS DP

2001. The doctrine of impossibility of performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention for the International Sale of Goods and the Principles of European Contract Law: A comparative analysis. *Pace International Law Review* 13:261-293.

2002. Comparative remarks on CISG Article 79 & PECL Articles 6:111, 8:108. <http://www.cisg.law.pace.edu/cisg/text/pedcomp79.html#er> (accessed on 23 January 2012).

GARRO AM

2005. Comparison between provisions of the CISG regarding exemption from liability for damages (Art.79) and the counterpart provisions of the UNIDROIT Principles (Art.7.1.7). <http://www.cisg.law.pace.edu/cisg/principles/un79.html#editorial> (accessed on 23 January 2012).

GUEST AG

2006. Risk and Frustration. In AG Guest (ed) 2006:303-343.

GUEST AG (Ed)

2006. *Benjamin's sale of goods*. 7<sup>th</sup> ed. London: Sweet & Maxwell.

HANSEBOUT A

2010. Landmark Supreme Court decision on hardship under CISG. *International Law Office*. <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=6a74fcf3-9728-44> (accessed on 22 March 2011).

HUTCHISON A

2010. Gap filling to address changed circumstances in contract law – where it comes to losses and gains, sharing is the fair solution. *Stellenbosch Law Review* 21(3):414-437.

KIM N

2008. Mistakes, changed circumstances and intent. *Kansas Law Review* 56:473-516.

- LINDSTRÖM N  
2006. Changed circumstances and hardship in the international sale of goods. *Nordic Journal of Commercial Law* 2006(1):1-29.
- LUBBE GF AND MURRAY CM  
1988. *Farlam & Hathaway contract cases, materials and commentary*. 3<sup>rd</sup> ed. Cape Town: Juta & Co Ltd.
- MARKESINIS BS, UNBERATH H AND JOHNSTON A  
2006. *The German law of contract: a comparative treatise*. 2<sup>nd</sup> ed. Oxford: Hart Publishing Ltd.
- McKENDRICK E (ED)  
1995. *Force Majeure and frustration of contract*. 2<sup>nd</sup> ed. London: Lloyd's of London Press Ltd.
- NEHF JP  
2001. Impossibility. In JM Perillo (ed) 2001:Vol. 14.
- PERILLO JM (ED)  
2001. *Corbin on contracts*. Vol. 14. Newark: Lexis Nexis Matthew Bender & Co.
- POSNER RA  
2003. *Economic analysis of the law*. 6<sup>th</sup> ed. New York: Aspen Publishers.
- PRETORIUS C-J AND FLOYD TB  
1994. Mistake and supervening impossibility of performance. *Tydskrif vir Hedendaags Romeins-Hollandse Reg* 57:325-329.
- RAMSDEN WA  
1976. Supervening impossibility of performance and changed circumstances in German law. *Tydskrif vir Hedendaags Romeins-Hollandse Reg* 39:367-378.  
1977. Supervening impossibility of performance and changed circumstances in German law. *Tydskrif vir Hedendaags Romeins-Hollandse Reg* 40:68-81.
1994. Could performance have been impossible in *Kok v Osborne & Another?*. *South African Mercantile Law Journal* 6:340-345.
1985. *Supervening impossibility of performance in the South African law of contract*. Cape Town: Juta & Co. Ltd.
- RIMKE J  
1999-2000. Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts. *Pace Review of the Convention on Contracts for the International Sale of Goods* 1999-2000:197-243.
- RÖSLER H  
2007. Hardship in German Codified private law – in comparative perspective to English, French and international contract law. *European Review of Private Law* 2007(3):483-513.
- SCHWENZER I  
2008. Force majeure and hardship in international contracts of sale. *Victoria University of Wellington Law Review* 39:709-725.
- SERGEANT B  
2010. Kumba, ICT debacle worries foreign investors in South Africa. <http://newsletter.mineweb.co.za/mineweb/view/mineweb/en/page72068?oid=107820> (accessed on 15 April 2011).
- SLATER SD  
1998. Overcome by hardship: The inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG. *Florida Journal of International Law* 12:231-262.
- TREITEL G  
2004. *Frustration and force majeure*. 2<sup>nd</sup> ed. London: Sweet & Maxwell.

VAN DER MERWE S, VAN HUYSTEEN LF,  
REINECKE MFB AND LUBBE GF  
2007. *Kontraktereg: Algemene be-  
ginsels*. 3<sup>rd</sup> ed. Cape Town: Juta.

VAN NIEKERK JP AND SCHULZE WG  
2000. *The South African law of inter-  
national trade: Selected topics*. Pre-  
toria: Saga Legal Publications CC.