Of Mice (and Other Disasters) and Men—Rent Abatement Due to Unforeseen and Uncontrollable Events in the Civilian Tradition

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I. INTRODUCTION

In Roman law, letting and hiring of immovable property was a consensual agreement whereby the landlord undertook to lease an urban dwelling or a piece of agricultural land to a tenant for a period of time in return for the payment of rent.[1] Due to the hierarchical nature of Roman society and the unequal distribution of wealth, only a small group of privileged people owned property while the majority lived in rented apartments or farmed on rented land. Hence, the contract of lease was an important social tool that affected the existence of many inhabitants of the Roman Empire.[2] The main contractual obligation of the landlord was to afford the tenant undisturbed use and enjoyment of the leased property for the term of lease. When the landlord defaulted in his contractual obligations, the tenant could, with certain exceptions, cancel the agreement and sue for damage. However, circumstances frequently arose where the tenant's use and enjoyment of the leased property had been impaired by unforeseen or uncontrollable events that could not be attributed to the parties' fault. These events typically included disasters

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1. M. KASER, DAS RÖMISCHE PRIVATRECHT § 132 2 (Munich 1955).

2. Similarly in various contemporary civilian systems, with the exception of France and Italy, only a small segment of the population can afford to own property and the contract of lease remains an important social reality affecting the lives of many people.

such as earthquake, flood, fire, or war.[3] Since the concept of insurance against disasters was, as such, foreign to Roman law, alternative means had to be found in law to aid the tenant in these circumstances. Thus in Roman law, the remedy of rent abatement compensated the financial loss suffered by a tenant due to the effect of unforeseen or uncontrollable events on the leased property.[4]

With the revival of the study of Roman law in the twelfth century, rent abatement due to unforeseen and uncontrollable events became an important remedy in medieval learned law. It continued to exist in various forms in the civilian tradition and it was recepted into a number of codified civilian legal systems at the turn of the nineteenth century. It is, however, not the aim of this Article to provide a historical overview of the origins and development of rent abatement in the civilian tradition.

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Ulpianus libro trigesimo secundo ad edictum. Si vis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat, videamus. Servius omnem vim, cui resisti non potest, dominum colono praestare debere ait, ut puta fluminum graculorum sturnorum et si quid simile acciderit, aut si incursus hostium fiat: si qua tamen vitia ex ipsa re oriantur, haec damno coloni esse, velut si vinum coacuerit, si raucis aut herbis segetes corruptae sint. Sed et si labes facta sit omnemque fructum tulerit, damnum coloni non esse, ne supra damnum seminis amissi mercedis agri praestare cogatur. Sed et si uredo fructum oleae corruperit aut solis fervore non adsueto id acciderit, damnum domini futurum: si vero nihil extra consuetudinem acciderit, damnum coloni esse. Idemque dicendum, si excercitus praeteriens per lasciviam aliquid abstulit. Sed et si ager terrae motu ita corruerit, ut nusquam sit, damno domini esse: oportere enim agrum praestari conductori, ut frui possit.

[Let us see whether a landlord is obliged to compensate the tenant when a severe storm has caused damage. Servius proposes that the owner should compensate the tenant for every form of violence which cannot be resisted. This includes, for example, floods, damage caused by jackdaws or finches, and other similar events, or an incursion by the enemy, but defects arising from the object itself should be borne by the tenant, for example, where wine has acidified or where worms or weeds have damaged crops. On the other hand, where an earthquake has destroyed the entire crop, damages are not borne by the tenant to keep him from being forced to pay the full amount of rent due as well as enduring the loss of the seed. Damages will also be borne by the owner where frost damage has destroyed the olive crop or where the crop has been damaged by an unusual heatwave. Where nothing extraordinary occurred, however, the damages are borne by the tenant. The same conclusion must be drawn where a passing army wantonly takes part of the crop. On the other hand, where agricultural land has been destroyed by an earthquake and reduced to nothing, the owner bears the damages since the property should be delivered to the tenant in a state fit for him to draw fruits from the property. (author's translation)] *See also* D 19 2 25 6; D 50 8 3; CJ 4 65 8; CJ 4 65 19; D 19 2 33; D 19 2 15 7; D 19 2 15 3; D 19 2 15 5; CJ 4 65 18; D 19 2 15 4; D 19 2 27 pr; D 19 2 27 1; D 19 2 30 pr; D 19 2 30 1; D 19 2 28 pr; D 19 2 28 1.

4. *See* M. TALAMANCA, PUBLICAZIONI PERVENUTE ALLA DIREZIONE *BIDR* 882 ff at 883 (1989-1990); L. CAPOGROSSI COLOGNESI, AI MARGINI DELLA PROPRIETÀ FONDIARIA 139 ff at 141 (2d ed. Rome 1996); D. KEHOE, INVESTMENT, PROFIT AND TENANCY—THE JURISTS AND THE ROMAN AGRARIAN ECONOMY 221-34 (Michigan 1997); R. FIORI, LA DEFINIZIONE DELLA "LOCATIO CONDUCTIO"—GIURISPRUDENZA ROMANA E TRADIZIONE ROMANISTICA 80-111 (Naples 1999).

In this Article, a comparison will instead be drawn between two contemporary legal systems in which rent abatement due to unforeseen and uncontrollable events has been recepted as a contractual remedy in the civilian tradition. The remedy was introduced into Dutch law through the writings of Roman-Dutch authors of the seventeenth and eighteenth centuries[5] and into the civil law of Louisiana via the works of Pothier and the provisions of the *Code Civil Français*.[6] Although the sources through which the remedy was recepted into these legal systems differ considerably, the inspiration for these sources can be retraced to the Roman-law origins of rent abatement. It is therefore interesting to note that various similarities in the provisions governing rent abatement exist in these legal systems. There are, however, conceptual differences between the law of the Netherlands and of Louisiana. While the law of Louisiana is a codified mixed legal system partly founded on the civilian tradition, the law of the Netherlands is a codified system of mainly civil law. In this Article, a brief overview the provisions governing rent abatement in both the civil law of the Netherlands and the civil law of Louisiana will be given to illustrate these similarities.

II. THE LAW OF THE NETHERLANDS

The legal system of the Netherlands is a codified system of civil law in which legislation and its interpretation takes precedence over other branches of law.[7] Hence, solutions to legal problems are mainly found in case law and academic interpretations of articles of the Dutch Civil Code (*Burgerlijk Wetboek*). Dutch courts remain reluctant to create law through precedent and although provisions of the *Burgerlijk Wetboek* are frequently interpreted and omissions amended by the courts, it ultimately remains the task of the Dutch legislature to create new law. When

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5. *See, e.g.*, HDJ Bodenstein, *Huur van huizen en landen volgens het hedendaagsch romeinsch-hollandsch recht* (Doctoral Thesis University of Leiden 1907); A. VINNIUS, JURISPRUDENTIAE CONTRACTAE SIVE PARTITIONUM IURIS CIVILIS I 17 (Leiden 1647); A. MATTHAEUS, DE AUCTIONIBUS LIBRI DUO II 5 § 16 (Paris 1680); J. WISSENBACH, EXERCITATIONUM AD QUINTA PANDECTARUM LIBROS Disp. 37 § 19 (Franeker 1658); G. NOODT, OPERA OMNIA COMMENTARIUM IN DIGESTAM IUSTINIANI on D 19 2 (Leiden 1735); H. DE GROOT, INLEYDINGE TOT DE HOLLANDSCHE REGTSGELEERTHEYT 3 19 2 § 52 (Martvelt 1652); H. DE GROOT, DE IURE BELLI AC PACIS I 12 § 18 (Amsterdam 1652); A. VAN WESEL, TRACTATUS DE REMISSIONE MERCEDIS I § 5 (Amsterdam 1701); S VAN LEEUWEN, CENSURA FORENSIS 4 22 17 (Leiden 1677); U. HUBER, HEDENDAEGSE RECHTSGELEERTHEYT 3 8 28-29 (Amsterdam 1726); J. VOET, COMMENTARIUS AD PANDECTAS 19 2 § 23 (Leiden 1698-1704).

6. J. POTHIER, TRAITÉ DE CONTRAT DE LOUAGE § 139 ff (Paris 1874); CODE CIVIL FRANÇAIS § 1719 ff.

7. A. Hartkamp & M. Tillema, *Contract law in the Netherlands* (The Hague 1995) IV 4-6 has been used as the primary source for an overview of the Dutch legal system.

interpreting articles from the *Burgerlijk Wetboek*, Dutch courts consider such factors as the wording of the article, its relation to the entire system of law, its political history, aim as well as underlying principles and intentions. The first codification of 1809 was promulgated during the French occupation of the Netherlands by order of King Louis Napoleon, brother of the French emperor. It was known as the *Wetboek Lodewijk Napoleon* and its content was largely based on the work of the Roman-Dutch author, Johannes van der Linden and the provisions of the *Code Napoleon*. In 1811, after the incorporation of the Netherlands into the French Empire, the *Wetboek Lodewijk Napoleon* was replaced by the *Code Napoleon*. After the liberation of the Netherlands in 1813, attempts were made to codify Dutch civil law and these attempts culminated in the promulgation of the 1838 *Burgerlijk Wetboek*. Although the 1838 codification drew from the *Code Napoleon*, its treatment of the law of property and obligations reverted to Roman-Dutch law. The present codification of 1992 is the fourth codification in the history of Dutch civil law.[8] Book 7 of the 1992 Civil Code contains the provisions relating to specific contracts and only four of its parts came into effect on 1 January 1992. These were the articles governing the provisions relating to sale, mandate, deposit, and suretyship. The remaining specific contracts, such as urban and agricultural lease, are currently governed by the provisions of the 1838 codification as amended by legislation and case law.

The Dutch law of contract distinguishes between *huur* and *pacht*. *Huur* corresponds to urban lease, while *pacht* refers to agricultural lease with the added benefit of drawing fruits from the property. The distinction between *huur* and *pacht* is not concerned with the rural or urban nature of the property, but focuses instead on its intended use.[9] Thus, the object of *pacht* does not have to be agricultural per se, but the contract must be concluded for an agricultural purpose.[10] Due to its social importance in Dutch civil law, the contract of *huur* is extensively regulated by statute and its provisions are mostly aimed at aiding the economically vulnerable tenant. Article 7A:1584 (3) *Burgerlijk Wetboek* specifically excludes *pacht* from the provisions governing *huur*.[11] *Pacht*

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8. T. Veen, *En voor berisping is hier ruime stof—over codificatie van het burgerlijk recht, legistische rechtsbeschouwing en herziening van het Nederlands privaatrecht in de negentiende en de twintigste eeuw* 2002 *Pro Memorie* (Bijlage) 7 ff.

9. HARTKAMP, CONTRACT 276-302 (1995).

10. On the meaning of this phrase, see extensively P. DE HAAN, PACHTRECHT 123-35 (Zwolle 1969).

11. Article 1584 (3) *Burgerlijk Wetboek—De pachtovereenkomst wordt niet onder de overeenkomst van huur en verhuur begrepen. Zij wordt bij afzonderlijke wet geregeld.* [Article

is governed by separate legislation in Dutch civil law (the *Pachtwet* of 1958), but its aim is similar to that of *huur*. The *pachter*, like the *huurder*, is generally in a financially vulnerable position as he depends on the yield of the leased property for his livelihood.[12]

A. Agricultural Rent Abatement

Apart from the recognition of agricultural rent abatement in Roman-Dutch law, early codifications of Dutch civil law acknowledged the existence of the remedy. The *Wetboek Lodewijk Napoleon* of 1809 contained various regulations concerning agricultural rent abatement and the 1838 codification reinforced the remedy.[13] Articles 1628 through 1630 of the 1838 *Burgerlijk Wetboek* provided the tenant, who had lost more than fifty percent of the harvest due to unforeseen or uncontrollable events, with a statutory claim for agricultural rent abatement. The rights conferred by articles 1628 through 1630 of the 1838 *Burgerlijk Wetboek* were, however, ancillary and frequently excluded from lease agreements.[14] The poor state of Dutch agriculture at the turn of the nineteenth century, as well as the defenceless position of the tenant, necessitated the introduction of compulsory legislative provisions governing agricultural rent abatement. Thus, in 1886 the first of a series of commissions (*Sickesz Landbouwcommissie*) was appointed to establish a legal framework for agriculture.[15] The commission's report (published in 1890) highlighted the shortcomings of the right to agricultural rent abatement. However, the commission did not favour legislation to alter the state of affairs, but proposed a gradual development of legislative measures.[16] In 1906, a second commission (*Staatscommissie Lovink/Westerdijk*) again highlighted the shortcomings of the existing right to rent abatement and proposed that the matter be resolved by formulating compulsory provisions to govern rent abatement.

In 1919, a third commission (*Staatscommissie Diepenhorst*) was appointed to examine rent abatement. The commission's 1920 report proposed a right to rent abatement based on substantially diminished

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1584 (3) *Burgerlijk Wetboek*—The contract of agricultural lease is not regulated by the provisions governing urban lease. It is regulated by separate legislation. (author's translation)]

12. *See generally* R. VAN HEES, EIGENDOM EN PACHT VAN LANDBOUWGROND (Groningen 1983); P.A. DIEPENHORST, ONZE LANDBOUW (Kampen 1933).

13. N. Dijk, *Over pacht en pachtstelsels* 32-33 (Doctoral Thesis University of Leiden 1859); *Tekstuitgave Pachtwet* Supplement 72 March 1996 II 2 (Deventer 1997).

14. *See* Articles 1631-1632, 1838 *Burgerlijk Wetboek*.

15. *See Tekstuitgave* III 3-6.

16. DE HAAN, *supra* note 10, at 6.

operational yield owing to unforeseen and uncontrollable events. The rights proposed by this report were extensive. It included unusual fluctuations in prices of raw materials as ground for rent abatement and extended the application of the remedy by removing the requirement of crop failure and replacing it with a neutral term "operational yield." The report proposed a corresponding claim for the landlord where organs of state imposed additional burdens on him and the tenant received unusual gain as a result of it. The content of the report was adopted into a draft bill that was tabled on 12 January 1922, but subsequently rejected. After the defeat of the 1922 draft bill, the proposals of the 1919 commission were reviewed and again adopted into a draft bill of 1929.[17] The 1929 bill was based on the fundamental premise that the landlord bore the risk of loss or accidental destruction due to unforeseen or uncontrollable circumstances. The Lower House of the Dutch Parliament (Tweede Kamer) accepted the 1929 draft bill, which was promulgated as the *Pachtwet* of 1937.

The tenant's right to rent abatement remained virtually unchanged in the 1937 Act.[18] In article 23 of the 1937 Act, the tenant was given a compulsory right to rent abatement where the operational yield of the leased property had been substantially diminished through unforeseen or uncontrollable events. The tenant had to prove that the yield of the property differed substantially from that which the parties had reasonably envisaged at the conclusion of the agreement. Although the 1937 Act elevated the tenant's claim to a compulsory legislative provision, it still operated largely in the realm of private law. The provisions of the Act were aimed at aiding and supporting the financially vulnerable tenant and did not sufficiently regulate the terms of the agreement between the parties. The Dutch legislator soon realised, however, that the alteration of the content of contracts without sufficient judicial scrutiny frequently resulted in inequity. Additional legislative measures were needed to scrutinise the terms of an agreement after its conclusion.

During the Second World War, the *Pachtbesluit* of 1941 was promulgated as an interim measure to regulate agricultural lease.[19] The *Pachtbesluit* instituted eleven provincial agencies (Grondkamers) and a central agency of appeal in Arnhem (Centrale Grondkamer), which assumed many of the duties of the judge stipulated in the 1937 Act.[20] An important task assumed by the provincial agencies was the judicial

17. *See Tekstuitgave* IV 7-8.
18. *See* articles 23 and 31 *Pachtwet* 1937.
19. DE HAAN, *supra* note 10, at 13-18.
20. *See Tekstuitgave* IV 12.

scrutiny of lease agreements. According to articles 41 and 43 of the *Pachtbesluit*, every agreement of lease had to be scrutinised for validity by the provincial agency. Hence, the provincial agency would only approve an agreement of lease if agricultural interests would not be harmed and the net yield would provide the tenant with a reasonable profit. The agency could also alter the terms of an agreement that did not comply with the regulations. Parties were penalised for entering into an agreement that had not been scrutinised by the provincial agency.[21]

The system of provincial agencies imposed by the *Pachtbesluit* of 1941 was assumed into the 1958 *Pachtwet*. The 1958 Act provides that the provincial agency is obligated to scrutinise and alter agreements of lease, which do not comply with the provisions set out in the Act.[22] All agreements of lease have to be in writing and the parties are required to submit a notary certificate requesting an examination of the contents of the agreement.[23] The certificate has to be submitted at the offices of the provincial agency of the region in which the property is situated. The agency will appoint two experts to conduct an investigation into the matter.[24] The parties to the agreement are furthermore compelled to supply the experts with all the relevant information. After the investigation has been concluded, the agency may elect either to withhold approval or to refer the agreement back to the parties, or to grant unequivocal approval.[25] Once the agreement has been approved, a report is sent to the parties in which the changes to the agreement are highlighted.[26] The tenant's right to agricultural rent abatement is governed by three articles of the 1958 *Pachtwet*.

Both the landlord's right to an increase of rent and the tenant's right to rent abatement are merely temporary because they are confined to a specific year or season. Article 16 provides the tenant of agricultural lease with a claim for rent abatement where the operational yield of the leased property has been substantially diminished or where his enjoyment of the leased property has been substantially reduced due to unforeseen or uncontrollable events. Articles 17 and 18 continue in the same vein by awarding the landlord a corresponding claim to increase the rent instalment where the tenant's use and enjoyment of the property has

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21. *See* article 71 *Pachtbesluit* 1941.

22. *See* articles 128-129 *Pachtwet* 1958. The system of *Grondkamers* has been criticised for its lack of experience and slow procedure. A proposal has been made to reintegrate the system of *Grondkamers* into the jurisdiction of the Dutch civil courts.

23. *See* articles 2, 88-89 *Pachtwet* 1958.

24. *See* articles 93-94 *Pachtwet* 1958.

25. *See* articles 95-102 *Pachtwet* 1958.

26. *See* article 103 *Pachtwet* 1958.

been increased through unforeseen circumstances.[27] The wording of these articles reflects the Roman law foundation of the remedy, but the legislator clearly took great pains to sever the connection between rent abatement and the landlord's contractual obligation *uti frui praestare*. Thus, the foundation of rent abatement in Dutch civil law has to be sought elsewhere. It is generally assumed that article 16 is based on considerations of equity.[28] To understand the foundation of this remedy, certain remarks concerning good faith and equity in Dutch law are required.

One of the important developments in the 1992 Civil Code in the field of the law of obligations is the increased importance of the bona fides. Dutch civil law contains numerous open-ended concepts in the law of contract. Equity and its contractual guise, good faith, are the most important normative principles in the 1992 Dutch Civil Code because they allow the judge to incorporate social developments as well as the specific circumstances of a case into a decision. Equity in Dutch law is an extensive concept that finds its content in various principles outlined in different branches of law. In the law of obligations, equity manifests itself in the concept of good faith. In the 1992 Dutch Civil Code, the antiquated term *goede trouw* (good faith) has been supplanted by the term *redelijkheid en billijkheid*.[29] It is an important principle that permeates every aspect of the Dutch law of obligations.[30] Good faith fulfils various functions in a system of law.[31] It not only functions as a source of law or a standard of conduct, but also influences the application of legal rules through its expansive and corrective functions. In the civil law of the Netherlands, good faith has therefore acquired a much more extensive function. It is not limited to a gap-filling tool and fulfils an important active function through its expansive and corrective application. The application of legal rules generally have an equitable result, but circumstances may necessitate an interference with the contractual freedom of the parties. Hence, article 6:2 *Burgerlijk Wetboek* states that each party to an agreement has to conduct him in

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27. P. DE HOOG, DE PACHTWET IN DE PRAKTIJK 96 ('s-Gravenhage 1996).

28. DE HOOG, *Pachtwet* 95.

29. One of the reasons for the change in terminology was to establish a clear distinction between good faith in the law of contract as opposed to good faith in the law of things.

30. W. VAN DER GINTEN, REDELIJKHEID EN BILLIJKHEID IN HET OVEREENKOMSTENRECHT (Amsterdam 1978); H. VAN DER WERF, REDELIJKHEID EN BILLIJKHEID IN HET CONTRACTENRECHT (Gouda 1982).

31. M. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht* 370 ff (Doctoral Thesis University of Utrecht 1999).

accordance with good faith.[32] It provides that rights and obligations arising from a contract only apply insofar as they do not conflict with the demands of good faith. In ascertaining the demands of good faith, the court has to examine established principles of law, public policy as well as the relevant social and individual interests.

The expansive function of good faith in the Dutch law of contract is governed by article 6:248 *Burgerlijk Wetboek*.[33] Subarticle one provides that any agreement in Dutch civil law does not only have the rights and duties expressly agreed on by the parties, but the court may also impose additional rights and duties on an agreement when good faith demands it. The corrective function of good faith should, however, operate within a sophisticated system of legal norms, which aim to promote equity in general rather than attempting to rectify casuistic manifestations of inequity. Thus, a good faith clause is usually an open-ended normative principle, the content of which is determined by the circumstances of the given case. This does not imply, however, that the judge has unbridled discretion in this regard. Most civil law systems have implemented sophisticated methods to deduce the demands of equity in a given case. Good faith in Dutch civil law has therefore transcended its original purpose as a gap-filling tool and it has developed into an independent normative principle in the Dutch law of contract.

Whenever a *lacuna* exists in a contractual relationship between the creditor and debtor, the demands of justice and equity may impose certain additional rights and duties. These *lacunae* may exist due to the nullity of certain provisions or on account of the parties' omission to regulate every aspect of their contractual relationship where law or

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32. Article 6:2 *Burgerlijk Wetboek—(1) Schuldeiser en schuldenaar zijn verplicht zich jegens elkaar te gedragen overeenkomstig de eisen van redelijkheid en billijkheid. (2) Een tussen hen krachtens wet, gewoonte of rechtshandeling geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn.* [Article 6:2 *Burgerlijk Wetboek* -(1) Creditor and debtor are obliged to conduct themselves in relation to one another according to the demands of good faith. (2) A provision between creditor and debtor arising from statute, custom or legal act will not apply in so far as it is incompatible with the demands of good faith in the given circumstances. (author's translation)]

33. Article 6:248 *Burgerlijk Wetboek*—(1) Een overeenkomst heeft niet alleen de door partijen overeengekomen rechtsgevolgen, maar ook die welke, naar de aard van de overeenkomst, uit de wet, de gewoonte of de eisen van redelijkheid en billijkheid voortvloeien. (2) Een tussen partijen als gevolg van de overeenkomst geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaaven van redelijkheid en billijkheid onaanvaardbaar zou zijn. [Article 6:248 *Burgerlijk Wetboek*-(1) An agreement does not only have the legal consequences envisaged by the parties. It also has those consequences which may be deduced from statute, custom or the demands of good faith owing to the nature of the agreement. (2) A provision arising from an agreement between the parties does not apply to the extent that it is incompatible with the demands of good faith in the given circumstances. (author's translation)]

custom does not provide an answer. The assessment of a *lacuna* requires an extensive analysis of the agreement. Where parties have expressly excluded certain rights and obligations from the agreement, however, good faith may not be employed to reintroduce these rights or duties. The nature of the agreement, coupled with the interest of the parties and the circumstances of the case, will serve as the criteria to assess that rights and duties have to be deduced from the demands of justice and equity. The test employed to determine the demands of justice and equity is objective.[34] The judge first has to assess the legal position in question. He then has to compare the inequity of this result with a proposed interference with the contractual freedom of the parties. The judge has to exercise his discretion sparingly and only in cases where the inequity of the proposed result in manifest.

Subarticle 2 of article 6:248 *Burgerlijk Wetboek* furthermore provides that obligations in terms of a contract, which would otherwise bind the parties to an agreement, may be limited where justice and equity demand it. Even express provisions contained in an agreement may be altered or limited by the corrective function of good faith. The corrective function of good faith has become increasingly important in instances of changed circumstances arising after the conclusion of an agreement. It is in this sphere that rent abatement finds application. Where a tenant suffered severe financial loss as a result of unforeseen or uncontrollable events, the landlord cannot be compelled to compensate his loss since he had no fault in the matter. To leave the tenant without any remedy would, however, conflict with the demands of good faith in this regard. Justice and equity therefore dictate that the tenant should be aided by awarding him a remedy to claim rent abatement. To allow an unbridled claim would, however, also defeat the aims of justice. The remedy is therefore balanced by the expansive and corrective functions of good faith.

Article 16 of the 1958 *Pachtwet*:

> 1. De Pachter heeft aanspraak op een vermindering van de pachtprijs over een pachtjaar of een pachtseizoen, gedurende hetwelk tengevolge van buitengewone omstandigheden de opbrengst van het bedrijf aanzienlijk minder is geweest dan bij het aangaan van de overeenkomst te verwachten was of de pachter tijdelijk het genot van het gepachte geheel of gedeeltelijk heeft moeten missen.
> 2. Tot vermindering geven geen aanleiding:
> a. `een verlaging van de prijs van de voortbrengselen van het bedrijf;

34. Hesselink, *Redelijkheid*, *supra* note 31, at 370 ff.

b. omstandigheden welke aan de pachter zijn toe te rekenen of waarvan hij de gevolge door verzekering of op ander wijse redelijkerwijs had kunnen voorkomen;
c. schade, welk de pachter op een ander kan verhalen.

3. De vordering van de pachter vervalt zes maanden na het eindigen van het pachtjaar of het pachtzeizoen, waarover de pachtprijs verschuldigd is.[35]

Article 16 provides the tenant with a statutory claim for the reduction of the amount of rent where unusual circumstances have resulted in consequences which the tenant should not be forced to bear alone.[36] It is a compulsory provision that the parties cannot exclude from their agreement.[37] Article 16(1) contains two grounds for remission. Rent abatement may be claimed where unusual circumstances have resulted in the operational yield of the leased property being substantially less than envisaged at the conclusion of the lease. Unusual circumstances (*buitengewone omstandigheden*) have not been defined in the 1958 Act and the Dutch Parliament has maintained that the matter should be left to the discretion of the judge.[38] Case law has, however, highlighted various concrete examples of these events such as natural disasters, abnormal weather conditions, and war.[39] It includes any abnormal operational risk irrespective of its economical or physical nature.[40] The judge's assessment of the "unusual events" cannot be made *in vacuo*. The frequency of their occurrence, as well as their timing, has been highlighted in case law as factors which may influence the judge's discretion.[41] However, if the events were foreseeable at the conclusion of

35. [(1) A tenant of agricultural land is entitled to a remission of rent in respect of the year or season in which the yield of the property was considerably diminished due to unforeseen events compared to the amount envisaged at the conclusion of the agreement or where the tenant was temporarily deprived of the enjoyment of the entire or a part of the leased property. (2) Circumstances precluding a claim for rent abatement include a depreciation of the market value of the yield of the property; damage arising from events which may be attributed to the tenant's fault or which could reasonably have been prevented by taking out insurance and damages which the tenant could recover from a third party. (3) The tenant's claim ceases six months after the conclusion of the year or season for which the amount of rent is due. (author's translation)]

36. DE HAAN, *supra* note 10, at 565; *Tekstuitgave* on art. 16.

37. Pachtkamer Amersfoort 30 November 1939 *De Pacht* 1941 282.

38. Hof Arnhem 9 May 1960 *De Pacht* 1960 2155.

39. Hof Arnhem 11 November 1946 *De Pacht* 1948 886; Hof Arnhem 24 November 1947 *De Pacht* 1948 919.

40. DE HAAN, *supra* note 10, at 566.

41. Rechtbank Assen 8 July 1913 *Weekblad van het recht* 9792; Pachtkamer Tiel 4 September 1941 *De Pacht* 1942 338.

the contract or caused by personal circumstances of the tenant, rent abatement will not be allowed.[42]

Article 16(1) indicates that rent abatement is no longer based on the agricultural yield of the leased property. The Dutch legislator specifically based the tenant's right to rent abatement on operational yield (*de opbrengst van het bedrijf*) to evade the antiquated notion of loss of harvest. Hence, it is of little concern whether the crop was unharvested or stored in barns at the time of destruction. In severing the connection between a claim for rent abatement and crop failure, the Dutch legislature has increased the application of the contractual remedy. The neutrality of "operational yield" allows the extension of a claim for rent abatement to lease for economic profit. Both contracts of lease spanning several years and those spanning a single year are accommodated by article 16(1). In assessing the amount of rent to be remitted, the judge has to take the total operational yield of a year or season into account.[43] A comparison is then drawn between the diminished operational yield and the projected yield that was reasonably expected at the conclusion of the contract. Although the 1838 *Burgerlijk Wetboek* acknowledged set-off between barren and fertile years at the end of the term of lease, these provisions were abrogated in the 1923 and 1929 draft bills.[44] Establishing a considerable diminution (*aanzienlijk minder*) as required by article 16 is left to the discretion of the judge.[45]

The tenant may also claim rent abatement owing to the temporary loss of enjoyment of the leased property due to unforeseen events.[46] This ground for rent abatement exists independently from the actual economic yield of the property and is solely concerned with temporary loss of enjoyment.[47] The inclusion of this provision has also extended the scope of the contractual remedy. This provision covers contracts of lease, which were not necessarily concluded for economic profit, but purely to obtain enjoyment of the leased object for a period of time. Where loss of enjoyment could have been foreseen at the conclusion of the agreement or where it could be attributed to the parties' fault, rent abatement may

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42. Pachtkamer Heerenveen 28 August 1940 *De Pacht* 1941 189; Hof 's-Gravenhage 8 February 1957 *Nederlands Juristenblad* 1957 399.

43. Pachtkamer Groningen 18 July 1950 *Nederlands Juristenblad* 1951 417.

44. *See* DE HAAN, *supra* note 10, at 567; *contra* Pachtkamer Emmen 20 November 1945 *Nederlands Juristenblad* 1946 162.

45. The discretion is a component of the judge's competencies. *See* DE HAAN, *supra* note 10, at 568; Hof Arnhem 24 November 1947 *Nederlands Juristenblad* 1949 82.

46. *See* P. ABAS, A.S. RUEB & C.J.H. BRUNNER, MR. C. ASSER'S HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT 5 2 § 91 (7th ed. Zwolle 1990).

47. Hof Arnhem 11 November 1948 *De Pacht* 1948 886; Hof Arnhem 24 November 1947 *De Pacht* 1948 919 *Nederlands Juristenblad* 1948 415.

not be claimed.[48] The tenant may not unilaterally reduce the amount of rent due without the matter being decided by the *pachtrechter* and ruling being made on the matter.

A claim for rent abatement may only be instituted at the end of a given year. Where remission is claimed for multiple years, each claim has to be instituted separately. A claim for rent abatement has to be instituted within six months after the conclusion of the year or season for which rent has become due.[49] Because diminished operational yield or loss of enjoyment generally become apparent only after a number of years, rent abatement may be claimed for the year in which the result of the unforeseen events affected the tenant's operational yield or enjoyment of the property.[50] Article 19 of the 1958 Act provides for a periodical adjustment of the amount of rent. This article is aimed at permanently adjusting the amount of rent due for future years or seasons, while article 16 is largely concerned with ad hoc remission due to unusual circumstances. Where article 19 has been used to effect an adjustment to the amount of rent, article 16 will not apply.[51] No criterion has been set in article 16 to guide the judge in assessing the amount of rent abatement. Where a tenant's claim is based on diminished operational yield, the amount does not necessarily have to correspond to the diminution, but claims based on loss of enjoyment require some equivalence between the amount awarded and the extent of loss.

Article 16(2) contains three exceptions to the tenant's claim for rent abatement. First, rent abatement may not be claimed where the market value of the produce of the leased property decreases in value. Secondly, such a claim is also excluded when the events can be attributed to the tenant's fault or could reasonably have been prevented by taking out insurance.[52] Personal circumstances of the tenant such as disease or disability are not regarded as sufficient grounds for rent abatement. Thirdly, an interesting exception to the tenant's claim is found in article 16(2c). Subarticles (2b) and (2c) are closely related. Subarticle (2b) provides that rent abatement may not be claimed where the events giving rise to damage resulted from the tenant's fault or negligence, for example

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48. Pachtkamer Heerenveen 28 August 1940 *De Pacht* 1941 189; Hof 's-Gravenhage 8 February 1957 *Nederlands Juristenblad* 1957 399.

49. Hof Arnhem 22 December 1958 *De Pacht* 1959 2014 *Nederlands Juristenblad* 1959 467; DE HAAN, *supra* note 10, at 568.

50. Centrale Grondkamer 16 February 1959 *De Pacht* 1959 2048 *Nederlands Juristenblad* 1960 101.

51. Hof Arnhem 12 February 1951 *Nederlands Juristenblad* 1951 247; Centrale Grondkamer 16 February 1959 *De Pacht* 1959 2048 *Nederlands Juristenblad* 1960 101.

52. *See De Pacht* 1961 54-58; *De Pacht* 1974 67-68.

by not taking out insurance. This exception applies to claims based on reduced operational yield as well as temporary loss of enjoyment. The wording of this subarticle (*door verzekering . . . had kunnen voorkomen*) indicates that it is of no importance whether the tenant actually received remuneration de facto, but whether he could reasonably have received it.[53] Subarticle (2c) provides that rent abatement will not be allowed where the tenant's loss could be recovered elsewhere, for example from the settlement with his personal insurance. Where an insured tenant suffered substantially diminished operational yield, the landlord essentially profits from the tenant's choice to insure himself against damages. Although a legal duty to insure oneself does not exist in Dutch law, the Act does not prohibit the landlord from including such a duty amongst the standard clauses in the contract of lease.[54] Failure to honour a contractual clause will result in defective performance, which will frustrate the tenant's right to claim rent abatement. Since the Second World War, it has become agricultural practice in the Netherlands for the tenant to insure himself against unforeseen events. Article 16 does not elucidate the term "reasonably" (*redelijkerwijs*) and factors such as the nature of the insurance, its cost and specific conditions contained in the agreement will play an important role in assessing whether insurance was reasonable in the circumstances. In assessing a claim for rent abatement, the judge therefore has to take into account all insurance endowments that the tenant had, or could reasonably have, received. These include voluntary insurance or insurance in terms of the agreement as well compulsory insurance that the tenant should reasonably have taken out. Article 16 applies to smaller holdings, agricultural holdings, as well as nonrecurrent lease.[55]

Article 17 of the 1958 *Pachtwet*:

> 1. De verpachter heeft aanspraak op een verhoging van de pachtprijs over een pachtjaar of een pachtseizoen, gedurende hetwelk de lasten, die de verpachter door publiekrechtelijke lichamen zijn opgelegd wegens buitengewone werken, waardoor des pachters bedrijf gebaat wordt, aanzienlijk hoger zijn geweest dan bij het aangaan van de overeenkomst te verwachten was.

53. Centrale Grondkamer 8 June 1970 *De Pacht* 1971 2991.
54. The insurance must be limited to usual insurance for operational damages.
55. *See* articles 58 and 70 *f Pachtwet* 1958.

> 2. De vordering van de verpachter vervalt zes maanden na het eindigen van het pachtjaar of het pachtseizoen, waarover de pachtprijs verschuldigd is.[56]

Articles 17 and 18 allow the landlord to claim increased rent during fertile years to compensate for the amount of rent remitted during barren years. In article 17, the burdens imposed on the landlord by the state include the construction of bridges, dykes, and dams.[57] These burdens should result in a considerable increase in the tenant's enjoyment of the leased property, which could not have been foreseen at the conclusion of the agreement.[58] It is of little concern whether the value of the leased property increased de facto as a result of these burdens. The main concern of this article is whether, and to what extent, the tenant benefited from it. A criterion for the assessment of benefit was not included in this article and the judge will have to be guided by the extent of the tenant's benefit.[59] The landlord has to claim an increase for each year individually, taking into account that such a claim lapses after six months. Article 17 is compulsory and cannot be excluded from an agreement.[60] The article also applies to various forms of lease described in articles 58 and 70*f* of the Act.

Article 18 of the 1958 *Pachtwet*:

> 1. De verpachter heeft aanspraak op een verhoging van de pachtprijs over een pachtjaar of over een pachtseizoen, indien hij voor eigen rekening buitengewone werken heeft uitgevoerd, waardoor het bedrijf van de pachter dermate is gebaat, dat een verhoging van de pachtprijs van de pachter kan worden verlangd.
> 2. De vordering van de verpachter vervalt zes maande na het eindigen van het pachtjaar of het pachtseizoen, waarover de pachtprijs verschuldigd is.[61]

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56. [(1) A landlord is entitled to increase the amount of rent of the year or season in question during which burdens imposed by organs of state on account of unusual tasks which benefitted the tenant's activities, were substantially increased than those envisaged at the conclusion of the agreement. (2) The landlord's claim ceases six months after the end of the year or season in respect of which the rent is due. (author's translation)]

57. DL Rodrigues Lopes, *Pacht* 583 (Deventer 1997); *Tekstuitgave* on art. 17; Pachtkamer Zevenbergen 12 June 1943 *De Pacht* 1943 596 *Nederlands Juristenblad* 1944-1945 152; Hof Arnhem 8 March 1954 *De Pacht* 1955 1705 *Nederlands Juristenblad* 1955 234.

58. DE HAAN, *supra* note 10, at 569. The article does not apply if maintenance to existing buildings becomes more expensive. *See* Pachtkamer Almelo 2 June 1953 *De Pacht* 1953 1532.

59. Grondkamer Utrecht 20 November 1968 *De Pacht* 1969 2875; Pachtkamer Assen 28 April 1959 *De Pacht* 1960 2085; Pachtkamer Assen 23 June 1959 *De Pacht* 1960 2086; Hof Arnhem 9 May 1960 *De Pacht* 1960 2155 *Nederlands Juristenblad* 1960 583.

60. *See* article 57 *Pachtwet* 1958.

61. (1) The landlord is entitled to increase the amount of rent in respect of the year or season if he had done any unusual tasks of his own accord through which the business of the

While article 17 applies to burdens imposed on the landlord by organs of state, article 18 refers to work that the landlord undertook voluntarily on the leased property, thereby substantially increasing the tenant's enjoyment of it.[62] Such tasks include improvements of the property as well as the modernisation of buildings.[63] Unusual tasks (*buitengewone werken*) have been defined in Dutch case law as tasks that fall outside the landlord's contractual obligation.[64] A claim based on article 18 should indicate that the landlord undertook unusual work on the leased property, which he was not required to do in terms of the contract.[65] The task undertaken by the landlord does not have to occur on the property itself, but the tenant has to draw substantial benefit from it. The landlord also has to undertake the tasks voluntarily. Similar to article 16, the claim is not limited to the year in which the tasks occurred, but rather the year in which the tenant received substantial benefit from these tasks. Unlike article 19, the increase provided for in this article is merely temporary and has to be claimed individually for every year in which the tenant enjoyed substantial benefit. Article 18 furthermore differs from the preceding two articles in one important aspect. Increase may also be claimed for future years, unlike the preceding articles, which only apply to past years.[66] A criterion for assessing the increase has not been supplied in article 18, but it will generally not include the entire cost of the tasks. The judge will rather employ the extent of the benefit derived from the works as a guiding principle.[67] The court will have to take into account the extent to which the tenant benefited from these tasks as well as the landlord's costs, guided by the lesser of the two amounts.[68] A different method of assessment entails an assessment between the amount of benefit before and after the conclusion of the tasks. This article is also compulsory and its claim lapses after six months. In terms of a recent change in Dutch legislation, this article will not apply to the specific forms of leases mentioned in articles 58 and 70*f*

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tenant had benefitted to such an extent that an increase in the amount of rent may be expected. (2) The landlord's claim ceases six months after the end of the year or season in respect of which the rent is due.

62. DE HAAN, *supra* note 10, at 670; *Tekstuitgave* on art. 18.

63. Rodrigues Lopes, *Pacht* 5 8 4.

64. *Pacht* 1961 68-71.

65. *See* Asser-Rueb, 91 *Handleiding*.

66. Centrale Grondkamer 15 February 1959 *De Pacht* 1959 2048 *Nederlands Juristenblad* 1960 101.

67. Hof Arnhem 9 May 1960 *De Pacht* 1960 2155 *Nederlands Juristenblad* 1960 583.

68. *De Pacht* 1961 69.

since a landlord can easily determine at the conclusion of the agreement which type of unusual tasks he will undertake on the property.[69]

B. Urban Rent Abatement

Because Dutch civil law is a codified system, the *naturalia* of the contract of lease have been incorporated into the provisions of the Civil Code.[70] In article 7A:1584(1) of the 1992 *Burgerlijk Wetboek*, urban lease is defined as a contract whereby one party grants enjoyment of an object to another for a period of time in return for the payment of an amount of rent.[71] Hence, the focus of urban lease in the Dutch Civil Code is not the object itself, but rather the equivalence in performance between enjoyment and the amount of rent.[72] Article 7A:1586 of the *Burgerlijk Wetboek* lists the main contractual obligations of the landlord.[73] For the purposes of rent abatement, subarticle 3 that compels the landlord to afford the tenant undisturbed enjoyment of the leased object for the term of lease, is important.[74] Article 7A:1586 was originally incorporated into the 1838 Code and its content has remained

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69. See *Amendment* 12 October 1995 as found in *Tekstuitgave* on article 18.

70. *See generally* G. DIEPHUIS, HET NEDERLANDSCH BURGERLIJK RECHT XII 41ff (2d ed. Groningen 1898); N. PEERENBOOM, HUUR EN VERHUUR 7 ff (Amsterdam 1961); SM VONK, HUUR, ENKELE WETTEN LEESBAAR GEMAAKT (Arnhem 1981) (discussing articles 1589 and 1591); CJ VAN DER ZEBEN, COMPENDIUM BIJZONDERE OVEREENKOMSTEN 63 ff (6th ed. Deventer 1989).

71. Article 1584(1) *Burgerlijk Wetboek—Huur en verhuur is eene overeenkomst, waarbij de eene partij zich verbindt om de andere het genot eener zaak te doen hebben, gedurende eenen bepaalden tijd en tegen eenen bepaalden prijs, welken de laastgemelde aanneemt te betalen.* [Article 1584 (1) *Burgerlijk Wetboe*-Letting and hiring is an agreement in terms of which one party binds himself to allow the other party enjoyment of an object for a period of time against the payment of a price which the latter party had agreed to pay. (author's translation)]

72. While changes to the current title of the *Burgerlijk Wetboek*, dealing with urban rent have been proposed for a number of years, a final text of these changes is still unavailable. In the current draft bill 26 089 published in the *Kamerstukken* I 2000/01 nr 267, undisturbed enjoyment does not feature as prominently in the landlord's contractual obligations. It has instead been replaced by the concept of "defect" (*gebrek*) which has been given a wide definition in article 204 of the bill. If a defect in terms of article 204 arises, the landlord is obliged to rectify it in accordance with the considerations of equity as proposed in article 206(1)—JH SAELMAN, HUUR EN VERHUUR 436 ff (2d ed. Zwolle 1990).

73. Article 7A:1586 *Burgerlijk Wetboek—De verhuurder is, door den aard van de overeenkomst, en zonder dat daartoe eenig bijzonder beding vereischt wordt, verpligt: (1) Om het verhuurde aan den huurder ter beschikking te stellen; (2) Om hetzelve te onderhouden in zoodanigen staat, dat het tot het gebruik waartoe het verhuurd is dienen kan; (3) Om den huurder het rustig genot daarvan te doen hebben, zoo lang de huur duurt.* [Article 7A:1586 *Burgerlijk Wetboek*—The landlord is obliged by virtue of the agreement and without the need for any specific provision to deliver the object of lease to the tenant; to maintain it in such a condition that the tenant may use it for the purpose for which it had been let; to allow the tenant undisturbed enjoyment for the term of lease. (author's translation)]

74. Hoge Raad 20 February 1976, *Nederlands Juristenblad* 1976 374.

virtually unchanged.[75] The landlord's obligation to permit the tenant undisturbed enjoyment of the leased property is widely regarded as the main contractual obligation from which the other obligations mentioned in this article originate. It is an extensive and adaptable obligation that may be altered to cater for the differing content of the contract of lease. Because of its flexible nature, Dutch courts have taken both subjective and objective factors into account to determine its content in any given circumstances.[76] An important consideration in determining the content of the landlord's obligation to permit the tenant undisturbed enjoyment of the leased property will be considerations of equity. Two articles in the Dutch Civil Code govern urban rent abatement due to unforeseen or uncontrollable events.

Article 7A:1589 of the 1838 *Burgerlijk Wetboek*:

> Indien, gedurende den huurtijd, de verhuurde zaak door eenig toeval geheel en al vergaan is, vervalt de huurovereenkomst van regstwege. Indien de zaak slechts ten deele vergaan is, heeft de huurder de keus om, naar gelang der omstandigheden, of vermindering van de huurprijs te vorderen of de huurovereenkomst te ontbinden; doch hij kan, in geen dier beide gevallen, aanspraak op schadevergoeding maken.[77]

This article is an adaptation of article 1722 of the French *Code Civil*, but its roots may be traced to Roman law.[78] While it is easy to justify the existence of this article according to the general scheme of urban rent in the *Burgerlijk Wetboek*, article 7A:1589 has nevertheless generated some controversy.[79] If one party to an agreement is prevented

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75. *Handboek Huurrecht* (Supp. 20 December 2000) on article 1586; JH HARTMAN-VAN TOUR, HUURWETGEVING TEKSTUIGAWE 2000 - 2001 12 ff ('s-Gravenhage 2000).

76. *Handboek* on article 7A:1586 nn.5-6.

77. [If, during the term of lease, the leased object is totally destroyed by accident, the contract of lease will cease *ex lege*. If the object is only partially destroyed, the tenant will be entitled to choose either to reduce the amount of rent due or to end the agreement depending on the circumstances. In neither of these cases will the tenant be entitled to claim damages. (author's translation)]

78. *See* in detail Houwing PhAN *Het risico van het verhuurde goed*, *in* OPSTELLEN OVER HEDENDAAGSCH RECHT AANGEBODEN AAN JC VAN OVEN 125 ff (Leiden 1946), for a comprehensive survey of earlier jurisprudence on the article. Houwing proposes that article 1589 may also be traced to § 30 of Pothier's treatise on rent. *See also* JA DE MOL, HUURRECHT 22 ff (Alphen aan de Rijn 1977); RA DOZY & YAM JACOBS, HOOFDSTUKKEN HUURRECHT 64 ff (Arnhem 1992); *Handboek* on article 1589 n. 1 and the earlier literature on article 1589 cited there.

79. In the draft bill 26 089, article 7A:1589 does not appear in the same guise. Article 210 of the bill provides for dissolution of the agreement when the leased object has been totally destroyed. Unlike article 1589 which distinguished between partial and total destruction of the leased object, article 210 employs total impossibility of undisturbed enjoyment as the criterion to assess whether to dissolve the agreement. The concept of *vis maior* (*toeval*) is also replaced by defect as defined in article 204 and the possibility of rent abatement is restated in article 207(1).

from performing by *vis maior*, the other party is freed from his contractual obligations and the agreement is terminated *ex lege*.[80] However, if the undisturbed enjoyment of the leased property is infringed and performance has not become impossible, the other party will merely be freed from paying rent if the infringement cannot be attributed to his personal circumstances. Article 7A:1584 of the *Burgerlijk Wetboek* states that the tenant is entitled to undisturbed enjoyment of the leased property for the term of lease. Article 1589 applies if such enjoyment becomes impossible through accident (*toeval*). The main problem with the last-mentioned article is, however, that it does not afford the tenant the right to claim damages, whereas related articles such as 1586(3) does grant the tenant a claim for damages on account of the infringement of his undisturbed enjoyment of the leased property.[81] Article 1587(2) of the *Burgerlijk Wetboek* provides that a landlord is contractually obliged to make all the necessary repairs to the leased property irrespective of their cause. This article does not mention dissolution of the agreement or a claim for damages. Article 1589, on the other hand, may be distinguished from other articles dealing with infringement of undisturbed enjoyment of the leased object by its cause. The last-mentioned article only applies when the leased object was totally or partially destroyed by accident.[82] When these circumstances occur, the tenant is entitled only to the remedies in terms of article 1589 that do not include a claim for damages.[83]

In Dutch case law it is accepted that accident (*toeval*) is a synonym for *vis maior* (*overmacht*).[84] To determine whether accident existed, Dutch courts will apply article 6:75 of the *Burgerlijk Wetboek*, which provides that *vis maior* exists if the defect cannot be attributed to the debtor's fault or if he cannot be held liable for it in terms of statute, agreement, or general opinion.[85] The question whether acts of state should be classified

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80. Hoge Raad 17 June 1949 *Nederlands Juristenblad* 1949 544; DE MOL, *supra* note 78, at 22 ff.

81. Asser-Rueb, 5 II § 20 *Handleiding*.

82. Rechtbank Groningen 12 February 1958 *Nederlands Juristenblad* 1958 517.

83. Rechtbank Rotterdam 13 April 1896 *Weekblad van het recht* 6855; Rechtbank Middelburg 15 June 1949 *Nederlands Juristenblad* 1950 424.

84. DE MOL, *supra* note 78, at 22 ff; Dozy-Jacobs, 64 ff *Hoofdstukken*. If the leased object had been neglected on purpose, article 1589 will not apply—Kantongerecht Amsterdam 3 July 1986 *De Praktijkgids* 1989.

85. Article 6:75 *Burgerlijk Wetboek—Een tekortkoming kan de schuldenaar niet worden toegerekend, indien zij niet is te wijten aan zijn schuld, noch kragtens wet, rechtshandeling of in het verkeer geldende opvattingen voor zijn rekening komt.* [Article 6:75 *Burgerlijk Wetboek*—A default may not be attributed to the debtor if it did not occur due to his fault or if it cannot be attributed to him on account of legislation, legal act, or common opinion. (author's translation)]

as *vis maior* is a controversial matter that has given rise to extensive jurisprudence.[86] There are no fixed criteria to govern this matter and each act of state will have to be assessed individually while taking the circumstances of each case into account.[87] An important consideration will be whether the act of state could reasonably have been foreseen at the conclusion of the contract of lease.[88] An object is generally regarded as being destroyed when it substantively ceases to exist.[89] However, cases have arisen where the leased object remained substantively intact, but the tenant's undisturbed enjoyment of it became objectively impossible.[90] While older literature on the subject favoured only substantive destruction of the leased object, case law propagated the inclusion of nonsubstantive destruction where the leased object remained intact, but the tenant's undisturbed enjoyment became objectively impossible.[91]

If the leased object was only partially destroyed, the tenant could choose either to claim a proportion reduction of the rent or to end the agreement. This choice conforms to the general scheme of the law of

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86. DE MOL, *supra* note 78, at 22 ff; HR 30 May 1947 *Nederlands Juristenblad* 1948 38. Case law supporting the inclusion of acts of state as an example of *vis maior*—Rechtbank Almelo 9 January 1929 *Nederlands Juristenblad* 1929 356 *Weekblad van het recht* 11 943; Kantongerecht Haarlem 19 November 1943 *Nederlands Juristenblad* 1944 382; Kantongerecht Winschoten 17 November 1959 *Nederlands Juristenblad* 1960 344; Kantongerecht Amsterdam 10 december 1976 De Praktijkgids 1977 1185. Case law opposing the inclusion of acts of state as examples of *vis maior*—Rechtbank Arnhem 11 May 1916 *Nederlands Juristenblad* 1917 1041 *Weekblad van het recht* 10 099; Hof Amsterdam 29 March 1944 *Nederlands Juristenblad* 1944/45 561; Hoge Raad 23 March 1979 *Nederlands Juristenblad* 1979 430; Rechtbank Amsterdam 1 May 1916 629; Rechtbank Maastricht 27 February 1919 *Nederlands Juristenblad* 1919 392.

87. Rechtbank Almelo 9 January 1929 *Nederlands Juristenblad* 1929 356; Kantongerecht Leeuwarden 28 December 1918 *Weekblad van het recht* 10 390; Rechtbank Groningen 12 February 1958 *Nederlands Juristenblad* 1958 517. However, Dozy-Jacobs *Hoofdstukken* 64 ff have indicated that personal circumstances of the tenant resulting in diminished enjoyment of the leased object can never constitute *vis maior*; see Hoge Raad 17 June 1949 *Nederlands Juristenblad* 1949 544.

88. Rechtbank Arnhem 11 May 1916 *Nederlands Juristenblad* 1917 1041; Hof Amsterdam 20 October 1920 *Nederlands Juristenblad* 1921 801; Asser-Rueb, 5 II § 64 *Handleiding*.

89. Rechtbank Rotterdam 30 November 1895 *Weekblad van het recht* 6940; HR 24 November 1972 *Nederlands Juristenblad* 1973 102; Rechtbank Middelburg 15 June 1949 *Nederlands Juristenblad* 1950 424; Hof Amsterdam 27 June 1979 *Schip en Schade* 1979 99.

90. Hoge Raad 26 June 1974 *Nederlands Juristenblad* 1975 95; Hoge Raad 18 October 1872, *Weekblad van het recht* 3519; Hof Amsterdam 20 October 1920 *Nederlands Juristenblad* 1921 801 *Weekblad van het recht* 10 666; Rechtbank Amsterdam 24 June 1918 *Nederlands Juristenblad* 1918 *Weekblad van het recht* 10 359; Kantongerecht Haarlem 26 May 1944 *Nederlands Juristenblad* 1944/45 514; Kantongerecht Groningen 12 September 1946 *Nederlands Juristenblad* 1947 639; Rechtbank Middelburg 26 June 1948 *Nederlands Juristenblad* 1948 717; Hof Amsterdam 31 December 1958 *Nederlands Juristenblad* 1959 591; Rechtbank Zutphen 27 October 1982 *Bouwrecht* 1983 221; Hof 's-Gravenhage 7 February 1898 *Weekblad van het recht* 7130. *See contra* Hof 's-Gravenhage 20 December 1945 *Nederlands Juristenblad* 1946 489.

91. Houwing, 132ff *Risico*; *Handboek* on article 1589 notes 6 a-d.

lease. If the tenant is partially deprived of undisturbed enjoyment, the contract will remain in existence, but he will nonetheless be entitled to a commensurate reduction of the amount of rent due in proportion to his diminished enjoyment.[92] No fixed criterion exists to distinguish between "substantially damaged" and "destroyed" in terms of article 1589.[93] The Dutch courts have employed a twofold criterion to assess total destruction of the leased object.[94] It states that an object will be regarded as being totally destroyed when no part of the object remains which could be used for the purpose for which the object had been leased and when the amount of reconstruction will be so great that it cannot be classified as repairs.[95] One could therefore argue that the leased object would be regarded as partially destroyed if one of the two requirements have been fulfilled.[96] The article does not dictate the manner in which the abatement of rent should be calculated and it is generally done in proportion to the diminished enjoyment while taking the circumstances of the case into account.[97]

Article 7A:1591 of the 1838 *Burgerlijk Wetboek*:

> (1) Indien, gedurende den huurtijd, de verhuurde zaak dringend reparatien nodig heeft, welke niet tot na het eindigen der huur kunnen worden uitgesteld, moet de huurder dezelve gedoogen, welke ongemakken hem ook hierdoor worden veroorzaakt, en hoewel hij ook, gedurende het doen dier reparatien van een gedeelte van de verhuurde zaak verstoken zij.
>
> (2) Doch indien deze reparatien langer dan veertig dagen duren, zal de huurprijs verminderd worden naar evenredigheid van den tijd, en van het gedeelte van de verhuurde zaak, waarvan de huurder zal zijn verstoken geweest.
>
> (3) Indien de reparatien van dien aard zijn dat daardoor het gehuurde, hetgeen den huurder en zijn huisgezin ter bewoning

92. Hoge Raad 24 November 1972, *Nederlands Juristenblad* 1973 102; Hoge Raad 26 June 1974 *Nederlands Juristenblad* 1975 95.

93. Houwing, 132 ff *Risico* proposed that in order to distinguish between "damage" and "destruction," the effect of the event on the leased object should be taken into account.

94. Hof Amsterdam 24 December 1942 *Nederlands Juristenblad* 1943 339; Asser-Rueb, 5 II § 64 *Handleiding*.

95. Hof Amsterdam 25 April 1946 *Nederlands Juristenblad* 1946 689; Hof 's-Gravenhage 8 January 1948 *Nederlands Juristenblad* 1948 305; Rechtbank Zwolle 28 April 1948 *Nederlands Juristenblad* 1949 363; Rechtbank Middelburg 15 June 1949 *Nederlands Juristenblad* 1950 424; Hof Amsterdam 21 November 1974 *Nederlands Juristenblad* 1975 298.

96. Rechtbank Rotterdam 22 May 1931 *Weekblad van het recht* 12 312; Rechtbank Rotterdam 3 May 1909 *Weekblad van het recht* 9029; Rechtbank 's-Hertogenbosch 10 July 1919 *Nederlands Juristenblad* 1920 259; Rechtbank Leeuwarden 7 February 1935 *Nederlands Juristenblad* 1935 1297; Asser-Rueb, 5 II § 64 *Handleiding*; Dozy-Jacobs, 64 ff *Hoofdstukken*.

97. Rechtbank Leeuwarden 7 February 1935 *Nederlands Juristenblad* 1935 1297.

> noodzakelijk is, onbewoonbaar wordt, kan denzelve de huur doen te verbreken.[98]

If the leased object is in dire need of repair and the repairs cannot be left until the end of the term of lease, the tenant is contractually obliged to endure the discomfort of these repairs.[99] This article acts as the counterbalance for the landlord's contractual obligation to do necessary repairs to the leased object. It places a direct obligation on the tenant to endure these repairs and failure to do so may, in certain circumstances, enable the landlord to terminate the agreement.[100] The circumstances of the case will dictate whether the repairs are necessary. If the repairs last longer that forty days, the tenant will be entitled to a commensurate abatement of the rent to compensate for his loss of enjoyment. This subarticle is often interpreted as a concession to the tenant to relieve his burden of having to endure necessary repairs indefinitely. The forty-day period will be calculated from the day the repairs were started until the day of completion.[101] It will not only include actual workdays since the discomfort endured by the tenant will continue until such time as the work has been completed.

III. THE LAW OF LOUISIANA

Although Spanish settlers explored the territory of Louisiana during the sixteenth century, the Spanish crown never claimed it and France was the first country to claim and colonise the territory in 1682.[102] The French held Louisiana until 1762 when it was ceded to Spain in terms of the Treaty of Fontainebleau.[103] Spain finally took possession of Louisiana in 1769 and exercised control over it for nearly thirty years. During the

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98. [If, during the term of lease, the object of lease requires necessary repairs which cannot be put off until the end of the term of lease, the tenant is obliged to endure these repairs irrespective of the discomfort and partial loss of use of the property caused by such repairs. However, if these repairs continue for longer than forty days, rent will be remitted in proportion to the time taken to complete the repairs as well as the portion of the leased property which the tenant could not use during the course of those repairs. If the repairs are of such a nature that the leased property becomes totally uninhabitable, the tenant may terminate the agreement. (author's translation)]

99. Asser-Rueb, 5 II § 24 *Handleiding*; Hartman-van Tour, 19 *Huurwetgeving* ; AL Croes, *Over huur en onderhuur* 27 ff (4th ed. Arnhem 1991); Dozy-Jacobs, 64 ff *Hoofdstukken*; PJ Wiegman & TJ Zuidema, *Recht voor de huurder* § 2 4 2-2 4 3 (Lelystad 2000); Hoge Raad 2 December 1994 *Nederlands Juristenblad* 1995 183; Rechtbank Utrecht 3 December 1985 *Woonrecht* 1986 24; Kantongerecht 's-Gravenhage 30 September 1985 *Woonrecht* 1985 124.

100. Asser-Rueb, 5 II § 24 *Handleiding*.

101. Asser-Rueb, 5 II § 24 *Handleiding*.

102. R. Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 1971 TUL. L. REV. 5 ff.

103. *Id.*

thirty years of Spanish settlement, the existing French law was supplanted by a compilation of the laws of *Castille* as well as the laws of the territories of Spain.[104] These included various codifications of Spanish laws such as *La Siete Partidas* which were indirectly founded on Roman law.[105] Spain held the territory of Louisiana until 1800 when it was returned to France in terms of the Treaty of San Idelfonso. The French did not take formal possession of the territory of Louisiana until 1803 after which it was acquired by the United States of America.[106] A Congressional Act of 1803-1804 provided that the existing private law, which consisted of a hybrid system of French and Spanish laws, would continue to apply in the territory of Louisiana.[107] Despite attempts by United States lawmakers to impose Anglo-American common law onto the territory of Louisiana, the existing civil law prevailed. In 1806, the Governor of Louisiana decreed that a Civil Code had to be compiled with the express instruction to retain the civil law basis of the existing private law. These efforts culminated in the first Louisiana Civil Code of 1808, also referred to as the *Digest*, which was promulgated by an Act of 31 March 1808.[108] Almost seventy percent of the 1808 Civil Code could be directly traced to the writings of Domat, Pothier, and the drafts of the French *Code Civil*.[109] The main sources of the 1808 Code were Roman law, French customary law, royal ordinances, and legislation promulgated during the French revolution.[110] The 1808 Civil Code remained in force for less than twenty years after which it was replaced by an amended version in 1825.[111] The 1825 Civil Code was again amended in 1870 to bring it in line with legislative and social developments in the territory of Louisiana. The current Louisiana Civil Code is an amended version of the 1870 Code. The law of lease was originally contained in Book 3, title 8 of the 1808 Civil Code and this title was largely based on the works of

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104. TJ Hood, *The History of the Development of the Louisiana Civil Code*, 1958 TUL. L. REV. 7 ff; R. Batiza, *The Influence of Spanish Law in Louisiana*, 1958 Tul. L. Rev. 29 ff.

105. Batiza, *supra* note 102, at 31.

106. V. PALMER, MIXED JURISDICTIONS WORLDWIDE–THE THIRD LEGAL FAMILY 257 ff (Cambridge 2001); *see also* S. Herman, *The Louisiana Civil Code: A European Legacy for the United States*, *in* AM Rabello (ed.) EUROPEAN LEGAL TRADITIONS AND ISRAEL 309 ff (Jerusalem 1994); J. Zekoll, *Common law und civil law im Privatrecht von Louisiana*, 1994 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 323 ff.

107. Hood, *supra* note 104, at 7.

108. Batiza, *supra* note 102, at 7.

109. L. Baudouin, *The Influence of the Code Napoleon*, 1958 TUL. L. REV. 21 ff.

110. R. Batiza, *Roman Law in the French and Louisiana Civil Codes: A Comparative Textual Survey*, 1995 TUL. L. REV. 1601 ff.

111. *See generally* AE CONWAY, A REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825 (New Orleans 1937).

Domat, Pothier, and the draft projects of the French Civil Code.[112] The system of ownership and limited real rights proposed by the 1808 Civil Code rested on simplified precepts of Roman law which were received into French law. Due to the influence of the works of Pothier, the distinction between *stricti iuris* and *bonae fidei* contracts was not assumed into the 1808 Louisiana Civil Code. A distinction was instead drawn between synallagmatic and unilateral contracts.[113] The French *Code Civil* was greatly influenced by the philosophical ideas propagated by the supporters of the natural law doctrine of the seventeenth century and these ideas were indirectly absorbed into the law of Louisiana. Before the state of rent abatement in the Louisiana Civil Code can be assessed, certain introductory remarks concerning good faith and equity in the law of Louisiana are required.

Equity in the law of Louisiana does not refer to a separate system of rules and courts as in the British legal system.[114] It refers instead to an entrenched aspect of the Civil Code consisting of a body of rules and principles generated either by the courts or legislation. Many of these rules and principles can be traced back to the civil law heritage of the Louisiana legal system, although aspects of common law equity have in recent years been adopted. Equity in Louisiana law traditionally referred to article 21 of the 1870 Civil Code which stipulated that a judge could fill a *lacuna* in the existing law by employing a discretion based on considerations of equity.[115] Professor Vernon Palmer has, however, argued that this picture of equity as a gap-filling tool does not describe the entire function of this principle in the Louisiana legal system.[116] In the earlier codifications of Louisiana law, the drafters were extremely wary of incorporating nebulous concepts, such as equity, into the Code, mainly due to its link to the Anglo-American concept of equity and the injustices perpetrated in pre-revolution French law under the mantle of equity. In order to curb the effect of equity on the Civil Code, the drafters carefully constructed equity as a tool that could only be

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112. Batiza, *supra* note 102, at 43; R. BATIZA, THE VERBATIM AND ALMOST VERBATIM SOURCES OF THE LOUISIANA CIVIL CODES OF 1808, 1825 AND 1870: THE ORIGINAL TEXTS 1-2 (New Orleans 1973).

113. *See* 1808 LA. CIV. CODE art. 1107.

114. V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 1994 TUL. L. REV. 8 ff.

115. Article 21 of the Louisiana Civil Code has since moved to article 4 by virtue of Act 124 of 1987 effective 1 January 1988. Article 4 of the Louisiana Civil Code provides: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."

116. Palmer, *supra* note 114, at 10 ff.

employed in specific circumstances to fill existing *lacunae* in the Civil Code. However, the gap-filling role of equity originally proposed in the 1808 Civil Code has undergone considerable expansion since 1870. In contrast to the marginal role of equity in the earlier codifications, equity in the modern Louisiana legal system refers to any instance of injustice, or inconvenience in law, that has to be rectified even where no *lacunae* exist.[117]

In contemporary Louisiana civil law, a judge may employ equity in two circumstances. Where a *lacuna* exists in the current law, the judge has discretion to employ whatever legal sources and methods to bridge the gap, usually by analogous reasoning from similar provisions in the civilian tradition. In cases where no *lacunae* exist, but justice and equity demand it, existing concepts may be altered by using elements from common-law equity. Professor Palmer has therefore concluded that, contrary to the original aim of article 21 of the Civil Code, judges in Louisiana law have virtually acquired praetorian competencies to interfere with agreements between parties.[118] While many authors have argued that equity, in the Louisiana legal system, merely refers to article 21 of the Civil Code, the concept is in fact much more extensive.[119] Terms such as good faith and equity frequently occur in articles of the Civil Code which cannot be relayed to article 21 and the judge has acquired praetorian competencies to alter and amend existing law through the expansive and corrective functions of good faith.[120] The Civil Code contains numerous references to written or entrenched equity borrowed from the civil law heritage of the Civil Code that can be traced to Roman concepts of *aequitas* and *bona fides*.[121] Articles 1759[122] and 1983[123] regulated the operation of the *bona fides* in the Louisiana law of contract. In an insightful article on the scope and function of good faith in the Louisiana Civil Code, Saul Litvinoff has shown that good faith is a open-ended normative principle, the expansion of which greatly

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117. *Id.* at 19 ff.

118. *Id.* at 20 ff.

119. The wording of article 21 was directly borrowed from the *Projet* of 1800 and its origin may be traced to Aristotle's concept of equity in the *Ethics*—Palmer, *supra* note 114, at 35.

120. *See id.* at 22 ff.

121. Article 1759 Louisiana Civil Code—Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.

122. Article 1759 of the Louisiana Civil Code—Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.

123. Article 1983 of the Louisiana Civil Code—Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on the grounds provided by law. Contracts must be performed in good faith. *See also* articles 2053-2055 of the Louisiana Civil Code.

influence the extent of judicial freedom to revise the content of contracts.[124] Hence, as in civil-law systems, the judge may employ the expansive or corrective functions of good faith to amend the content of the parties' agreement to reach an equitable result. When both articles 1759 and 1983 of the Louisiana Civil Code are read together, it seems that the predominant function of good faith in the Louisiana law of contract is to enable the judge to reach a more equitable decision than those traditionally supplied by the provisions of the Code. The equitable adaptations of existing civil law are not a source of law in the legal system of Louisiana, but the precedents created by these decisions are nonetheless binding.[125]

The contract of lease in the law of Louisiana is rooted in the civilian tradition. A major restatement of the law of lease was undertaken in 1992.[126] Lease is defined as a synallagmatic contract whereby one party provides the use and enjoyment of the leased object to another in return for an agreed amount of rent.[127] In the *Viterbo* case the court stated:

> The civil law, on the other hand, regards lease for years as a mere transfer of the use and enjoyment of the property; and holds the landlord bound, without any express covenant to keep it in repair and otherwise fit for use and enjoyment for the purposes for which it is leased.[128]

The rights generated by the contract of lease are largely personal and can only be enforced against the other party. The law of Louisiana distinguishes three types of lease: urban lease, agricultural (predial) lease, and commercial lease.[129] Article 2692 of the Civil Code provides that one of the landlord's primary obligations arising from the contract of lease is to guarantee the tenant undisturbed use and possession of the object of lease for an agreed period of time against the payment of rent.[130] It also provides that the landlord is obligated to maintain the object of

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124. S. Litvinoff, *Good faith*, 1997 TUL. L. REV. 1645 ff at 1663.

125. Palmer, *supra* note 114, at 31 ff.

126. RD Moreno, *Development in Lease law 1992-1993*, 1994 LA. L. REV. 1237 ff.

127. *See, e.g.*, Gulf Refining Co. v. Glassell, 186 La. 190, 1701 So. 846 (1936); V. PALMER, LEASES—THE LAW IN LOUISIANA § 1-1 (Georgia 1982). Letting and hiring is currently regulated by book IX of the Louisiana Civil Code. *See also* GM ARMSTRONG, LOUISIANA LANDLORD AND TENANT LAW § 8 21, 8 71 (Texas 1983).

128. Viterbo v. Friedlander, US La. 1887 S Ct 962 at 965.

129. PALMER, *supra* note 127, § 1 2.

130. Article 2692 Louisiana Civil Code—The lessor is bound from the very nature of the contract, and without any clause to that effect: (1) to deliver the thing leased to the lessee; (2) to maintain the thing a condition such as to serve for the use for which it is hired; (3) to cause the lessee to be in peaceable possession of the thing during the continuance of the lease. *See* Potter v. First Fed. Sav. & Loan Ass'n, 615 So. 2d 318 (1993); Essen Developments v. Marr, 687 So. 2d 98 (1st Cir. 1995); Walker v. Greer, 726 So. 2d 1094 (2d Cir. 1999).

lease for the duration of the contract. This provision applies to all contracts of lease unless it is expressly excluded by the parties.[131] The tenant is not responsible for damage that cannot be attributed to his fault or that occurred due to general wear and tear.[132]

A. Urban Rent Abatement

Article 2700 of the Louisiana Civil Code provides that a tenant is obliged to endure necessary repairs to the leased premises during the term of lease:

> If, during the continuance of the lease, the thing leased should be in want of repairs, and if those repairs cannot be postponed until the expiration of the lease, the tenant must suffer such repairs to be made, whatever be the inconvenience he undergoes thereby, and though he be deprived either totally or in part[133] of the use of the thing leased to him during the making of the repairs. But in case such repairs should continue for a longer time than one month, the price of rent shall be lessened in proportion to the time during which the repairs have continued, and to the parts of the tenement for the use of which the lessee has thereby been deprived. And the whole of the rent shall be remitted,[134] if the repairs have been of such nature as to oblige the tenant to leave the house or room and to take another house, while that he has leased was repairing.

The tenant's obligation to endure these repairs is qualified by two factors, namely that the decay of the leased property must have occurred during the term of lease and that the repairs must be critical and cannot be left until the end of the term of lease.[135] When both requirements are met, the tenant becomes obliged to endure the repairs irrespective of the extent to which his enjoyment of the leased property may be affected by it. However, it would be inequitable to expect the tenant to endure such repairs indefinitely. Thus, if these repairs continue for longer than one calendar month, the tenant will be entitled to reduce the rent in proportion to the length of time taken to complete the necessary repairs as well as to parts of the leased property affected by the repairs. The rent

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131. Cont'l Bank & Trust Co. v. Times Publ'g Co., 142 La. 209, 76 So. 612 (1917).

132. Provosty v. Guss, 350 So. 2d 1239 (4th Cir. 1977).

133. Error in the English translation from the original French text—it should read "of a part." *See* note on article 2700 in AN YIANNOPOULOS, LOUISIANA CIVIL CODE (Minnesota 1996); *see also* WEST'S LOUISIANA STATUTES ANNOTATED 11 (Minnesota 1996) art. 2700.

134. Incomplete translation from the original French text–the phrase "during the continuance of the repairs" should be added. *See* Pontalba v. Domingon, 11 La. 192, 194 (1837); Eubanks v. McDowell, 460 So. 2d 42. 45 (1st Cir. 1984).

135. PALMER, *supra* note 127, § 3-15.

will be remitted *in toto* for the remainder of the contract if the repairs force the tenant to seek alternative accommodation.[136]

Urban rent abatement is also regulated by articles 2697 and 2699 of the Louisiana Civil Code. Article 2697 states:

> If, during the lease, the thing be totally destroyed by an unforeseen event, or it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim for damages.

Article 2699 provides:

> If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls shall intercept the light of the house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity.

These articles apply to both urban and agricultural lease.[137] Where the leased property is accidentally destroyed or rendered useless for the purposes for which it had been let, article 2697 provides that the contract of lease is terminated *ipso iure*. When the object of lease is partially destroyed, on the other hand, the tenant is given an option either to rescind the contract of lease or to claim a proportional rent abatement.[138] Case law has confirmed that article 2697 operates solely to the benefit of the tenant.[139] The logic behind this provision lies in the fact that the contract may be salvaged when the leased object was only partially destroyed.[140] However, the tenant's right to dissolve the lease has been qualified. The law of Louisiana does not favour the dissolution of

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136. *See* Coleman v. Haight, 1895 14 La. Ann. 564; Carvanjal v. Levy, 450 So. 2d 721, 723 (4th Cir. 1984) (describing that when a tenant changed the door lock and so denied the landlord access to the leased premises, he violated the tenant's right in terms of article 2700 of the Louisiana Civil Code to make necessary repairs to the leased dwelling); *see also* Billeaudeaux v. Soileau, 303 So. 2d 810, 812 (3d Cir. 1974).

137. Viterbo v. Friedlander, US La. 1887 S Ct 962 at 969.

138. Treigle Sash Factory v. Saladino, 211 La. 945 31 So. 2d 172, 175 (1947). Where a building is only partly destroyed by fire, the tenant is given the right to demand revocation of the lease or a diminution of the rent at his convenience. If evidence could prove that the premises could be restored for half the value that the premises were worth before the fire, the building will only be regarded as partly destroyed and the tenant will not be entitled to cancel the lease. PALMER, *supra* note 127, § 3-14.

139. Girouard v. Agate, 44 So. 2d 388, 390 (La. Ct. App. 1950); Duplain v. Wiltz, 194 So. 60 (La. Ct. App. 1940).

140. PALMER, *supra* note 127, § 3-14.

contracts of lease except in extreme cases.[141] Thus, the fact that the leased object has been partially destroyed will not in all circumstances enable the tenant to annul the lease at his convenience.[142]

The courts have been forced to distinguish between "damage" and "destruction" for the purpose of article 2697.[143] The last-mentioned article applies solely to cases where the leased property had been partially or totally destroyed due to unforeseen events.[144] The distinction between "damage" and "destruction" for the purpose of article 2697 was probably imposed out of considerations of equity and economic convenience.[145] The landlord's obligation to maintain the object of lease does not include an obligation to reconstruct a leased property that has been destroyed through unforeseen or uncontrollable events. However, it would be inequitable to force the tenant to suffer the consequences of these events alone. In order to prove that the leased object has been partially destroyed for the purpose of article 2697, expert testimony on the extent of the repairs is required.[146] In the *Bernstein* case, the court proposed that the assessment of reparation or partial destruction in terms of article 2697 should be conducted according to the circumstances of the case.[147] This case generated some controversy because not all case law supported the inclusion of the circumstances of the case as a factor to decide whether the leased object had been partially destroyed for the purpose of article 2697.[148]

In an attempt to standardise the criteria used to distinguish between repairs and partial destruction for the purpose of article 2697, the court in *Bossier Center* identified seven factors which had to be taken into

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141. *See, e.g.*, Dussnau v. Generis, 6 La. Ann. 279 (1851); Denman v. Lopez, 12 La. Ann. 823 (1875); Vincent v. Frelich, 50 La. Ann. 378. 23 So. 373 (1898); Lirette v. Sharp, 44 So. 2d 221 (1st Cir. 1950).

142. *See, e.g.*, Meyer v. Henderson, 49 La. Ann. 1547, 16 So. 729 (1894); Chivleatto v. Family Furniture & Appliance Ctr., 196 So. 2d 298, 300 (4th Cir. 1967).

143. Bernstein v. Bauman, 170 La. 378 127 So. 874 (1930); Wellan v. Weiss, 182 La. 1025, 162 So. 761 (1935); Brunies v. Police Jury of Jefferson Parish, 237 La. 227 110 So. 2d 732, at 6 ff (1959); PALMER, *supra* note 127, § 3-15.

144. If the leased object was destroyed by latent defects, the tenant may terminate the contract citing a breach of the landlord's obligation in terms of article 2695 of the Louisiana Civil Code—the landlord's warrantee against latent defects. *See* recently Westridge v. Poydras Props., 598 So. 2d 586 (4th Cir. 1992).

145. PALMER, *supra* note 127, § 3-15.

146. Caffin v. Redon, 6 La. Ann. 487 (1851); Vincent v. Frelich, 50 La. Ann. 378, 23 So. 373 (1898); Jackson v. Doll, 109 La. 230, 33 So. 207 (1902); Golberg v. Porterie, 2 La. Ct. App. 645 (1925); Dehan v. Youree, 161 La. 808, 109 So. 498 (1926).

147. *Bernstein*, 170 La. 378, 127 So. 874.

148. PALMER, *supra* note 127, § 3-16.

account when making such a decision.[149] These factors include the length of time required to conclude the repairs, the extent of the tenant's deprivation of the enjoyment of the object, the duration of his displacement, the damage done to the tenant's property, the amount of insurance paid to the tenant compared to the value of the building prior to the occurrence of the events, the cost of the repairs compared to the value of the building prior to the occurrence of the events, and finally, the degree and extent of damage to the building. Article 2699 provides that a tenant may petition the landlord for annulment of the contract if the object of lease was rendered unfit for the purposes for which it had been let through no fault of the tenant.[150] In the *Eubanks* decision, the plaintiff rented an apartment from the defendant.[151] A flood forced the tenant to abandon the apartment and she notified the landlord that she was unable to live in the apartment and therefore demanded her security deposit back. Due to the flood, the carpeting in the apartment had to be replaced and the landlord requested the tenant to remove her belongings in order to complete the necessary repairs. The court had to distinguish between "damage" and "partial destruction" to decide whether to apply article 2697 or 2700. The court referred to the factors listed in the *Bossier* decision and decided:

> There was no damage to the structural integrity of the building. The damage involved here was mere injury not partial destruction. Eubanks leased the apartment as her residence. The damage to the apartment may have been an inconvenience to Eubanks, it did not render the apartment permanently unfit for use as her place of residence.[152]

B. Agricultural Rent Abatement

The *locus classicus* of agricultural rent abatement in the law of Louisiana is the *Viterbo* case. This case was concerned with a petition to annul a lease due to inundation of a sugar cane plantation by the Mississippi river. The inundation was caused by the giving way of a

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149. Bossier Ctr., Inc. v. Palais Royal, Inc., 385 So. 2d 886, 889 (2d Cir. 1980)—Damage to a building caused by a tornado. Nearly total destruction to one-third of the roof of the premises occupied by the tenant and substantial damage to the floor, interior ceiling, walls, electrical, and air-conditioning systems resulted in total eviction of the tenant for months. The court found that these circumstances constituted partial destruction of the premises for the purpose of article 2697 and granted rent abatement. *See also* S. LITVINOFF, SALE AND LEASE IN LOUISIANA JURISPRUDENCE 693 ff (4th ed. Baton Rouge 1997).

150. JC Christian, *Constructive Eviction of Lessees in Louisiana*, 1956 TUL. L. REV. 474 ff at 477.

151. Eubanks v. McDowell, 460 So. 2d 42 (1st Cir. 1984).

152. *Id.* at 44-45.

levee that resulted in the loss of crops, as well as the destruction of all the existing plant cane. The plantation remained submerged for three months and the sediment blocked the canals. In this case the Supreme Court highlighted three differences between urban rent abatement in article 2697 and agricultural rent abatement in article 2743.[153] The former article mainly referred to the annulment of lease and rent abatement was merely included as an exception in the event of partial destruction. Article 2743, on the other hand, was primarily concerned with an abatement of rent due to unforeseen or uncontrollable events and annulment of the lease is not mentioned. A distinction was also drawn between the type of injuries required in terms of these two cases. Articles 2697 and 2699 are concerned with the total or partial destruction of the object of lease, while article 2743 is concerned with the destruction of the fruits of the property. The final distinction drawn by the Supreme Court referred to the contingencies guarded against. Articles 2697 and 2699 referred to any form of unforeseen or uncontrollable events, while article 2743 only referred to an event of extraordinary nature. However, this distinction was based on the line of earlier cases that refused rent abatement on account of inundation. Articles 2743 of the Louisiana Civil Code states:

> The tenant of a predial estate can not claim an abatement of rent, under the plea that, during the lease, either the whole, or a part of his crop, has been destroyed by accidents, unless those accidents be of such an extraordinary nature, that they could not have been foreseen by either of the parties at the time the contract was made; such as the ravages of war extending over a country then at peace, and where no person entertained any apprehension of being exposed to invasion or the like. But even in these cases, the loss suffered must have been equal to the value of one-half of the crop at least, to entitle the tenant to an abatement of rent. The tenant has no right to an abatement, if it is stipulated in the contract, that the tenant shall run all the chances of all foreseen and unforeseen accidents.

Articles 2744 of the Louisiana Civil Code provides:

> The tenant can not obtain an abatement, when the loss of fruit takes place after its separation from the earth, unless the lease gives to the lessor a portion of the crop in kind; in which case the lessor ought to bear his share of the loss, provided the tenant has committed no unreasonable delay in delivering his portion of the crop.

Both articles are phrased in a negative manner prohibiting the tenant from claiming rent abatement unless certain requirements have been met.

153. 7 Sup. Ct. 962, 975 (1887).

Article 2743 states that a tenant's claim for rent abatement will only succeed if the crop had been totally or partially destroyed by an extraordinary event which neither of the parties could have foreseen at the conclusion of the contract.[154] The article does not award the tenant a claim for damages. The amount of loss required by article 2743, fifty percent of the value of the crop, reflects the *ultra dimidiam iusti pretii* criterion established in medieval learned law.[155] Article 2744 restates the general principle regarding the transfer of the risk of accidental destruction of the fruits of the property after separation from the soil.[156] Only unharvested fruits may be taken into account in assessing the amount to be remitted. The historical and statutory notes on these articles indicate that article 2743 existed almost *verbatim* in both the 1808 and the 1825 codifications of the Louisiana civil law.[157] These notes also cite articles 1769-1773 of the *Code Napoleon* of 1804 as the historical antecedents of article 2743. Article 2744 originally did not exist in the 1808 Code, but it was included in the 1825 codification under influence of the French *projet*. A similar provision existed in article 1771 of the *Code Napoleon*.

A tenant's claim for rent abatement based on article 2743 will only be successful if it is proven that the damage to the unharvested crops of the leased property were caused by an unforeseen accident of extraordinary nature.[158] In the law of Louisiana, unforeseen accident has been equated with *vis maior*.[159] Many of the earlier cases referring to article 2743, or its predecessors, were decided during a time when the flooding of the Mississippi River was a common occurrence. Inundation of sugar plantations could therefore not be classified as unforeseen accidents of extraordinary nature and the tenant's claim for rent abatement was frequently denied.[160] In *Vinson v Graves* the court stated:

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154. Claude Neon Fed. Co. v. Mayer Bros., 150 So. 410 (La. Ct. App. 1933).

155. FF Stone, *A Primer on Rent*, 1939 TUL. L. REV. 329 ff.

156. Williamson v. Diesi Serv. Station Corp., 465 So. 2d 186, 190 (3d Cir. 1985)—When rent is paid in kind, a tenant is entitled to an abatement of rent for the unforeseen loss of a gathered crop, if there was no unreasonable delay in the delivery of the landlord's portion of the crop. A tenant was not entitled to an abatement of rent in kind where a grain silo in which the harvest had been stored went bankrupt and grain tickets marked with the portion belonging to the landlords were never delivered.

157. WEST'S LOUISIANA STATUTES ANNOTATED arts. 2743-2744 (Minnesota 1997).

158. Christian, *supra* note 150, at 478.

159. Knapp v. Guerin, 144 La. 754, 81 So. 302 (1919).

160. *See, e.g.*, Mason v. Murray, 21 La. Ann. 535, 536 (1869)—A party seeking to give to an inundation the character of an extraordinary accident must show that it was unusual, unforeseen and one to which the country was not ordinarily accustomed; Jackson v. Michie, 33 La. Ann.723 (1881)—The tenant of a predial estate cannot claim an abatement of the rent under article 2743 on account of the overflow of the Mississippi river. Such an event is not of the

> The overflow of the Mississippi River is of such frequent occurrence that it cannot be regarded as belonging to that class of extraordinary and unforeseen accidents which entitle the tenant of a predial estate to an abatement of the rent … The periodical overflow of the waters of a river is not an extraordinary accident; and if a party seeks to give to an inundation that character, he must show that it was unusual, unforeseen and one to which the country was not ordinarily subjected.[161]

Christian has noted, however, that in modern times with strict flood control measures, these cases would probably have been decided in favour of the tenant.[162] Article 2743 provides the tenant with a claim for rent abatement where the harvest of the property has been partially or totally destroyed. However, where the damage is so severe that it constitutes a partial destruction of the leased property itself, the applicable remedy would be an annulment of the contract rather than an abatement of rent. In *Viterbo v Friedlander*, a crevasse occurred in the Mississippi River, flooding a leased plantation and causing extensive damage to the sugar cane crop.[163] In reaching a decision, Mr. Justice Gray pointed out the fundamental difference between the civil and common law conceptions of the contract of lease.[164] While the common law views lease as the granting of ownership of the object of lease for a predetermined period, civil law regards lease merely as the transfer of use and enjoyment against the payment of rent. Since the law of lease in the Louisiana legal system was largely founded on civil law, Justice Gray examined the Roman law provisions on rent abatement and, thereafter, the commentaries of Domat and Pothier on these text fragments. The judge then proceeded to show that the general principles of rent abatement was recepted into the 1808 Louisiana Civil Code. In the judge's view, however, articles 2743 and 2744 exclusively applied to agricultural lease and did not cover urban rent abatement.[165] After examining the extent of the damage caused by the inundation, Justice Gray decided:

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accidents of extraordinary nature that could not have been foreseen by the parties; Payne v. James & Trager, 45 La. Ann. 381 (1893)—History of overflows in the state are a frequent occurrence and cannot therefore be extraordinary and unforeseen; Hollingsworth v. Atkins, 46 La. Ann. 515 (1894); Haywood v. McKenna, 123 So. 479 (La. 1929); Norman v. Lacroix, 148 So. 458 (1933)—Overflow is not unforeseen or extraordinary accident which would relieve a tenant from paying rent under the statute. If the parties regulate rent abatement differently inter partes, the provisions of the contract will be enforced.

161. 16 La. Ann. 162, 163 (1861).

162. Christian, *supra* note 150, at 478.

163. 120 U.S. 707, 7 S. Ct. 962 (1887).

164. *Id.* at 965.

165. *Id.* at 969.

> Upon the whole of the case, we are of the opinion that the lease being of a sugar plantation for the purpose of being used to cultivate sugar cane, the injuries proved to the plantation, and to its capacity for producing cane and sugar, amounted to a partial destruction of the plantation, or, what is the same thing in legal effect, to making it cease to be fit for the purpose for which it was leased; that those injuries were caused by a fortuitous event, and that under articles 2697 and 2699 of the Revised Civil Code, construed in the light of the other articles that we have cited, and of the principles of the civil law as established in Louisiana, the plaintiff was entitled to have the lease annulled.[166]

If the tenant were aware of the danger and imminence of flooding and still concluded the contract of lease he is assumed to have accepted the risk of accidental destruction and will therefore not be entitled to an abatement of rent.[167] Mr. Justice Gray furthermore went to great lengths to point out the differences between article 2743 and two similar provisions governing urban rent abatement.[168] In his view, article 2743 represented a derogation of the general principles of the law of lease and consequently had to be construed carefully.

IV. CONCLUDING REMARKS

This contribution has illustrated that although the Netherlands and Louisiana are continents apart, their common civilian heritage has created a unique similarity in various fields of private law. Rent abatement in Dutch civil law is a contractual remedy governed by the expansive and corrective functions of good faith. The remedy has been acknowledged in Dutch law since the first codification of 1809. The statutory claim for rent abatement introduced by the 1838 *Burgerlijk Wetboek* largely focused on agricultural tenancy and loss of harvest. The right to rent abatement afforded by the 1838 *Burgerlijk Wetboek* was ancillary and frequently excluded from contractual agreements. After recommendations from various commissions, the tenant's right to agricultural rent abatement was transformed into a compulsory legislative provision in the 1937 *Pachtwet*. In this Act, the Dutch legislator also severed the connection between a claim for rent abatement and crop failure and opted to introduce a neutral term "operational yield." However, the 1937 Act still operated largely in the realm of

166. *Id.* at 978.

167. Morgan & Lindsey v. Ellis Variety Stores, 145 So. 514 (1932)—A party contracting to purchase store merchandise, with the knowledge of danger of flood if the river levee broke, assumed risk of having to make purchase, notwithstanding resulting injury to business, breaking of a levee not being a fortuitous event terminating parties' obligations.

168. US La. 1887 S Ct 974 ff.

private law and did not allow sufficient judicial scrutiny of the content of lease agreements. Hence, in 1941, the Dutch legislator promulgated an interim measure, the *Pachtbesluit*, to regulate agricultural lease. The *Pachtbesluit* created provincial agencies to regulate various aspects of agricultural lease. An important aspect of these provincial agencies' mandate was to scrutinise the content of all agreements of lease. Legislation furthermore provided that all lease agreements had to be scrutinised by the provincial agencies for validity and altered where applicable.

Agricultural rent abatement is regulated by articles 16-18 of the 1958 *Pachtwet*. Article 16 provides two separate grounds for rent abatement. Rent abatement may be claimed on account of diminished operational yield. The use of this neutral term has extended the remedy to include various forms of lease for profit. Various aspects of this article provide for the discretion of the judge which infuses the expansive and corrective functions of good faith into the provisions of article 16. The article also provides for rent abatement on account of the tenant's diminished enjoyment of the leased property. This provision is a subsequent addition and covers contracts of lease which were not concluded to generate financial profit. A claim for rent abatement may only be instituted at the end of a year or season for which the rent has become due and the claim expires within six months. Article 16(2c) has, however, caused a lamentable erosion of the tenant's claim for agricultural rent abatement. This subarticle provides that a claim for rent abatement is excluded whenever insurance could have compensated the damages resulting from unforeseen events. It has become agricultural practice in the Netherlands to take out insurance at the beginning of the term of lease. Although Dutch law does not compel the individual tenant of agricultural land to take out insurance, this provision is frequently included in contracts of agricultural lease. There have been important developments in the field of agricultural rent abatement in Dutch law, but the paucity of case law indicates that the remedy is largely overlooked in recent Dutch jurisprudence. The rise of insurance has greatly eroded the tenant's claim for agricultural rent abatement.

Urban rent abatement is governed by articles 7A:1589 and :1591 of the 1992 *Burgerlijk Wetboek*. The focus of urban lease in Dutch civil law is the equivalence in performance between the tenant's undisturbed enjoyment and the amount of rent due. The landlord's main contractual obligations are listed in article 7A:1586 of the Burgerlijk Wetboek. The landlord's most important contractual obligation is to provide the tenant with undisturbed enjoyment of the leased property for the term of lease.

It is an extensive obligation, the content of which may be altered to adapt to the differing content of individual contracts of lease. Owing to the flexible nature of the landlord's obligation to permit undisturbed enjoyment of the leased property, considerations of equity and the expansive and corrective functions of good faith will fulfil an important role in this regard. Article 7A:1589 grants the tenant rent abatement on account of the partial destruction of the leased property due to accident. It is an article that has generated some controversy in Dutch jurisprudence. The accident required by article 7A:1589 has been interpreted in Dutch jurisprudence as a synonym for *vis maior*. Whether acts of state should be classified as *vis maior* for the purpose of article 1589 remains a controversial matter that will be decided by the judge, taking individual circumstances of the case into account. The article also does not provide a fixed criterion to distinguish between substantial damage and partial destruction. Dutch courts have laid down a twofold criterion to assess total destruction in terms of article 7A:1589 and it has therefore been proposed that partial destruction may be said to exist when one of the requirements for total destruction have been fulfilled. Article 7A:1589 does not provide for a method of calculating the amount of remission and the matter is generally left to the discretion of the judge. Article 7A:1591, on the other hand, provides that the tenant is obliged to endure necessary repairs to the leased property. However, where these repairs continue for more than forty days, the tenant will be entitled to claim an abatement of rent in proportion to the period of non-use of the property.

The law of Louisiana is based on the civilian tradition through the reception of the French Code Civil and Spanish laws. Since both these codifications were indirectly based on simplified concepts taken from Roman law, many of the Roman law provisions have been taken over into contemporary Louisiana civil law. Concepts such as good faith and equity therefore play an important role in the development of Louisiana civil law. Equity in the law of Louisiana originally applied only to specific circumstances as a gap-filling tool to amend existing positive law. The working of the principle of equity was specifically limited since the drafters of the earlier Codes were suspicious of nebulous concepts and their effect on the positive law. However, since 1870, the function of equity has dramatically expanded in the Louisiana Civil Code. It is today recognised that *bona fides*, the contractual manifestation of equity, has expansive and corrective functions which may be employed to interfere with the content of contract to achieve an equitable result.

The contract of lease in the Louisiana civil law is still strongly rooted in the civilian tradition. It is defined as a synallagmatic agreement in terms of which one party agrees to give use and enjoyment of an object to another in return for the payment of an amount of rent. The law of Louisiana distinguishes between urban and agricultural lease, but both are regulated by the same title in the Civil Code. Articles 2700 and 2697 of the Louisiana Civil Code govern urban rent abatement. The former article states that a tenant is obliged to endure necessary repairs during the term of lease, while the latter deals with partial destruction of the leased premises due to unforeseen accident. Article 2697 has generated some controversy since the courts have found it difficult to pinpoint criteria to assess partial destruction for the purpose of this article. The frequency of recent case law generated by articles 2700 and 2697 is an indication that urban rent abatement, as a contractual remedy, is still relevant to the needs of Louisiana civil law. Articles 2743-2744 of the Civil Code regulate agricultural rent abatement. Unlike the urban component of the remedy, these articles have produced little case law in recent years primarily due to the stringent flood control measures in the Mississippi delta.

So what is the point of this contribution? Roman law as the basis of the civilian tradition still influences various aspects of the European private law. However, its influence in not confined to pure civil-law systems. It also provides the logical starting point for any discussion of the civilian tradition, and its influence is evident even in mixed jurisdictions. The provisions governing rent abatement in these two legal systems were taken over from Roman law and adapted to suit the needs of different societies. Despite these regional adaptations, the basic provisions of rent abatement remained fairly similar in both the civil law of the Netherlands and the civil law of Louisiana. What can we learn from these similarities? The ultimate aim of a comparative study such as this is to illustrate how jurisdictions treat their problems and legal challenges in a unique way. In the law of the Netherlands, rent abatement has become closely associated with insurance against natural disasters. The sophisticated system of water courts has also given rise to a separate branch of law which is specifically suited to the needs of Dutch society. In the law of Louisiana, a different route was taken and stringent flood control measures have largely eroded the agricultural component of rent abatement. In both jurisdictions, however, the urban component of rent abatement is still thriving and it produces a large amount of recent case law.