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Motive Matters!

Motive Matters!
An exploration of the notion 'deliberate breach of contract' and its consequences for the application of remedies

Het motief weegt mee!
Een onderzoek naar het begrip 'opzettelijke wanprestatie' en de gevolgen voor de toepassing van contractuele remedies

Proefschrift

ter verkrijging van de graad van doctor aan de
Erasmus Universiteit Rotterdam
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Prof.dr. H.G. Schmidt

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Aan mijn ouders

Aan Marte

“Through the days of shame that are coming

Through the nights of wild distress

Though your promise count for nothing

You must keep it nonetheless”

Leonard Cohen, ‘Heart With No Companion’

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1 Introduction

1.1 Research theme

This thesis explores the notion of deliberate breach of contract and its potential remedial consequences. In the major jurisdictions in Europe and in the United States the notion of deliberate breach of contract is generally not coherently and officially defined and acknowledged as an independent legal phenomenon. The ultimate added value of this thesis intends to be a first coherent comparative research on deliberate breach of contract and its potential consequences for the core standard remedies after breach of contract.

A few examples provide a first idea of the existence and occurrence of deliberate breach of contract and of the questions in the sphere of remedies which accompany a coherent exploration of this phenomenon. A first example is the situation of a 'double' sale. A sells an old but complete collection of Dostoyevskiy writings in Russian to B for the amount of EUR 5000. B values the collection at EUR 6500. A complete collection in this type of print is rare, but not unique. After the conclusion of the contract between A and B, C approaches A and offers him EUR 7500 for the same collection. A sells and delivers the collection to C for EUR 7500. A relevant question in terms of remedies may be whether B may claim damages above a 'normal' expectation level – for example by relieving general bars on expectation damages, such as the limit of foreseeability or remoteness or by approaching allowing B access to account of profits as an equal alternative for expectation damages –, because the breach may be considered as a deliberate breach. Another relevant question may be what the status of a potential penalty clause containing a considerable penalty – e.g. EUR 8000 – is in relation to the deliberateness of the breach.

A second example can be found in the area of building and construction contracts. A agrees with B to build for B a swimming pool according to several specific contractual specifications. After finishing the pool it turns out that A used a different type of stones than contractually agreed and that he built the pool slightly shallower than contractually specified. A relevant question is whether B still has a valid claim for performance or a claim for expectation damages on the level of cost of reinstatement considering the potential deliberateness of the breach, even though the loss of value due to the breach may be minimal. Another question is whether B – in case of absence of loss of value of the pool – has a valid claim for partial termination or perhaps a claim for damages for immaterial loss, because A committed breach of contract deliberately without direct financial consequences.

A third example is a specific case of breach of contract in insurance law. If B as an employee becomes disabled as a result of an accident at his workplace and he has a disability insurance, insurer A may commit deliberate breach by systematically and consistently refusing to cooperate by accepting liability and by ensuring a smooth payment schedule. This case is a specific example and raises several questions on the nature of the breach, but also on the potential remedial consequences. A first question is when a breach in this case should be considered to be deliberate, because an insurer should also have a possibility to defend himself against a claim of the insured. Nevertheless, when deliberate breach of contract in this case can be established, the question arises which remedies in private law B has to cover his losses – for example due to excessive delay of payment. Are for example punitive damages an option under explicit reference to the deliberateness of the breach?

This thesis offers a structured approach to explore the notion of deliberate breach and to answer several of the questions just mentioned. A first goal of this thesis is to explore the features of the term 'deliberate breach of contract' in more detail. After a general exploration on the features of deliberate breach, various jurisdictions are explored on an eclectic basis in order to find explicit or implicit examples of deliberate breach of contract in case law, in legal provisions and in academic contributions. The goal of this exploration is not only to find examples of deliberate breach itself, but also to find concrete remedial solutions provided by courts or by other important legal sources for situations of deliberate breach.

The results of the exploration lead to the statement that, although deliberate breach as an existing sequence of facts is not completely denied in various jurisdictions, a coherent and consistent approach of this notion, especially in terms of remedies, in general seems to be absent. The last part of this thesis argues that deliberate breach of contract as an independent legal phenomenon deserves explicit attention in the law of contract. It is argued that deliberate breach should not only be explicitly recognized as an independent notion, but remedies in contract should also be applied and eventually, on a case-by-case approach, adapted as a result of deliberate breach of contract.

Finally, this thesis applies general recommendations on how remedies can be adapted as a result of deliberate breach of contract on eight concrete case studies. This thesis ultimately combines exploration of the notion of deliberate breach with the argument that deliberate breach of contract is a phenomenon which should be taken seriously in the law of contract and which should be approached consistently in terms of remedies.

1.2 Research questions

Four research questions pave the road to build the central argument of this thesis:

1. What is deliberate breach of contract?

2. Does deliberateness of the breach of contract play a role in existing contract law, more specifically in contract law related legal provisions – 'law in the books' – or in case law –' law in action' – , in the sense that deliberateness as a relevant factor influences the choice for application of remedies in contract and if so, how?

3. Why should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?

4. How should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?

Research question 1 explores the notion of deliberate breach of contract from various perspectives. Before the element of deliberateness is explored, Chapter 2 provides a brief overview of the traditional notions of contract, breach of contract and remedies in contract. These notions are explored in a comparative setting. The justification for using a comparative approach towards these

notions is to illustrate the conceptual diversity which accompanies these general notions. Moreover, the answers to the core research questions contain examples from various legal systems.

Chapter 3 explores the notion of deliberate breach of contract from various perspectives, focusing on the potential meanings of deliberateness. The notion of deliberate breach will be compared to the notion of efficient breach of contract. The notion of deliberateness itself also needs elaboration from a tort law perspective, an empirical perspective and a criminal law perspective in order to understand why uniformity on the meaning of deliberate breach cannot be easily achieved.

Research questions 2, 3 and 4 are tackled in Chapters 4, 5 and 6, but the research questions do not exactly match the content of the chapters. First, potential remedies are discussed in legal provisions, existing case law and law and economics literature (Chapter 4). Second, a theory of four touchstones will be developed which should play a role in every solution to a deliberate breach case. Moreover, six recommendations on the influence of deliberateness on remedies in contract result from the research done in the first three chapters (Chapter 5). Third, eight case studies are presented in the last chapter to provide a more concrete picture of the effect of the recommendations in concrete cases (Chapter 6). The last research question - the 'how' question - is partly answered in Chapter 5 in more general terms by presenting the recommendations and partly in Chapter 6 by presenting concrete case law examples in which the recommendations return.

1.3 Methodology and justifications for the chosen approach

The four research questions may be answered in various ways. This thesis opts for a classic legal, but eclectic approach. The arguments for the chosen approach towards deliberate breach of contract are primarily drawn from comparative legal research – mainly in the form of studying court decisions, academic contributions and other common legal sources: the classic legal approach – and law and economics literature. Furthermore, on a secondary level, this thesis also relies on findings and arguments from legal theory, empirical legal studies and criminal law in order to deliver a well-argued conclusion.

The approach is eclectic in the sense that this thesis picks arguments and examples from various legal systems and legal theories, but it does not strive for completeness in any of these areas. An eclectic approach implies making choices. This approach is only defensible if these choices are justified. The notion of deliberate breach of contract is a relatively unexplored one. This thesis considers vital that the reader should be able to test statements of courts, other authors and the author of this thesis regarding deliberate breach on concrete cases. The main thread throughout this thesis will be a set of eight case studies which are briefly introduced in the introduction. These cases are important examples of deliberate breach and they show the versatility of the notion itself and its widespread occurrence. Whether the eight case studies provide a representative image of the manifestation of deliberate breach of contract is hard to prove in a statistical sense. In any case, the chosen case studies are based on concrete landmark court cases in various legal systems. Furthermore, some of these cases are also frequently used as examples in theoretical contributions both in the studies of law and economics and in empirical studies.

The arguments and case law examples to explore the notion of deliberate breach and to support and illustrate the importance of the notion of deliberate breach as well as the solutions to deal with deliberate breach are derived from various legal systems. As far as comparative legal research is

concerned, this thesis does not strive for completeness. Without limiting itself to the following legal systems, this thesis primarily uses examples from US law, English law, German law, French law and Dutch law. US law is the only legal system which already developed coherent theories on deliberate breach. Within Europe, the classic dichotomy between common law and continental law systems proves to be relevant in describing and assessing deliberate breach. English law is the major representative of common law on the European continent. French law is the only major continental jurisdiction which has reluctantly attempted to assess deliberateness of a breach of contract as a relevant factor in remedies in contract. German law is the other major legal representative on the continent, whereas Dutch law provides some interesting examples of court cases where courts seem to circumvent the idea of mentioning deliberateness as a relevant factor in assessing remedies in contract. Taking into account these justifications, this thesis also uses examples from other legal systems and from legal vehicles – soft law or not – overriding national legal systems, such as the Convention on Contracts for the International Sale of Goods – hereafter the CISG – , the Principles of European Contract Law – hereafter the PECL –, the Draft Common Frame of Reference – hereafter the DCFR – , the Common European Sales Law – hereafter the CESL – and the Unidroit Principles of International Commercial Contracts – hereafter the PICC.

This thesis explores a phenomenon – deliberate breach – and develops suggestions to deal with this phenomenon. These suggestions result in presenting solutions to the mentioned case studies. These solutions should also be justified. The analysis of deliberate breach of contract and its consequences for remedies in contract result in four major touchstones representing four vital perspectives on contract and breach of contract. The *moral* touchstone is the mutual trust of the parties in the performance of the contractual obligations and the value of the contract itself that it deals with non-performance appropriately. The *systematic* touchstone is that private law and contract law in general, and the law of remedies in contract in particular governs relations between private parties, who may vindicate their contractual rights. Therefore, the law of remedies is systematically and structurally aimed at vindication and compensation, and not at satisfaction and punishment. They interact with each other differently in each legal system and in each different legal theory. The *practical or procedural* touchstone is the test of proof and access to affordable legal representation. Deliberateness is a motive which is hard to prove. Substantive remedies are only relevant if deliberateness can be proven in a reliable way. The *economic* touchstone is that contracts and contract law should stimulate welfare enhancing transactions. Contract law should therefore be also as efficient as possible.

In most legal systems, the notion of deliberate breach is not really acknowledged as a noticeable legal phenomenon which deserves separate and explicit attention. As far as it is, the sequence of facts concerned is generally not labeled as deliberate breach. This thesis argues that the phenomenon should be explicitly acknowledged, which can be done by using the four touchstones mentioned. However, in every legal system the mentioned touchstones are intertwined differently. Moral, systematic, practical or procedural, and economic arguments are assessed differently in each legal system. More precisely, assessing deliberate breach on these touchstones reveals dichotomies between legal systems and legal cultures and between various schools of legal academic debate, such as empirical legal studies, legal theory and law and economics. Describing these dichotomies aims to bring the reader a step closer to the final part of this thesis, as it helps revealing and unwinding the most convincing arguments in favor or against dealing with deliberate breach more severely.

All in all, this thesis shows that dealing with deliberate breach always involves dealing with these four touchstones, but it also shows that not every deliberate breach can be dealt with the same way. Nevertheless, taking into account these preconditions, this thesis finally opts for a certain hierarchy within these touchstones based on the cases and arguments. The concrete solutions based on this framework are presented in the exploration of the eight case studies at the end of this thesis.

2 'Contract', 'breach of contract' and remedies in contract

2.1 Introduction

This chapter offers a comparative analysis of three main pillars in the law of contract: contract, breach of contract and remedies in contract. This analysis is necessary to support the research on the notion of *deliberateness* in subsequent chapters. All research questions mention at least one of these core notions. They need to be clarified before anything useful can be said on the notion of *deliberate* breach of contract and its potential influence on remedies in contract. This chapter is the foundation on which the core of this thesis will be built. The comparative analysis already hints at difficulties in defining deliberate breach of contract, because each of the notions discussed has a different meaning in different legal systems. This chapter presents the reader with various conceptions of these notions in these systems and prepares him for the inevitable confusion which will arise when attempting to describe the phenomenon of *deliberate* breach.

The scope of this chapter is limited. It is evident that without any limit, this chapter could be endless on the one hand, because a vast amount of academic literature on all three notions could be analyzed and discussed.[1] On the other hand, the existence of this vast amount of literature may also be used as a trigger to ask the legitimate question why this chapter is necessary at all, because it will repeat facts and analyses already mentioned and performed by other authors.

The choice to incorporate a chapter with a more general comparative, though limited content needs to be explained. This chapter aims to describe the notions of contract, breach of contract and remedies in contract from a comparative perspective. The sometimes similar, but often different interpretation of these notions in various major legal systems offers an indication of difficulties arising in subsequent chapters. Deliberateness of the breach and its influence on remedies in contract can only be explored and analyzed against the background of a complex legal reality. The legal reality may differ from place to place. For example, a contract may entail other duties and rights for parties in German law compared to US law, because a contract is interpreted differently in German law compared to US law. Nevertheless, the comparative perspective should not discourage the author or the reader to establish similarities between legal systems and to establish core features which return in practically every interpretation of the notion of contract, breach of contract and remedies in contract. A brief encounter with primary differences and similarities of these notions in various legal systems serves as a beacon for the exploration of the position of deliberate breach in the law of contract – which is the main task and goal of this thesis.

Again, it should be emphasized that this chapter does not strive for completeness. Many standard academic works in all mentioned legal systems are available to find more in-depth information on contract, breach of contract and remedies in contract. This chapter refers to these contributions where necessary and limits itself by outlining the features of the three notions mentioned referring

[1] See for example a comparative, but technical contribution which specifically elaborates on the notions of contract, breach of contract and remedies Levasseur 2008. See for various definitions and further references also e.g. Beale 2010, p. 39-44; Von Bar & Clive 2009, art. II.1:101 with comments.

to major legal systems in Europe, to US law and sometimes to international bodies of private law – soft law or not – such as the DCFR, the PECL, the PICC and the CISG. This chapter focuses on the differences and similarities between the common law and the European continental law approaches to the three notions mentioned. The notion of 'contract' also needs some explanation from a theoretical perspective. Adding a theoretical perspective offers the reader useful information on the difference in opinion on what a contract exactly is in addition to the 'hardcore' information from the various legal systems. The relevance of a theoretical perspective on the notion of contract for this thesis becomes visible once the relationship between deliberate breach of contract and remedies in contract is analyzed.

Overall, this chapter intends to be a first step anticipating on the subsequent chapters on deliberate breach of contract and its potential connection to remedies in contract. References to the core problems will be made in this chapter if necessary. The anticipatory and fundamental character of this chapter generally justifies its existence as well as its limited set-up.

2.2 The notion of 'contract'

2.2.1 Preliminary remarks

This section primarily illustrates differences between concepts of contract in various jurisdictions. In advance, it is safe to state that the concept of contract differs most substantially between common law jurisdictions and European continental law jurisdictions. Furthermore, within a specific jurisdiction, the notion of contract is approached technically, in the sense that the legal constituents for the existence of a contract are discussed. This section also mentions theoretical foundations of the institution of contract such as the principle of freedom of contract and the principle of the binding force of the contract in a comparative perspective, which may clarify some differences in approach towards the notion of contract signaled in this section.

2.2.2 A common law approach

Although in subsequent parts of this thesis references to other common law jurisdictions than English and US legal systems will not be avoided, this section only discusses the two main representatives of the common law: English law and US law.

2.2.2.1 English law

According to one of the standard textbooks on contract law, *Chitty on Contracts*, the common law of contract recognizes two competing definitions of contract, explained in subsequent editions of this standard work.[2] The first defines a contract as a promise or a set of promises which the law will enforce.[3] The second defines a contract as an agreement giving rise to obligations which are enforced or recognized by law. Both definitions emphasize a different aspect of the contractual relationship. Within the context of English common law, the first definition underlines the traditional 19th century idea of the contract: a simple transaction between commercial parties.[4] Within this definition, one of the typical common law constituents of contract law, 'consideration', is a major element. A promise –

[2] Beale 2008, 1-001 (p. 4).
[3] Guest 1989, 1 (p. 1).
[4] Cartwright 2009, p. 157.

not a contract – can only be enforced if consideration is provided.[5] Consideration as a legal doctrine attempts to represent the 'quid pro quo' principle. Gratuitous promises cannot be enforced, because there is no consideration. The discussion about this formal requirement has always been extensive, because the debate on the enforceability of promises at the same time encompasses a debate about the function of the common law of contract in general. Although this thesis is not going to elaborate on the notion of consideration, it is relevant to take notice of this point, because the concept of consideration shows that the common law is traditionally concerned with ethics of trade and not so much with ethics or the interests of the non-commercial individual. Nevertheless, in the second half of the 20th century the requirement of consideration increasingly led to criticisms. Although the requirement is certainly not a dead letter at this moment, the strict attitude towards the fulfillment of consideration has somewhat decreased over the past century.[6]

English law recognizes another, alternative, way of making a promise legally enforceable, namely by way of a deed, a formal document. In the past, a deed had to carry a seal, but it is now sufficient, if it is clear that a document is intended to be a deed.[7] Once a deed exists, consideration is no longer necessary because the binding force of the promise is not dependent on contract.[8] Furthermore, English law recognizes the notion of the intention to create legal relations. This notion can be relevant to constitute binding promises, but only in situations where this intention is not self-evident, e.g. in the relations between husband and wife. In commercial transactions, the requirement of consideration remains vital.[9]

The second definition uses the term 'agreement'. Chitty distinguishes agreement from the intention to create legal relations, because sole agreement is not sufficient to constitute a contract. The agreement to drink a cup of tea at 4 pm is not made in order to create legal relations and, for that matter, not enforceable. Moreover, under English law 'agreement' is a term with a certain degree of objectivity. 'Agreement' in the sense of a subjective meeting of the minds is not necessary to constitute a contract. The manifestation of assent in the form of offer and acceptance is in most cases sufficient.[10]

The enforceability of the contract in law should arise from the mutual agreement. In essence, the element of enforceability is the core difference between a contract and the agreement to drink a cup of tea at 4 pm. The meaning of the term 'binding force of the contract' is therefore quite essential. It is a small step towards the question which promises are legally enforceable after the conclusion of a contract. The starting point in English law is that 'binding force' means that (contractual) promises should be kept. Parties commit themselves financially, i.e. they are legally obliged to pay damages if

[5] Cartwright 2007, p. 138; Peel 2011, p. 72, 73.
[6] See Whincup 2006, p. 97; Peel 2011, p. 169; McKendrick 2007, p. 252 ff.
[7] *First National Securities Ltd v Jones* [1978] 67 Ch. 109, 111.
[8] Peel 2011, p. 166.
[9] Cartwright 2007, p. 139, 140. Cartwright argues for a change of English contract law towards informality – with emphasis on the intention of the parties as a sole requirement to constitute a contract in. See Cartwright 2009, p. 173. Nevertheless, the use of the word 'promise' is interesting, because it suggests moral compliance to keep the promise. The relationship between promise and contract and a brief overview of theoretical conceptions of contract are mentioned in paragraph 2.3.
[10] Beale 2008, 1-004 (p. 6). The notion of agreement is also limited due to the fact that many aspects of contracts are often not explicitly negotiated. See also Peel 2011, p. 2. The agreement is often, if not always, on the essentials of the contract: the object of contract and price.

they commit breach of contract, but nothing more.[11] In essence, English common law has difficulties with assessing the value of the contract itself. The difficult relationship between the notions agreement, promise, obligation and contract entails that a clear-cut definition of 'contract' cannot easily be provided without a considerable risk of oversimplification. The vagueness of the notion of contract is a fact to be taken into account once the core research questions of this thesis are subject to research. From the perspective of English law, an important issue in this respect will be whether deliberate breach of contract is a form of inconsistent behavior – a promise to act in a certain way is not fulfilled – which should not only be discouraged, but also prevented, or whether a contract is not the vehicle to limit parties in their freedom of movement in a commercial setting as long as they pay damages to cover the inconsistent behavior.

2.2.2.2 US Law

For a good understanding of the notion of deliberate breach in a later stadium of this thesis, it is absolutely necessary to look into US law, because in fact this is the only jurisdiction which already paid systematically attention to this topic. A glance at the general notions in US law is inevitable in order to interpret the doctrinal discussion on deliberate breach.

US contract law has a very specific position in this thesis. In fact, it is the ideal comparative jurisdiction, because it has a chameleonic nature. In this chapter, US law is positioned next to English law, because it is a common law oriented jurisdiction. The area of contract law is shaped by case law and the doctrines are generally comparable. In that sense, US law can be opposed to European continental jurisdictions. However, it is too simple to distinguish only this dichotomy. It is in fact slightly inaccurate to label contract law in the United States as US contract law, because at least in theory contract law is not only case law oriented, but also state law oriented. Every state has its own contract law with its own rules.[12] In order to systemize the enormous amount of case law since 1923, the American Law Institute has started to develop principles in the area of contract law, known as the Restatements.[13] These Restatements are not enforced by law, but courts should have good reasons to deviate from the Restatements, because the Restatements are drafted and supported by a wide range of recognized and acclaimed legal scholars. In this sense, the development of the DCFR and its relation to European jurisdictions could be compared to US law. However, although the Restatements are important for the development and system of US law, only case law has formal authority.[14]

A first glance at the US concept of contract reveals a strong common law orientation. A contract is defined in the Second Restatement as follows in § 1:

[11] Chitty 2008, 1-019 (p. 16, 17); Holmes 1897, p. 5.

[12] Klass 2010, p. 22. The most striking example is the State of Louisiana which is the only state with a legal system not based on the common law but on the French system. Louisiana is the only state with a civil code.

[13] Farnsworth 2004, p. 26 ff. Restatements are eventually written for various branches of law, e.g. on Unjust Enrichment. The most important Restatements for contract law are the First Restatement in 1932 and the Second Restatement in 1981. Both Restatements were results from a long and thorough revision of case law and other structural developments.

[14] Nevertheless, practically all States have adopted a Uniform Commercial Code (UCC) since 1962, every State has its own Code. They are comparable, but they also contain differences. Louisiana is the exception, but this State has a unique Civil Code. See Farnsworth 2004, p. 32.

“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”

Contracts are approached as sets of promises, which represent exchanges or ‘bargains’. Briefly said, the fact that a bargain is struck – exchanges have been made – makes a contractual promise enforceable.[15] The idea of agreement between parties and intention to create legal relations is virtually absent. It seems on the other hand quite extraordinary that the doctrine emphasizes the enforceability of promises as a central concept, which seems to attach major value to the principle of the binding force of the contract.

For a European continental lawyer, this idea may cause confusion at various levels. In the first place, the common law connection between contract and promise may be misleading. A promise in the area of contract law is not supposed to mean a statement with a moral content. That, at least, is the mainstream opinion in common law doctrine.[16] It is necessary to emphasize this possible point of misunderstanding, because US legal doctrine heavily debates on the moral content of contract law. Where European – i.e. continental lawyers – may think that the idea of promises inevitably bears a moral element in it, it is not perceived as such in US law.

In the second place, US common law opts for damages as a primary remedy. Enforced performance – i.e. specific performance of the contract – is an exceptional remedy at discretion of the court as in English law.[17] However, there is a substantial difference between enforceability and the availability of enforced performance as a remedy. Scott and Kraus formulate as follows:

“Most of the time, therefore, what we mean by enforcing a contract is not that the promisor is required to perform, but rather that, after a promisor has failed to perform (either deliberately or inadvertently), a court will order the defendant promisor to pay a specified amount of money.”[18]

This quotation reveals the classic American attitude towards a contract. A breach of contract must be remedied, but the freedom of and to contract is predominant. The relative absoluteness of the principle of freedom of contract is a major factor which distinguishes US law from its legal ‘father’, English law.[19] Protection of weaker parties such as employees or consumers to the detriment of freedom of contract has relatively recently found its way in US law and is still not at the same level as in every European jurisdiction, including the United Kingdom.[20]

[15] Farnsworth 2004, p. 5.

[16] Klass 2010, p. 28, 29.

[17] See Holmes 1897, p. 5: “If you commit (*to, MvK*) a contract you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.” The position of the remedy of specific performance in English law is explained in subsection 2.4.2.2.

[18] Scott & Kraus 2002, p. 97.

[19] Slawson 1996 p. 12 ff.

[20] See e.g. Whitman 2007, p. 402. The author argues that US law is generally pursues the economic interests of consumers, whereas the European approach focuses on consumer protection.

2.2.3 A continental law approach

2.2.3.1 French law

The French Civil Code dictates the concept of contract and its underlying structure. The French Civil Code defines a contract in art. 1101 Cc:

“Le contrat est une convention par laquelle une ou plusieurs personnes s’obligent envers une ou plusieurs d’autres, à donner, à faire ou à ne pas faire quelque chose.”

In French law, a contract is in theory a specialis of the convention, which in its turn is a specialis of the ‘acte juridique’. This building brick system is used in other continental legal systems as well. The ‘acte juridique’, although not defined in the Civil Code as such, can be circumscribed as an act of will with an aim to create legal consequences.[21] The ‘convention’ is essentially an ‘acte juridique’, constituted through more than one act of will with an aim to create legal consequences. If a ‘convention’ creates obligations, the ‘convention’ has become a contract.

In practice, the notion of ‘contract’ draws all the attention, be it only because the other two building blocks are not mentioned as independent notions in the Civil Code. Moreover, the three notions just discussed are mentioned as synonyms.[22]

The French definition of contract mentions on the one hand a reciprocal aspect – hidden in the term ‘convention’ as explained and the term ‘envers’– , but it also focuses on the content of the obligations resulting from this reciprocal act. The definition suggests that parties voluntarily commit themselves to give or to do something towards each other. According to Fabre-Magnan, the element of reciprocal will to be bound seems to be essential in the definition of contract, although the definition of contract is generally a topic of discussion.[23]

If the element of will is apparently emphasized in contract theory, the French approach to the principle of the binding force of the contract may reveal something about the theoretical approach to deliberate breach of contract. What does the binding force of a contract according to French law mean?

From the perspective of this thesis, - the relevance of the binding force of the contract for the approach to deliberate breach of contract and remedial hierarchy – the French approach is at first sight not very accessible. The approach is generally not prospective – what consequences does the binding force of contract have for the parties when the contractual obligations are not correctly performed?– but explanatory. How can the binding force of contract be explained and justified? The French approach is typical. Whereas other legal systems or philosophical theories generally emphasize party autonomy or reliance on mutual promises as essential elements of binding force of the contract, the French approach is more positivistic.

Art. 1134 Cc embeds this principle as follows:

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[21] The opposite notion is the ‘fait juridique’, which also creates legal consequences, but without the aim to do so. Compare the act of buying a CD (acte juridique) with the act of accidentally causing a collision (fait juridique), Fages 2007, p. 16, 17.

[22] Fages 2007, p. 17.

[23] Fabre-Magnan 2004, no. 74, p. 174.

"Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites (…)".

In essence this provision says nothing more than that 'conventions' – i.e. also contracts – are binding, because the law says they are. As Fabre-Magnan correctly notes, this approach raises the question of whether the law could also decide that contracts are not binding.[24] This approach does actually not reveal anything about the underlying reasons for the necessity of the binding force of the contract, but it only provides for an authoritarian reason. On the other hand, the French approach of course recognizes the importance of party autonomy, which follows from the definition of contract in art. 1101 Cc.[25]

In summary, French law centralizes the notion of contract in its Civil Code. The notion of contract emphasizes the will of the parties and the fact that a contract creates obligations. The law enforces the contract, but it is not immediately clear why and therefore it also remains unclear how the law enforces contractual obligations in cases of breach and deliberate breach of contract: what is the role of actual performance as a contractual remedy and does the intentional dissociation from a contractual promise in the past create additional obligations for the debtor based on the principle of the binding force of the contract? These are questions to be tackled in a subsequent part of this thesis.

2.2.3.2 German law

The German Civil Code does not contain a definition of 'Vertrag' or contract. Nevertheless, the German approach towards a contract can be circumscribed as highly systematic. In this sense, the approach to the concept of contract is comparable to the French approach, but the systems themselves differ in a certain way. According to § 311 s. 1 BGB , a contract is approached as follows:

"Zur Begründung eines Schuldverhältnisses durch Rechtsgeschäft sowie zur Änderung des Inhalts eines Schuldverhältnisses ist ein Vertrag zwischen den Beteiligten erforderlich, soweit nicht das Gesetz ein anders vorschreibt."[26]

The structure of the German Civil Code is based on the term 'Schuldverhältnis', which can be translated as 'obligation' and not on the notion of contract.[27] Next to the terms 'Vertrag' and 'Schuldverhältnis' another abstract term comes into play, namely 'Rechtsgeschäft'. This term is more or less comparable to an 'acte juridique' in French law.

According to a definition in a authoritative German legal dictionary, a 'Vertrag' or contract can be defined as follows:

[24] Fabre-Magnan 2004, no. 28, p. 61, 62. Fages on the other hand links the principle of the binding force to the moral, historical and technical duty of parties to abide by contractual obligations. Fages 2007, p. 201, but again, this principle not discussed in the remedies section, but in the general section of the 'effects' of the contract.

[25] The elements 'objet' and 'cause' as vital parts of the French contract to make the contract valid will not be discussed, because they are not relevant for the purpose of this thesis. See inter alia art. 1108 Cc and Ghestin, 2006.

[26] A translation of § 311 s. 1 BGB, provided by http://www.gesetze-im-internet.de: "In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute."

[27] At this point, it is perhaps wise to emphasize that an obligation in this sense is not synonymous with a duty: An obligation creates a right to performance of the obligation on the one hand (from the perspective of the creditor) and a duty to perform the obligation on the other hand (from the perspective of the debtor).

“Der Vertrag is ein rein formaler rechtlicher Begriff, der lediglich besagt, daß durch Willensübereinstimmung zweier oder mehrerer Beteiligter Rechtswirkungen erzeugt werden.”[28]

This definition emphasizes three elements: a contract is a formal, legal notion, it is based on agreement of the parties involved and parties aim to create legal consequences. These elements are more or less comparable to the French approach to contract, but differences are also detectable, especially after reading the subsequent sentence:

“Wichtigster Fall eines Vertrags is der schuldrechtliche Vertrag, durch den Leistungspflichten begründet werden”.[29]

This sentence focuses on the performance-side of the contract: the existence of contractual obligations – i.e. Leistungspflichten – which are binding. German law distinguishes between contracts creating obligations secured by the according duties to perform and contracts which do not create obligations. The latter category incorporates for example contracts of marriage. The first type of contract is interesting, because the German circumscription is the first which explicitly mentions that obligations result in a duty to perform. The notion of contract may refer to the systematic process of formation - achieving agreement by mutual consent of will, e.g. by ‘juridical acts’, but also on the result of the agreement – the obligations arising from the contract and the according duty to perform. Markesinis notes that

“what a common law sees as a contract, the BGB would describe as a contractual relationship of obligation (Verträgliches Schuldverhältnis)”.[30]

That may be correct, but German law seems to be more explicit on the duties of the parties bound to the contractual obligations than the common law. Whereas in other jurisdictions the principle of freedom of contract and the binding force of the contract are usually seen as an inseparable couple and treated as such, in German law only freedom of contract seems to draw attention of common textbook writers.[31] However, binding force of the contract is very important for German law as well. This principle – referred to as ‘pacta sunt servanda’ – is often linked directly to contractual sanctions in the case of “opportunistic behavior” of the contractual debtor.[32] Moreover, § 241 s. 1 BGB clearly states the duties of the debtor of an obligation – including contractual obligations:

[28] Tilch 2001, p. 4578, 4579. In this definition the connection between the juridical act (Rechtsgeschaft) and the contract is not clear. However, a contract according to German law is also based on the idea of the juridical act. For this approach see a definition provided by Staudinger/Bork 2010, Vorbem § 145 Rn 1 ff.: “Der Vertrag ist die zwei- oder mehrseitige rechtsgeschäftliche Regelung eines Rechtsverhältnisses, die von Vertragsparteien einverständlich getroffen wird”.
[29] Tilch 2001, p. 4579.
[30] Markesinis 2006, p. 25.
[31] See for example Kötz 2009, p. 10-12 and Staudinger/Löwisch 2005, §311 Rn 2. More detailed literature on this topic is of course available. See e.g. Unberath 2007, p. 1-175, but his account is mainly theoretical. The practical part of his thesis is generally about contractual remedies.
[32] Huber 1999, p. 27 and Kötz 2009, p. 12. In a further paragraph, Kötz elaborates on the idea of ‘Rechtsbindungswille’, the idea that parties can only be legally bound if they want to be bound. This idea also relates to the binding force of the contract, but it is less clear that this principle is the complement of the principle of freedom of contract.

"Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kan auch in einem Unterlassen bestehen."

In addition, although no specific attention is paid to the principle of the binding force of the contract, Kötz makes a statement which seems to be very relevant for this thesis:

"Vertrage würden nicht geschlossen werden, wenn die Parteien nicht darauf vertrauen konnten, dass der andere Teil den Vertrag erfüllen wird. Dass man sein Wort halt und ein gegebenes Versprechen nicht bricht, entspricht zwar einem Gebot der Moral. Aber niemand bezweifelt, dass das Moralische Gebotene in gewissem Umfang auch rechtlich erzwungen werden muss (…)".[33]

According to this statement combined with § 241 s. 1, in German law morals and law are not separable as far as performance of contractual obligations is concerned. Binding force of the contract implies a moral duty to perform contractual obligations. Without that, a contract would be powerless. This approach is, as will become clear in subsequent parts of this thesis, subject to debate, especially in common law jurisdictions.

2.2.3.3 Dutch law

The Dutch Civil Code defines the 'overeenkomst' in art. 6:213 s.1 BW:

"Een overeenkomst in de zin van deze titel is een meerzijdige rechtshandeling, waarbij een of meer partijen jegens een andere een verbintenis aangaan."[34]

The definition in the Dutch Civil Code emphasizes the structural and dogmatic approach of the Dutch Civil Code towards the concept of contract. According to art. 3:33 and 3:35 BW, a juridical act is a declaration of will aiming at legal consequences. A multilateral juridical act presupposes agreement – a meeting of the minds – and an expression of the agreement by declarations of the parties. It should also be noted, that a contract as defined by art. 6:213 BW is only a specific type of contract, namely the contract resulting in and creating obligations.[35] This type of contract as such is the only type of contract relevant for this thesis, but it should be taken into account that other multilateral juridical acts may also be labeled as 'contracts' in legal and daily vocabulary, such as for example the contract of marriage or the agreement between two private parties to meet in a restaurant at 5 p.m. The patrimonial nature of the definition of contract in the Civil Code is logical because this type of contract is the most common and most discussed type of contract. The principles underlying the law of contract specifically regards this type of contract. A contract not resulting in obligations – such as the contract of marriage e.g. – is less vulnerable for a different interpretation of the principle of the binding force.

[33] Kötz 2009, p. 12.

[34] Art. 6:213 s. 1 BW: "A 'contract' within the meaning of this Title is a multilateral juridical act whereby one or more parties assume an obligation towards one or more other parties." Translation from Warendorf 2009, p. 697.

[35] PG 1981, p. 837. Whereas the former Civil Code included an extensive part on obligatory contracts, the current Civil Code with its tiered structure does not, because it focuses on the concept of 'juridical act' (Book 3). Only when a specific rule about a multilateral juridical act and indeed a contract is necessary, an additional rule is provided in Book 6. See Asser/Hartkamp & Sieburgh 6-III 2010/5.

The Dutch Civil Code provides a structured scheme of the construction of a contract. A contract is concluded via offer and acceptance according to art. 6:217 BW. Offer and acceptance are both juridical acts. Both parties consciously aim at achieving a new legal situation, which the contract represents. The contract arises from juridical acts and is in itself a juridical act as well. Systematically, the will of the parties and the agreement on the terms are essential to build a contract. If the contract is established, the obligations arising from the contract should be performed. In this sense, the main principles of contract law are logically embedded in the structure of the Dutch Civil Code. Naturally, the picture is not complete. The law of remedies should shed some light on the strength of the obligations: which remedies a disappointed creditor has, once the debtor does not perform, is briefly discussed in section 1.3.3.3.

2.2.4 'Contract' in soft law bodies: PECL, DCFR and PICC

The PECL 'only' sought a common core of contract law in legal systems in the European Union, i.e. the European Union in the 1990's – approximately 15 countries and as many jurisdictions plus Scots law. In finding a common core of private law the DCFR not only attempted to cover a wider area of private law next to general contract law rules – i.e. rules of specific contracts, parts of tort law, property law, trust law and law of unjustified enrichment –, but also covered a much wider area of jurisdictions. By 2009, when the final draft of the DCFR was finished, practically the complete European continent had been subject to this comparative research project. The PICC cover jurisdictions in the whole world, but with a focus on international commercial contracts. The drafters of these bodies of soft law faced the dilemma how to deal with the wide variety of notions of contract and how to merge them into a body which is supposed to represent a common core of contract, or even more ambitious, of private law. The most important lesson is that the approach differs from one body of soft law to another.

The PECL serve many purposes as intended and formulated by the drafters[36], but in essence they form a set of rules about contract law, construed after in-depth comparative research. The PECL provide (semi) definitions of a few legal terms in art. 1:301 PECL, but not of the major term 'contract'. As the German and Dutch Civil Code, the PECL only provides a rule for the formation of contract. However, this provision reveals important information about the apparent result of seeking a common core of the notion of 'contract'

Art. 2:101 s. 1 says:

"A contract is concluded if:

(a) the parties intend to be legally bound

(b) they reach a sufficient agreement without further requirement."

The PECL base their concept of contract on a continental approach. A contract is not connected with the notion of enforceable promises, but with the intention of parties to be legally bound and subsequently, with the notion of 'agreement'. In the comments it is explicitly emphasized that any further requirement such as the controversial requirement of consideration is not necessary to conclude a contract. However, although the PECL seem to opt for a fairly 'continental' concept of

[36] Lando & Beale 2000, p. xxiii.

contract, the absence of a clear choice is confusing. Art 2:107 PECL states that a promise which is intended to be legally binding without acceptance is binding. The concept of promise in the area of contract law is certainly in continental systems not very clear, if not absent. Therefore, the relationship between a contract and a promise within this soft law body remains unclear.

The DCFR opts for a completely different approach. The Draft Common Frame of Reference consists of Principles, Definitions and Model Rules of European Private Law, as the official title of this academic body of comparative research states.[37] Therefore, next to a wide variety of other legal definitions the DCFR defines the notion of contract. One of the reasons for incorporating definitions into the body of rules was the uncertainty arising from the PECL, because the terms used in the principles were not defined and not used consistently.[38]

The DCFR at least attempts to partly prevent the problem. The DCFR defines a contract as follows in art. II.1:101 s. 1:

“A ‘contract’ is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or a multilateral juridical act.”[39]

This definition is clearly based on a continental approach of a contractual relationship, because the juridical act as a basic construction stone for the contract is not known in common law jurisdictions. Furthermore, as the comments on this provision note, the notion of contract may as well define the agreement between the parties involved – as this definition does – as define the obligations arising from the agreement between the parties.

In order to illustrate the diversity in opinions on defining the concept of contract, the PICC – i.e. the Unidroit Principles – should also be taken into account. The PICC restate existing rules for international commercial contracts, although they are used in other contexts as well. With regard to the concept of contract, the drafters of the PICC did not opt for a unanimous definition of contract. The reason for it, according to an authoritative comment on the PICC, is as brief as it is slightly surprising:

“A definition is not given and would indeed be hard to give in view of differences between legal systems. This does normally not lead to problems; the scope of the PICC can be derived from their provisions without the need for a definition.”[40]

Although the first part of the comment as such is understandable, the conclusion may not be. The DCFR particularly illustrates that a wide variety in concepts essentially can be an important reason to choose for a specific definition of the concept of contract. However, one of the explanations may be the different historical background and the different purposes of both bodies. The DCFR is in the first

[37] See Von Bar & Clive 2009, Introduction.
[38] Von Bar & Clive 2009, p. 10. “Ultimately, useful definitions cannot be composed without model rules and useful model rules can hardly be drafted without definitions”. It would be slightly awkward if the drafters had stated that models rules could *not at all* be drafted without definitions, because the value of the PECL would be questionable after this conclusion, whereas quite a few drafters of the DCFR were also involved in drafting the PECL.
[39] The DCFR also contains a list of definitions, in which the notion of contract is defined the same way.
[40] Vogenauer & Kleinheisterkamp 2009, p. 32, 33. See also Oudin 2007, p. 520.

place an academic piece of work representing a common core of European private law. Moreover, the specific experience with its major predecessor, the PECL, learned that a lack of coherence in the terms used in the PECL led to a lack of clarity. Both elements support the idea for providing a definition of concepts with various interpretations, such as the concept of contract. The PICC on the other hand serve a much more practical purpose and are written for international and commercial contractual relations. The reason for not defining these elements either seems to be partly political, because the PICC is supposed to be based on many legal systems with various conceptions of contract and other legal terms.[41]

2.2.5 The Proposal for a Regulation on a Common European Sales Law: the notion of 'contract'

The status of the DCFR as a potential hard law instrument – optional or not – has declined since serious political objections were raised against the DCFR as a harmonizing tool for European private law.[42] As an academic text the DCFR retains its relevance, because it still contains valuable content for comparative research. The urgency of making the DCFR politically relevant faded away since the recent introduction of a new European proposal on a Regulation for sales law, the regulation on a Common European Sales Law (hereafter: CESL), introduced in October 2011.[43] The explanatory memorandum accompanying the CESL explains the exact position of the CESL in the area of European private law and explains its objectives. The CESL aims to contribute to harmonization of the law of cross-border sales in Europe, especially in business-to-consumer relationships, but also in business-to-business relationships where at least one party is a small or medium enterprise.[44]

The CESL approaches the notion of contract as follows[45]:

"'contract' means an agreement intended to give rise to obligations or other legal effects."

This definition is comparable with the approach in German and Dutch law. The political aims as well as the substantive aims of the CESL seem to be less ambitious than those of the DCFR, and therefore the CESL seems to be more balanced and less vulnerable to substantive and political criticisms. The specific provisions are nevertheless heavily inspired by their most recent academic predecessor, the DCFR. Difficulties still exist, especially regarding the various options member states have to widen the scope of the CESL, the implementation of the regulation in such a way that harmonization is indeed achieved and the potential overlap with other transnational instruments on sales law such as the

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[41] Vogenauer & Kleinheisterkamp 2009, p. 33, 34.

[42] See e.g. Jansen 2010.

[43] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635.

[44] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635. Art. 7. For the definition of a small or medium enterprise (SME), see p. 16. For the purpose of the CESL, see p. 8: "The Proposal provides for the establishment of a Common European Sales Law. It harmonises the national contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State's national law a second contract law regime for contracts covered by its scope that is identical throughout the European Union and will exist alongside the pre-existing rules of national contract law. The Common European Sales Law will apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract."

[45] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635. Art. 2 sub a.

CISG, but these difficulties are already part of academic debate and some of them are also addressed in the CESL itself or its accompanying texts.[46]

2.3 Contract, promise and obligation: various theoretical approaches

A contract defines a specific relationship between the parties involved. The content of the relationship depends on the content of the contract and on the specific definition of the contract. However, it is fair to assume that parties involved in a contractual relationship show a certain commitment towards each other defined by the contract, which is absent between strangers. Mutual commitment is an important aspect of a contractual relationship. The choice for a non-legal term here is deliberate, because the meaning and assessment of the commitment can differ substantially depending on the type of agreement between parties.

A second aspect which should be mentioned is the voluntariness of the commitment. Parties voluntarily commit themselves via a contract. They are free to choose to conclude a contract, to choose with whom they conclude contracts and they are free to choose the content of the contract. The principle of freedom of contract is a basic principle, but the emphasized aspect at the moment is the voluntary action of the parties. They decide for themselves to be legally bound by a contract.[47]

The objectives parties want to achieve by negotiating about an agreement are reflected by the level of commitment. Do parties rely on each other's mutual gentlemen's conduct or do they aim at creating *legal* consequences? The first situation does not require a contractual relationship, the last instance does. In general, the contract is the connection between intentions and consequences. If parties want to create legal relations between each other, they bind themselves via a contract. The contract consists of contractual obligations, which may be enforced once they are not fulfilled.

These loosely formulated aspects of contracting are usually presented more generally as two key complementary principles: freedom of contract on the one hand and the binding force of the contract on the other hand. These principles are present in every law of contract in every jurisdiction, but the content of these principles and their concrete position in the law of contract may – substantially – differ per jurisdiction. Therefore, this section does not intend to provide the ideal definition of a contract, but it intends to illustrate the differences in approach to the level of commitment via a contract. It has been said before, but the added value of this exercise in this chapter is that the problems with defining the notion of contract and other notions all have their impact on the approach of the concept of deliberate breach of contract.

The approach to the notion of contract and the two core principles of freedom of contract and binding force so far is primarily a civil law approach. A common law approach towards the notion of contract emphasizes the economic aspect of the contract. This aspect is already strongly embedded in the common law, for example because of the 'bargain' aspect and the requirement of consideration in a common law context. Another important other aspect of a common law approach to the notion of contract is the role of the promise. The notion of promise itself has a strong moral

[46] See e.g. Heidemann 2012; Lando 2011; Keirse 2012.
[47] This thesis does not discuss the notion of compulsorily concluded contracts, such as energy contracts. See for example Houben 2005 (Dutch).

connotation. Several legal theory scholars have attempted to explain the relationship between promise and contract and the eventual moral aspect of the notion of contract.

Fried has written extensively on the concept of contract. His approach towards contract is strongly influenced by moral considerations. He considers a contract itself as a promise. A promise has a strong moral basis. Fried says about this:

“It is true that over the last two centuries citizens in the liberal democracies have become increasingly free to dispose of their talents, labor, and property as seems best to them. The freedom to bind oneself contractually to a future disposition is an important and striking example of this freedom (…), because in a promise one is taking responsibility not only for one’s present self but for one’s future self.”[48]

Fried seems to acknowledge that a contract is about taking responsibility for future conduct. At this moment it is still unclear whether he also wishes to attach a moral component to this element of responsibility. It turns out he does:

“The law of contract, just because it is rooted in promise and so in right and wrong, is a ramifying system of moral judgments (…)”.[49]

Whereas it is clear that when Fried advances a promise principle in contract law with a certain moral content, he advances this argument in a common law context.

“The natural expression of the promise principle in contract law is the disposition to hold a promisor to his word, to make him do what he has promised – or pay the equivalent of the promised performance.”[50]

Keeping a promise is according to Fried apparently not the same as fulfilling the contractual obligation. This fundamental point of view to this phrase prominently returns in subsequent chapters, because for continental jurisdictions this essential point is not easily understandable. The concept is clear, but assessing performance and the financial value of the obligation as completely equal remedies is not a logical step for the continental lawyer. It is good to note this particular point early in this thesis, because it is a central element in the building process towards understanding the concept of deliberate breach.

Smith provides a detailed account of theories of contract and contract law. He is not always clear in distinguishing between these two concepts, but he mainly theorizes on the law of contract, which goes beyond the concept of contract alone. This terminological problem is manifest in the title, but also elsewhere. More importantly, Smith approaches contract law from two perspectives: an analytic and a normative perspective. The first perspective elaborates on the question what the essential characteristics of a contractual obligation are.[51] He describes several theories on which contract law may be based or, for that matter, the concept of contract itself. He describes promissory theories,

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[48] Fried 1981, p. 2.
[49] Fried 1981, p. 132.
[50] Fried 1981, p. 113.
[51] Smith 2004, p. 43.

reliance theories and transfer theories without pretending to be complete. The promissory theory is explained by Fried. The basic idea of reliance theories is that

"contractual obligations are obligations to ensure that others who we induce to rely upon us are not made worse off as a consequence of that reliance".[52]

The second, normative perspective elaborates on the questions how the enforcement of a contractual obligation should be justified. Smith elaborates on utilitarian or efficiency theories and rights-based theories to justify enforcement. Utilitarian theories justify contract law on the ground that contract law promotes well-being or 'utility', broadly defined.[53] Rights-based theories regard contractual obligations as obligations not to infringe individual rights, and regard contract law as giving legal force to such obligations.[54] Smith approaches these questions both from an analytical perspective and he argues that promissory theories best explain the characteristics of the contractual obligation, whereas the rights-based approach in his opinion is the best justification for the enforcement of the contractual obligation.[55]

Kimel emphasizes the idea that an intention to create legal relations is a valid requirement in English law. However, he notes that little attention is paid to this requirement in the text books and in court cases. Parties should be aware not only of the *voluntariness* of creating an obligation, but of creating a *legal* obligation as well.[56] Kimel theorizes on the notions of promise and contract and concludes that a promise is based on personal trust. Contract does not lack the personal trust element, but the enforceability of contracts renders the personal element less prominent. Contracts do not have the same intrinsic value as promises according to Kimel.[57]

The interaction between promises and contracts is not a topic of discussion on the European continent, because promises are not considered as a constituent for creating contracts. The interaction between the notions of contract and contractual obligation and the enforceability of the obligation is naturally also a continental issue. The main principles of freedom of contract and binding force of the contract are relevant in determining the exact features of a contract. One of the most important issues is that the principle of the binding force seems to be an ambiguous term. On the one hand, this principle may be understood in the sense that it explains why a contract should be binding at all. On the other hand, the principle explains what binding force means for the parties who concluded a contract. What is the content of the binding obligation resulting from the contract? Whereas the first aspect generally attracts the major part of the attention, at least in academic literature, the second aspect is sometimes neglected, because it seems to be too obvious: a party to a contract should perform the contractual obligation. Hartkamp en Sieburgh even emphasize the second aspect in their leading work on Dutch private law:

[52] Smith 2004, p. 78. See for a further explanation for transfer theories p. 96 ff. See also Fuller & Perdue 1936 p. 52-96.
[53] Smith 2004, p. 108.
[54] Smith 2004, p. 140.
[55] Smith 2004, p. 162.
[56] Kimel 2003, p. 138.
[57] Kimel 2003, p. 72. See for a further elaboration on this topic for example Atiyah 1979 or Atiyah 1981.

"The more complex our society will become, the more types of contract will be needed by potential parties and the more urgent the confidence of the parties in performance of contractual obligations will become. Without this confidence, without the certainty that such promises (to perform) are kept, no society could develop itself economically." [58]

The moral idea of keeping a contractual obligation is partially supported and partially denied by Oman, who offers an interesting view on the idea of contractual liability in general. According to him, a contractual relationship essentially contains a penalty clause in which the liable party may be subject to – physical - retaliation, if he does not perform the contractual obligation. Symbolically, such agreements were sealed by the hacking-up of an animal, e.g. a goat. Oman argues that modern litigation about breach of contract including the possible financial remedies of the creditor are just a more civilized version of the goat-ritual and its according promise. From this perspective, Oman explains several remedies in contract and the institution of contract and breach of contract. On the one hand, he seems to partially support the idea that contracts are more than financial bargains – a moral component in the form of a personal pledge is historically an element of the contractual relationship to solemnize the contract and make it more persuasive. On the other hand, he does not walk away from the idea that this historical account also leaves room for the idea that contracts provide economic incentives to show conduct compatible with contractual obligations without a further moral burden.[59]

2.4 The notion of 'breach of contract' and remedies in contract

2.4.1 Introductory remarks

A common approach of all jurisdictions seems to be that a contract constitutes contractual obligations. Performance of these obligations is enforceable at law – i.e. the relationship between the parties is labeled as 'contractual' once it is enforceable at law. However, obligations may not be performed or not be performed correctly. Absence of performance or defective performance generally means a breach of the contractual obligations, which is mostly referred to as breach of contract. Breach of contract as a legal phenomenon is not approached equally in various legal systems as will be shown in the subsequent sections. It is important to note here that breach of contract can be generally approached along two yardsticks of seriousness.

The first yardstick is the seriousness of the breach itself. Assessing the seriousness of the breach may be done in various ways, but one could imagine that breach of a secondary obligation may be less serious than breach of a primary obligation.[60] For example, if A is obliged to deliver a new blue car to B on Monday 1 March, breach of the obligation to deliver a new car will be assessed more seriously – A offers B a second-hand car – than breach of the obligation to deliver on the 1 March in the form of a small delay – A delivers the car on Tuesday 2 March. Availability of remedy will often depend on the seriousness of the breach. This section highlights some of the ways legal systems deal with this

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[58] Asser/Hartkamp & Sieburgh 6-III 2010/43.
[59] Oman 2011, p. 529-579.
[60] Note that the terms 'primary obligation 'and 'secondary obligaion' are used in the sense of 'main' and 'ancillary'. In the case *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849 Lord Diplock used the same words, but with another meaning, more specifically 'any obligation under the contract' versus 'obligation to pay damages for a primary obligation'.

yardstick. An example is the notion of fundamental breach, which refers to a more serious breach than a non-fundamental breach. It is safe to say that every system recognizes that not every breach should be dealt with similarly, but every system chooses its own way to deal with this issue.

A second yardstick of deciding on the legal consequences of breach is not the seriousness of the breach itself, but the degree of fault of the party committing breach. Apart from the seriousness of the breach itself, the reason of the debtor to commit breach, irrespective of the nature of the breach itself, may be relevant. A first distinction should be made between excusable and non-excusable breaches. A debtor may be confronted with extraordinary circumstances and as a consequence he may not be able to perform. The assessment of excuses and the role of fault is a topic on which differences exist between common law and continental law jurisdictions, but also within continental law jurisdictions. The borderline between excusable breaches and non-excusable breaches marks the potential liability. If the debtor is excused for the breach, he is not liable. If the debtor is not excused, he is liable. A further distinction, which is the core of this thesis, is a possible deliberate breach next to an 'ordinary' breach of contract. The contours of this second yardstick are presented in the third chapter.

Breach of contract as a legal phenomenon is only relevant for a creditor to establish, if he may take legal action. The most important legal remedies which are generally available in case of a non-excusable breach of contract are briefly mentioned and discussed as a preliminary outline for the far more elaborate discussion of remedies in contract in the sphere of deliberate breach of contract in Chapter 3 and subsequent chapters. These remedies are also discussed comparatively and the focus is on a claim of enforced performance, damages and termination.

2.4.2 Breach of contract: a common law perspective

Peel describes breach of contract as follows:

"A breach of contract is committed when a party without a lawful excuse fails or refuses to perform what is due under the contract, or performs defectively or incapacitates himself from performing."[61]

This description needs some explanation. First, not every failure to perform can be labeled a breach of contract. Whether a breach of contract can be established, depends on the terms of the contract, express or implied. According to McKendrick, the breach lies in the failure to perform a contractual obligation.[62] A few hurdles must be overcome to establish if a contractual obligation has been breached. The most important one is that the distinction between a promise and a mere condition is not always clear. It is for example not clear whether an estate agent who is engaged to find a buyer for a house makes any promise to do something.[63] In order to establish breach, the obligation a party has to perform should be clear and unambiguous. However, that is not always possible. It may for example be questionable if an employer is obliged to offer the employee work under the employment contract (next to the obvious obligation to pay wages). Under circumstances, an employee seems to have a 'right to work', especially if reputation issues are at stake, but the validity

[61] Peel 2011, p. 828. The concept of lawful excuse is discussed in Chapter 3 of this thesis.
[62] McKendrick 2007, p. 771.
[63] Peel 2011, p. 43, p. 828.

of this claim depends on the specific express or implied contract terms. Furthermore, performance must be due before a breach of the obligation can be established.[64]

Second, if a party performs defectively, he can also be in breach of contract. Literally, defective performance is a contradictio in terminis, but the term has to be viewed in the light of complete non-performance: the seller who delivers not at all next to the seller who delivers goods of a poorer quality or too late. The difference is relevant, because the effects of defective performance can be different from non-performance.[65]

Third, the somewhat abstract phrase 'incapacitation' deserves explanation. For this thesis it is the most relevant way breach can occur, because the party who incapacitates himself from performing may do so deliberately. In the sphere of a sales contract of a specific thing a seller can incapacitate himself if he sells the good he promised to deliver to the original buyer to another buyer.[66] He cannot perform any longer due to his own deliberate incapacitation. However, it is another matter if the deliberateness of the breach, in this case the self-induced incapacitation, adds anything special to the arsenal of remedies after breach of contract in comparison with 'ordinary' breach of contract.

Last, under law many contractual duties are strict. Especially in cases where a buyer cannot pay the price or where the deliverer of generic goods cannot deliver the promised goods due to non-performance of his own supplier or another reason, in general the other party does not have to establish fault to obtain a remedy due to breach of contract.[67] Strict liability can be considered as the starting point instead of fault liability. However, it is very dangerous to make general statements like this referring to English law, as the bottom-up structure of English contract law seldom allows to generalize solutions and approaches chosen in specific cases.[68]

The notion of breach of contract in US law is comparable to the English notion. Breach of contract generally constitutes liability and fault is not required to constitute breach of contract.[69] In other words, justified non-performance cannot be labeled as breach of contract.[70] Non-performance is not justified when performance comes due. Non-performance may be justified by an outside cause such as impracticability or frustration of purpose.

2.4.3 Remedies in contract: a common law perspective

In this section, the main possible remedies after breach of contract will be introduced, i.e. damages, actual performance of the contract and termination.

Breach of contract is first and foremost a civil wrong. The concept of breach of contract does in itself not tell anything about the consequences of committing breach of contract. Breach of contract

[64] Peel 2011, p. 833. Other refinements of failure to perform an obligation are also mentioned.
[65] Peel 2011, p. 830.
[66] Peel 2011, p. 831.
[67] Peel 2011, p. 834.
[68] For example, according to the Supply of Goods And Services Act 1982, it can be said with some restrictions that liability for a contract which exclusively supplies for services is based on fault.
[69] Scott & Krauss 2002, p. 883.
[70] Farnsworth 2004, p. 503. Scott & Kraus 2002, p. 853 ff. In a subsequent part of this thesis some problems between excusable and non-excusable breach will be explored.

creates the opportunity for the party affected by the breach to bring an action. At the same time, the party who breaches will be confronted with claims if the affected party chooses to do so.

At this point a further difficulty concerning terminology emerges from English law. When actions of the claimant are going to be discussed, the objectives and nature of these actions should be established first, in order to understand the relative importance and scope of each reaction. A first question would then be if the different reactions are to be considered as 'right' or as 'remedies' with the connected, secondary, questions what exactly these terms mean and what the difference is. A second question is which interests the various reactions seek to protect. Damages are primarily meant to be compensatory in the sense that a party will be compensated for lost expectations: damages are supposed to protect the expectation interest and the claimant receives expectation damages. It is not the purpose of this chapter to elaborate on this point extensively, but it has to be said that differences on this point exist.[71] In any case, the way the different terms are used in this thesis should be accounted for. The term 'remedy' has a wide and a narrow meaning. If contrasted with 'right', a remedy in this situation represents a possible, legal reaction to a breach of contract. However, the creditor is not the actor to decide if and how the remedy should be used. He can ask the court to apply the remedy, but the court has discretionary powers and decides. In a wider sense, a remedy represents every possibility to react to a breach of contract and incorporates rights as well as remedies in the narrow sense. For example, the remedy of damages is available as of right to the creditor.

A striking difference between US and English law regarding remedies after breach of contract is not the hierarchal structure – it is more or less the same: damages are available as of right, specific performance is the exception, but US law seems to recognize more flexibility in awarding other or additional monetary remedies than traditional damages: expectation or reliance damages. US law may generally accept breach of contract as an economic and sometimes efficient reality, but the possibilities to receive adequate financial compensation in a case of breach of contract seem to be more adequate than on the European continent. Next to expectation and reliance damages and specific performance are restitution and punitive damages available as remedies in contract.[72] These additional remedies may be available in cases of deliberate breach. It is already noteworthy that fault is generally not necessary to establish liability for breach of contract, whereas the degree of fault may influence the availability of certain remedies.

At this point, it is not specifically relevant to discuss all remedies in English and US law in detail. Attention will be paid to the core standard remedies damages, specific performance and termination.

2.4.3.1 Damages

The first and most important remedy for breach of contract under English law is the remedy of damages. Damages are available as of right after a breach of contract. Peel alleges that a claim for

[71] This relatively vague term should be contrasted with the so-called 'performance interest', because the first objective of a contract remains that its obligations are performed. If the claimant primarily misses performance, his performance interest should be protected. Can any difference between expectation damages and performance damages be established and if so, what are these differences? For an extensive account of terminology and theory around remedial relief and its difficulties see inter alia Birks, 2000, p. 20 ff.; Webb 2006, p. 41 ff.; Halson & Pearce 2008, p. 73 ff.

[72] Scott & Kraus 2002, p. 969 ff.

damages is one for compensation in money for the fact that the claimant has not received the performance he bargained for.[73] Most importantly, damages are primarily meant to be compensatory. The ultimate objective of damages is to bring the party who claims damages after breach of contract into a financial position as if the contract had been correctly performed, generally referred to as 'expectation damages'. The key yardstick to assess the claim for damages and the amount of damages is the loss of the claimant and the eventual gain by the breaching party.[74] In general, the victim may claim expectation damages: damages which reflect the justified expectations of the claimant had the contract been correctly performed. However, two other grounds for awarding damages can be used in appropriate circumstances. Firstly, the claimant may claim reliance based damages instead of expectation based damages. In such a case, the claimant should be brought into a position as if the contract had never been concluded. This option is for example relevant where the claimant has already made a substantial investment on the basis of the contract. The claimant could also have struck a bad bargain.[75] In such a case he is better off by claiming reliance damages than expectation damages. More important for this thesis is the claim for restitution based "damages". The claim pursued is actually not one for damages because a claim for restitution is not based on the claimant's loss but on the gain of the defendant. In this situation a claim for restitution results in both parties being put into the situation as if the contract had not been concluded. The differences between these three major types of losses will not be discussed. A claim for restitution damages is not always available for the claimant, but as being stated before, for the purpose of this thesis it is relevant whether a claim can be established to reclaim any gain of the defendant after a deliberate breach of contract.[76] The House of Lords decides that only under very specific circumstances a claimant can recover the gain of the defendant after breach of contract.

2.4.3.2 Actual performance of the contract

The second remedy which may be available to the victim in case of breach of contract is a form of specific relief, by way of injunction or specific performance. This remedy differs substantially from damages, because it is not available as of right to the victim. In general, damages are the primary remedy. The main rule is that only if damages are not adequate as compensation, specific performance may be available.[77] However, the court has discretionary power to grant an order for specific performance. Of course, the court cannot use its discretion at will. The scope of this remedy in equity is limited by a variety of criteria or 'Fallgruppen'. The approach which this thesis chooses to adopt regarding specific performance is the availability of specific performance in the case of deliberate breach of contract. Can any trace be found that deliberateness of the breach plays a role by awarding the claimant the remedy of specific performance? If so, the legal possibility to commit deliberate breach may be seriously reduced. One more general remark should be made at this point. The attention for specific performance as a serious and useful remedy has increased over the last few decades. However, the most recent leading case, *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, reminds the reader that specific performance is still an exception.[78] The combination of specific performance being the exceptional remedy and damages in principle only being available

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[73] Peel 2011, p. 988. See the landmark case *Robinson v Harman* (1848) 1 Ex. 850.
[74] Peel 2011, p. 989 with many references.
[75] *Anglia Television Ltd v Reed* [1972] 1 Q.B. 60.
[76] *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] A.C. 268.
[77] Peel 2011, p. 1099.
[78] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1.

on the basis of loss of the claimant, leads to a fundamental conclusion that committing deliberate breach is under English law for a possibility for the debtor, because the creditor does not have the critical tool – a claim for enforced performance – to avoid deliberate breach.

Whereas specific performance as a secondary remedy is not available as of right, the hierarchy of remedies should be viewed differently where the obligation is for a specific amount of money. In other words, in a simple sales or service contract, the rules on specific performance are only applicable on the obligation to deliver the goods or to perform the service concerned, but not on the reciprocal obligation to pay the price. The party who claims the price may rely on the action for the agreed sum. This action is in effect a claim for performance. The restrictions on the remedy for specific performance – only the court can order specific performance under specific conditions – do generally not apply if the aggrieved party claims payment of the price, because the action for the agreed sum is a different remedy. If in subsequent chapters the influence of deliberateness of the breach is examined further in concrete cases, it is essential to keep in mind which obligation of the contract is breached: the core obligation after which the contract is generally named – i.e. the sale, the service etc. – or the payment of the price.[79]

In addition to the standard remedies damages and specific performance, English law also recognizes the exceptional remedy of damages in lieu of specific performance. Only in exceptional circumstances may the court award damages in situations where a claimant does not have a claim for 'common law' expectation damages. The award for damages in lieu of specific performance means that damages may replace or be added to an honored request for specific performance. An example of such a situation is the case of an anticipatory breach of contract. When the aggrieved party does not accept the breach, the court may order specific performance after which damages may be claimed in lieu of performance.[80] Damages may be awarded in addition to specific performance for delay in completion.[81]

2.4.3.3 Termination

In order to be complete, some attention should be paid to a third remedy which can be invoked, namely termination of the contract. In case of breach of contract the victim can under certain circumstances terminate the contract. Both parties are relieved from their obligations. Subsequently, the victim can also claim damages for the losses suffered due to the breach of contract. However, termination is a complicated remedy, because not every breach of contract offers the victim the right to terminate. Within the spectrum of this thesis, termination as a legal remedy after breach of contract does not seem to be very relevant, because the breaching party will not object to termination, as he has chosen to breach the contract himself, precisely because he does not want keep the contract alive. Termination only becomes relevant as a legal issue if the breaching party would rather keep the contract alive and puts up a defense consisting of the reasoning that he did not commit any substantial breach, if at all. However, the importance of this remedy is shown if one considers that termination is just one of the tools the aggrieved party may use to remedy breach of contract. The contract may not be kept alive, but the aggrieved party may achieve justice if the remedy of termination is available.

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[79] Peel 2011, p. 1091 ff.

[80] Peel 2011, p. 1129. See also *Oakacre v Claire Cleaners (Holdings) Ltd* [1982] Ch. 197.

[81] Peel 2011, p. 1130. See also *Ford-Hunt v Ragbhir Singh* [1973] 1 W.L.R. 738.

The difficulty regarding the remedy of termination is that it depends on the one hand on the type of breach – fundamental or not – and on the other hand on the type of the contract term which has been broken to assess whether termination is a possibility.[82] A distinction in different types of contract terms is a typical feature of the common law. Civil law jurisdictions do generally not know such a distinction.[83] In general, three types of terms can be distinguished: conditions, warranties and innominate terms. First, breach of conditions always allows the victim to terminate the contract. Second, breach of a warranty does not. The intermediate variant is breach of an innominate term. Whether termination is possible in this case generally depends on the seriousness of the breach, which is closely connected to the nature of the term. The difficulty is to establish what the nature of a contractual term is. This distinction can be contractually arranged and then it is relatively easy, but if not, much discussion can arise about this issue.[84] Seriousness of the breach is also, as mentioned earlier in this chapter, closely connected with motive of the party committing breach, although the terms are not equal. Therefore, it is relevant to briefly introduce the way English law deals with the factor seriousness of the breach in assessing remedies.

Under US legal terminology – i.e. according to section 2-106 of Uniform Commercial Code – 'termination' is an available action for a party confronted with non-performance not being breach of contract, whereas 'cancellation' is the term reserved for the action of terminating the contract after breach.[85] 'Cancellation' under US law is treated as a so-called defensive remedy. It can only be activated if breach of contract is 'substantial'. Apparently, although every breach leads to liability in contract, not every breach is sufficient to make termination of the contract available. The defense component of the remedy is the fact that both parties after termination are not bound by the contract.

2.4.4 The notion of 'breach of contract' and remedies in contract: a continental law perspective

Several European continental systems treat breach of contract differently from common law systems. Breach of contract is preceded by the notion non-performance which may generally be imputable or not. However, for structural reasons it is already relevant to know that continental systems generally treat performance of the contractual obligation – after breach or not – as a right resulting from the contract. Therefore, it is not logical to discuss enforced performance as a remedy after breach of contract. Consequently, this section is not structured in themes, but in jurisdictions.

2.4.4.1 French law

French law recognizes three major actions which may be available after breach of contract: enforced performance, termination and damages. French law does not know the term breach of contract as such, but uses the term 'inexécution de l'obligation'. A first remark should be that this term does not attach any label to the conduct of the party in breach. It only says that a contractual obligation has not been performed.

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[82] *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849.

[83] In Dutch law the only trace of a distinction between contract terms can be found in distinguishing general terms and conditions from "normal" contract terms. To each of them different legal regimes apply.

[84] McKendrick 2007, p. 774 ff.

[85] Klass 2010, p. 180. Nevertheless, in my opinion this distinction is not used consistently. 'Termination' is also used to indicate the action of the aggrieved party to end the contract after breach of contract, albeit only because English law does so as well.

In general, French law provides the disappointed creditor with two options in the case of breach of contract: enforced performance – 'exécution forcée' – or termination of the contract – 'résolution'. This choice can be found in art. 1184 s.2 Cc.[86] According to Fages, French law does not recognize a hierarchy in remedies in this respect . Parties are in principle free to prefer one remedy above the other in case of breach of contract.[87] That seems to be slightly harsh, because according to art. 1184 s.2 Cc, a party must request the court to resolve the contract. Moreover, according to section 3, the court may delay termination under certain circumstances. The disappointed party can, logically, not choose both. Either the contract remains existing and is enforced, or the contract is terminated.

According to art. 1142 Cc the remedy of 'exécution forcée' is only available if the contract constitutes an obligation to give. However, this provision may sound somewhat misleading, because the courts may also allow enforced performance in cases of breach of obligations to do.[88] Only obligations to do of a very personal nature cannot be enforced, at least not by the remedy of enforced performance.[89]

Enforced performance is available as of right to the creditor. The occurrence of damage is not required. The absence of this requirement again places enforced performance ahead of another major remedy in the case of breach of contract: damages. The limits on enforced performance are not discussed in detail here. The most important aspect of this remedy seems to be its primary position in French law, at least in theory, although the real power of this remedy is somewhat hidden due to art. 1184 Cc and especially art. 1142 Cc.

When the remedy of damages is studied more closely, a terminological issue should be resolved in the first place. The remedy of damages in French law is linked to the term 'responsabilité contractuelle' – liability in contract. In common law language breach of contract and liability in contract are almost synonymous, because damages are the primary remedy in common law. In other words, a situation of breach of contract is the standard situation in which a party is liable in contract and must pay damages. That is not the case in French law. A party in breach can be held liable in the sense that the disappointed party can claim enforced performance from the party in breach in case a contractual obligation has not been performed. The disappointed party can also terminate the contract under certain circumstances. However, under French law a party is only liable in contract if the disappointed party claims damages. This terminological choice can be explained, because the two other remedies can generally be invoked without the presence of imputability on the side of the party in breach.

[86] Art. 1184 s.2 and 3. Cc: (…) "La partie envers laquelle l'engagement n'a point été exécutée, a le choix ou de forcer l'autre a l'exécution de la convention, lorsqu'elle est possible ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances."

[87] Fages 2007, p. 262. See for a historical and comparative contribution Dawson 1959.

[88] Fabre-Magnan 2004, no. 207, p. 559. The provision should be rewritten according to Fages. See Fages 2007, p. 266. The last decade several proposals for reform of the French law of contract have been written, e.g. the 'Avant-projet Catala'; see P Catala, *Rapport sur l'avant-projet de réforme du droit des obligations et du droit de la prescription*, Paris: La documentation Française 2006 (2006), but also a more recent project F. Terré (ed.), *Pour une réforme du droit des contrats*, Paris: Dalloz 2009.

[89] Cass.civ, 14 mars 1990 (*Eden c/Whistler*)

The primary provisions on damages are artt. 1146, 1147 and 1148 Cc. From these provisions, the main requirements to constitute liability for damages arise: breach of contract, damage, causality between breach and damage and imputability. It should be emphasized that imputability and breach of contract are treated as two separate requirements. Imputability arises when the debtor is at fault, but also if the debtor is not personally at fault, he can be liable for actions of his employees or for the use of malfunctioning objects. The breach is only not imputable in the case of a 'cause etrangère', so fault is not an essential requirement.[90]

From the perspective of this thesis, the role of fault in holding the party in breach liable in damages deserves more detailed attention. According to Fages, it is not relevant to use the term 'faute contractuelle' (contractual wrong) in relation to breach of contract, because he equals breach of contract with contractual wrong. It is even less relevant to establish the seriousness of the wrong. Whether the debtor has committed breach by accident or intentionally, whether the seriousness of the wrong was high, normal or low, liability can always be established.[91]

This statement seems to be somewhat sharp considering the structure of the remedy of damages. The breach of contract cannot be equivalent to the degree of wrongfulness of the party in breach, because if the breach is not imputable, the party in breach is not liable. Moreover, as we shall see, art. 1150 Cc recognizes the legal relevance of intentional conduct of the party in breach, because in the situation of intentional breach, unforeseen losses may also be claimed. This is not possible in the case of 'normal' breach of contract.

2.4.4.2 German law

The German law of obligations has significantly been changed in the recent past. The new law of obligations came into force on 1 January 2002 and the structure of the BGB concerning remedies in contract is now based on the European Directive 1999/44/EC on consumer sales.[92] The use of the term 'breach of contract' suggests an overlap with the common law concept of breach of contract, but there are striking differences.

The key term in German law regarding breach of contract is 'Leistungsstörung'.[93] A fundamental issue in German law is that breach of contract in order to cause liability in contract, unlike the common law term, includes fault of the debtor. A corresponding fundamental issue is that according to German contract law the contractual relationship should be kept alive. This concept of breach of contract has direct consequences for the available remedies and for the remedial hierarchy. German law considers performance of the contractual obligation as the most important remedy, the so-called

[90] Fages 2007, p. 266. Note that art. 1137 Cc seems to refer to fault as a requirement to constitute liability, but the apparent contradiction between art. 1137 and 1147 Cc can be clarified by pointing at the difference between obligations to achieve a certain result (fault is not required) and obligations to exercise a duty of care (fault is required). Fabre-Magnan 2004, no. 213, p. 573.

[91] Fages 2007, p. 284. "(…) parler de faute contractuelle du debiteur n'ajoute ou n'enlève rien, ici, à l'analyse de sa responsabilité. L'inexécution equivaut, si l'on veut, a une faute, mais il est indifférent de savoir si cette inexécution est volontaire ou involontaire, moralement condemnable ou non. Du reste, au plan des condition de la responsabilité, la hierarchie des fautes n'a aucune incidence: la responsabilité du débiteur est engagé en cas de faute lourde, simple ou légère."

[92] See inter alia Markesinis 2006, p 379-392 and Zimmermann 2005.

[93] Unberath asserts that 'Vertragsverletzung' is partly synonymous with 'Leistungsstörung', see Unberath 2007, p. 182.

'Primäranspruch'. This remedy is not exactly a reaction to breach of contract, because enforced performance as such is primarily based on the contract itself.[94] Therefore, this remedy can also be qualified as a right to performance resulting from the contract. The creditor has a right to performance from the moment the contract is concluded – naturally taking into account the agreed time of performance. Other remedies, such as damages and termination, only become available when breach of contract is established – including fault of the debtor – and they attempt to remedy the harmful consequences of breach of contract. Relying on the secondary major remedy, damages, is qualified as 'Sekundäranspruch'. The remedy of termination – 'Rücktritt'– is available in the case of breach of contract in order to release the innocent party from the obligation to perform himself. Consequently, this remedy is only available in synallagmatic contracts.[95]

2.4.4.3 Dutch law

The notion of breach of contract is – in translation – not used in Dutch law. The more technocratic term 'toerekenbare tekortkoming' is the correct term. The tiered structure of the Civil Code allowed the lawmaker to introduce a difference between an imputable breach, a breach and a non-performance. For purposes of understanding remedial relief in Dutch law, the only relevant thing to take into account is that damages are only available if breach of contract is imputable.

The primary reason for such a distinction lies in the systematic approach of Dutch contract law, starting from the contract itself. The law centralizes the contract and provides everything to keep the contract and the underlying relationship between the parties alive. That is why enforcing the contract by awarding the aggrieved party actual performance of the contract as of right serves as the primary remedy. This statement is even inaccurate, because it suggests that actual performance is only a remedy after 'breach of contract'. Actual performance of the contract – more specifically: the contractual obligation – may be claimed as of right. The only restriction is therefore that the contractual obligation is due. The primary position of this right is not directly present in the Civil Code, but art. 3:296 BW at least covers the procedural side of the right to performance, because it says that the court must honor a claim to performance without any discretion beyond the exceptions mentioned in the same article.

In practice, the right to performance is not absolute taking into account the exceptions.[96] Taking into account the primary position of actual performance as a right, directly resulting from the contract, 'breach of contract' is not necessary for invoking actual performance.[97]

According to art. 6:74 BW, the remedy of damages is generally only available after the debtor is given another chance to perform – which indicates the secondary nature of this remedy – and only in the case of imputable breach of contract. Non-performance as such is not sufficient, something more is required. Technically however, it is the creditor who must prove the imputability of the breach.

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[94] Kötz 2009, (No 481) p. 201. See Staudinger/Otto (2009) §275 et seq.

[95] See e.g. Unberath 2007, p. 204 ff. and for a substantial account on damages and termination Staudinger/Otto (2009), § 280 et seq. § 346 et seq.

[96] See for an in-depth analysis of the Dutch right to performance with many references to other legal systems Haas 2009. The landmark case on the relative power of the right to performance is the case of HR 5 januari 2001, *NJ* 2001, 79 (*Multi Vastgoed/Nethou*).

[97] This is not entirely accurate either, consequential loss may be claimed in addition to performance of the contract. The focus for this moment is on damages as a remedy instead of actual performance.

Without any action of the creditor on this point, breach is assumed to be imputable. In any case, according to Dutch law liability in contract is not strict. Imputability should not be equalized with 'fault', because it has a more extensive meaning. Certain risks outside fault can also be attributed to the debtor in order to make the breach imputable.[98] Furthermore, Dutch law draws a sharp distinction between establishing liability and the subsequent award of damages. Damages are dealt with in a separate part of the Civil Code. Once the court has decided that the claim for damages of the creditor is valid, the court has several instruments at its disposal to adapt the level of damages to the particulars of the case. Damages in contract are generally assessed on the basis of a positive interest of the creditor. The debtor should pay damages to the level as if the contract had been correctly performed.[99]

As far as termination is concerned, art. 6:265 BW allows the creditor to terminate the contract. Termination is also a secondary remedy, because in general the debtor should have had the opportunity – a second chance – to perform correctly. Dutch law recognizes the possibility for a partial termination, in many cases this results in a price reduction. In the recent past Dutch law struggled with the remedy of termination in the sense, that is was not completely clear if termination could be invoked for every breach of contract or only for serious breaches of contract. Dutch law does not recognize the notion of fundamental breach of contract. However, art. 6:265 BW defines a minimal limit in order to make termination as a remedy available to the creditor. The creditor is not allowed to terminate if the breach does not "justify" termination which is the case when the breach itself is minor.[100] The Dutch Hoge Raad decided in several cases that applicability of the exception of minor breach is exceptional and that in virtually all cases of breach of contract, termination is available as a remedy.[101] On the other hand, it should be taken into account that seriousness of the breach is a factor which is taken into account in assessing the availability and extent of remedies in contract and possible defenses of the party in breach.[102]

2.5 A curiosum? CISG, PICC, DCFR, CESL and the notion of fundamental breach

The CISG provides content which proves to be useful in the preparation for the exploration of the notion of deliberate breach of contract. Although in force since 1980, The CISG has a long history, because it was already in the beginning of the 20th century that many countries realized that the sales contract was becoming the most important contract. An international provision to deal with this type of contract smoothly was therefore inevitable. Paradoxically, the CISG applies to contracts of sale of goods, but it does not define 'sale' nor 'goods' nor 'contract of sale of goods'. Some

[98] See also art. 6:75 Cc and Chapter 3.

[99] See for example Lindenbergh 2008. It is not always clear what the so-called positive interest (in Dutch: positief contractsbelang) includes. Chapter 4 deals in a more detailed way with the particulars of Dutch law of damages regarding deliberate breach of contract.

[100] Another exception is the special nature of the breach, but this is an exception defined in the parliamentary history which practically never arise and which cannot be extended.

[101] HR 4 februari 2000, NJ 2000, 562 (Mol/Meijer). See for a dissertation on a possible reshuffling of availability of traditional remedies, taking into account seriousness of the breach Stolp 2007.

[102] See for a recent example HR 25 maart 2011, LJN BP 8991. Seriousness of the breach as a relevant factor in assessing remedies is analyzed further in Chapter 4 of this thesis.

difficulties may arise, but generally the lack of a definition in this respect does not cause large problems.[103]

The notion of 'breach of contract' in the CISG is specifically noteworthy, because the CISG follows the common law where fault as a requirement for the remedy of damages is not necessary. On the other hand, it is slightly confusing how the CISG faces the right or remedy of actual performance. In principle, seller and buyer may require performance under the CISG. However, art. 28 CISG limits the possibilities of the buyer.

Art. 28 CISG:

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

This provision explicitly mentions specific performance for the benefit of common law systems, but more importantly, it does not choose the continental law approach whereby the right to performance is available as of right.[104]

In addition to the CISG, it is also useful to take a closer look at the soft law bodies such as PECL, DCFR and PICC. The added value of these soft law vehicles is that they contain common cores of private law and, more specifically, contract law. What soft law vehicles do with notions with various and different interpretations such as contract, breach of contract and remedies in contract is relevant for this thesis, because in this thesis these notions are used in a context of specific jurisdictions or a comparative context. As far as traditional remedies are concerned, it is safe to state that in general PECL and DCFR choose a continental law model. This means that both sets of principles point out actual performance of the contract as the primary remedy. The influence of the common law remains visible and sometimes causes confusion in interpretation.[105]

As far as the remedy of termination is concerned, some attention has to be paid to the notion of fundamental breach of contract. In the overview on common law concerning termination, this remedy attracted some attention, because it could not be invoked in the case of every breach of contract. Only breach of a *condition* triggers the availability of termination as a remedy. The breach itself need not be more serious, but the part of the label 'condition' attributes the level of seriousness of the breach, because any breach of a condition opens the gate towards termination.

Some supranational bodies of law or legal instruments, more precisely the CISG, the PICC and the DCFR, also recognize a qualified level of breach, but not in the same way.

Art. 25 CISG:

[103] Bridge 2007, p. 517 ff.
[104] Bridge 2007, p. 587.
[105] See e.g. Van Kogelenberg 2009, p. 599-619.

“A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”

Art. 8:103 PECL states:

“A non-performance of an obligation is fundamental to the contract if:

(a)strict compliance with the obligation is of the essence of the contract; or

(b) the non-performance substantially deprives the aggrieved party of what is was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or

(c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party’s future performance.”

Art. III.3:502 s. 2 DCFR states**:**

“A non-performance of a contractual obligation is fundamental if

(a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result or

(b) it is intentional or reckless and gives the creditor reason to believe that the debtor’s future performance cannot be relied on.”

Art. 7.3.1, s. 2 PICC states:

“In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b)strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party’s future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.”

The CESL also contains a provision on the meaning of fundamental non-performance, art. 87 s. 2:

“Non-performance of an obligation by one party is fundamental if:

(a) it substantially deprives the other party of what that party was entitled to expect

under the contract, unless at the time of conclusion of the contract the nonperforming

party did not foresee and could not be expected to have foreseen that result; or

(b) it is of such a nature as to make it clear that the non-performing party’s future

performance cannot be relied on.”

The general idea is that termination of the contract should not be available as a remedy without a good reason. Terminating the contract is considered to be a tough remedy, which on the one hand cancels contractual obligations of the parties and on the other hand forces the parties to undo what they already did under the previously existing contract. A small breach of contract is not sufficient to make termination available, but even a ‘normal’ breach is not. Only a fundamental breach is sufficient to trigger the remedy of termination. The CISG, the DCFR , the PICC and the CESL all incorporated this notion. The question is what fundamental breach exactly means. When is a breach fundamental? As the three mentioned provisions show, the three instruments use different definitions. For this thesis, it is of course essential that the DCFR and the PICC explicitly define intentional breach as a fundamental breach, whereas the CISG and the CESL do not. All instruments recognize on the other hand that fundamental breach occurs when the aggrieved party is substantially deprived of the very object of the contract. Two questions are relevant in this section. In the first place the question arises why exactly ‘ordinary’ breach of contract cannot be sufficient to invoke certain remedies. This idea of ‘levels’ of breach already suggests that the level of seriousness of the breach plays a role. A second question concerns the significance of the motive of the breaching party and, more specifically, why it is relevant in the context of the PICC and the DCFR, but as it seems not in the context of the CISG and the CESL. At this moment, it is almost sufficient to ask these questions. A start of an answer may be provided, but in the course of this thesis, the relationship between motive and seriousness of the breach is dealt with more extensively.

The PICC contains the clearest explicated notion of fundamental breach and gives explicit attention to the notion of intentional breach as a form of fundamental breach. However, the importance of this notion is immediately downplayed a bit by the official comments on the PICC.[106] In case a breach is intentional, but insignificant, the principle of good faith can block the non-performance to become fundamental.

The PECL and the DCFR are also very brief about the connection between fundamental breach and intentional breach. Seriousness of the breach gets much attention, but this factor is not directly linked with the intention of the party in breach. It should be mentioned that the provisions in the PECL and DCFR do not qualify an intentional breach directly as a fundamental breach. A second requirement next to the deliberateness of the breach is that the aggrieved party must have reason to

[106] http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf, Off. Cmt 3c to art. 7.3.1., p. 222. See also Vogenauer & Kleinheisterkamp 2009, p. 827, 828: “The isolated focus on the ‘state of mind’ of the non-performing party as suggested by Art. 7.3.1.(2)(c) should therefore be given less weight than the other factors in Art. 7.3.1 (2).

believe that the debtor's future performance cannot be relied on. In my opinion, an intentional breach by its very nature causes justified lack of confidence in the debtor's future performance. The connection with future performance may therefore not only be a requirement but also a justification to qualify intentional breach as fundamental. In addition, there may be cases where a party intentionally withholds performance, e.g. because he is angry about another, unrelated transaction. In such cases the additional requirement may have added value.[107] Although the wording of the provision in the CESL is similar to the wording of the comparable provision of the DCFR, the reference to intentional non-performance is omitted. Nevertheless, it can be argued that the minimal difference in formulation now implies that intentional breach is also covered by referring to the 'nature' of the breach.

The provision in the CISG does not mention that intentional breach may also constitute fundamental breach. The definition of fundamental breach reveals the most important precondition – substantial deprivation of what is to be expected from the contract –, but leaves out several others. Intention as a factor of interest is not mentioned, but neither is e.g. the level of damage of the aggrieved party.[108] However, in both cases one must be careful not to conclude that motive of the party in breach does not play a role at all. Some authors infer from the notion fundamental breach itself that intentional breach is fundamental.[109] Moreover, in concrete situations intentional breach practically always leads to fundamental breach. An intentional, definite refusal to perform before or at the time when performance is due constitutes a fundamental breach, unless the refusal was justified.[110] Furthermore, the text of the provision may at least include some sort of intention of the parties. The consequences of a breach of contract may not always be foreseeable, but in most cases parties will know the extent of the breach and the damage they cause by committing breach of contract.[111] However, the question whether a breach is fundamental, when the consequences for the aggrieved party are minimal whereas the breach itself was intentional, is not directly answered by the CISG.

2.6 Breach of contract anticipated upon by parties: penalty clauses and exclusion clauses

Standard remedies offer aggrieved parties a possibility to react on breach of contract, when no provision is incorporated in the contract with regard to breach of contract and its consequences. The principle of freedom of contract in general entails that parties are able to arrange the consequences of breach of contract in terms of remedies in the contract itself. Two possibilities deserve to be mentioned specifically, because deliberateness of the breach may influence their application too.

2.6.1 Penalty clauses and liquidated damages clauses

The first contractual arrangement which needs to be mentioned is the penalty clause. Parties may incorporate a clause into their contract which is connected to the primary obligation of the contract. If a party does not fulfill the obligation according to the contract, he receives a penalty according to

[107] Lando & Beale 2000, p. 366 and Von Bar & Clive 2009, p. 855. These comments mention several theoretical examples where intentional and fundamental breach come together – inter alia an example of double sale –, but there is no additional explanation of these examples.
[108] Schlechtriem & Schwenzer 2005, p. 283.
[109] Schlechtriem & Schwenzer 2005, p. 285; Honsell & Brunner 2010, Art. 25**;** OLG Hamburg, 14 december 1994, CISG-online 216 5. Zivilsenat, 14.12.1994, 5 U 224/93.
[110] For example, in case of a retention right Schlechtriem & Schwenzer 2005, p. 293.
[111] Zeller 2009, p. 199-203.

the penalty clause. The purpose of a penalty clause is in general twofold. First, the penalty clause serves as an incentive for the other party to perform correctly. In other words, a penalty clause with a substantive clause may be a mechanism to prevent breach of contract. Second, if breach occurs, the amount mentioned in the penalty clause may replace the amount of expectation damages the aggrieved party would be able to claim. In other words, a penalty clause may save costly proceedings on the exact level of damages. The penalty clause is therefore also a clause incorporating an agreement on damages.

In comparative perspective, many legal systems recognize the possibility of parties to include a penalty clause into their contract, but important differences also exist, which will become especially relevant, once the potential influence of deliberateness of the breach on the validity of the specific clause is assessed.

Briefly summarized, common law systems only recognize the clause which provides a pre-estimate of potential damages. This type of clause is generally referred to as a 'liquidated damages clause' or an 'agreed damages clause'. A clause implying only the element of the incentive for the party to perform correctly – or in other words – a clause in terrorem of the other party in case of non-performance is labeled as a 'penalty clause' and is generally not valid in common law jurisdictions.[112] The 'penalty' element is difficult to accept for common law jurisdictions, because they tend to consider these clauses primarily as clauses arranging damages, whereas the standard remedy of damages in contract law only serves the objective of compensation and not – not even on a secondary level – the objective of punishment or deterrence. Especially English law draws a sharp line between the liquidated damages clause and the penalty clause. Because parties may prefer to include this type of clause into their contracts for both reasons, the House of Lords and lower courts had to decide on the matter of labeling: which clauses are penalty clauses and not allowed? The landmark decision in this area is the case *of Dunlop Pneumatic Tyre Ltd. v New Garage and Motor Co Ltd*.[113] The most important requirement for a clause to be labeled as a liquidated damages clause is that it must contain a genuine pre-estimate of the damages in case of a – future – breach of contract. The pre-estimate need not be similar to the concrete amount of damages suffered. Although parties do often not explain their specific intentions on this type of clause, this system of a strict distinction between liquidated damages and penalty clauses does not only cause uncertainty for parties. When a clause is labeled as a liquidated damages clause, the court cannot easily mitigate the amount mentioned in the clause, even if it is substantially higher than the amount of actual damage.[114]

In continental jurisdictions, the law is less strict towards the nature of a penalty clause. Whether the clause is meant to be a liquidated damages clause or a 'pure' penalty clause, is not decisive for its validity. Although parties have more freedom in this respect, this freedom is slightly made undone by the relatively large possibility for courts to mitigate the penalty mentioned in the clause.[115] The competence to mitigate is not endless – it is for example in general not sufficient if the actual

[112] Peel 2011, p. 1072 ff.; Solórzano 2009, p. 781; DiMatteo 2001, p. 635. DiMatteo points at the dichotomy between the principle of freedom of contract and the prohibition of penalty clauses.
[113] *Dunlop Pneumatic Tyre Ltd. V. New Garage and Motor Co Ltd* [1915] AC 79
[114] The technical discussion on the difference between allowed agreed damages clauses and prohibited penalty clauses provided an incentive to invent several types of clauses circumventing the no-go penalty-element, such as the acceleration clause or a clause giving a discount on punctual payment. See Peel 2011, p. 1079, 1080.
[115] See e.g. DCFR 2009, Schelhaas 2004.

amount damages is lower than the amount mentioned in the clause –, but in comparison to the common law approach courts have more space to intervene.

In subsequent chapters it will become clear that the possibility to incorporate a clause into the contract with a substantial amount to pay for the party who commits breach plays an interesting role once deliberate breach of contract as a legal phenomenon is studied more closely. On the one hand, one can imagine that the validity of a pure penalty clause could have a preventive effect on deliberate breach of contract and on the other hand one could imagine that a deliberate breach of contract could have a negative effect on the willingness of the court to mitigate the concrete amount mentioned in the penalty clause.

2.6.2 Exclusion and limitation clauses

A second way for parties to anticipate on breach of contract is to incorporate an exclusion clause into the contract. Exclusion clauses may take into account the possible monetary consequences of breach of contract. By limiting or even excluding liability after breach of contract, parties may exactly be able to calculate the risks of a contract. Clauses excluding or limiting liability exist in many variations. Parties may exclude liability for specific type of damage, such as economic loss or consequential loss. They may also exclude liability for damages beyond a certain fixated amount. Although parties are in general allowed to arrange their own contractual relationship including the legal relationship arising after an eventual breach of contract, not every type of exclusion or limitation of liability is allowed under all circumstances. Sometimes, the lawmaker provides rules or guidelines on how parties may make use of exclusion clauses – e.g. from a perspective of consumer protection, European directives provide rules for the use of exclusion clauses in business to consumer contracts –, but courts also tend to assess each contract and each exclusion clause on its merits. Capacity of the parties, type of contract, type of exclusion clause: these circumstances in every legal system play a role once after a breach of contract a court must assess the validity of the exclusion clause.[116] This thesis is not the place to analyze the specific differences between legal systems regarding the validity tests of exclusion clauses.[117] Nevertheless, the influence of deliberateness of the breach on the validity of exclusion clauses is a perspective which returns in this thesis. This element is relevant, because deliberateness of the breach may not only be able to modify application of standard remedies after breach of contract, but also remedies in the contract itself such as exclusion clauses.

The relation between deliberateness of the breach and the exclusion clause is explored in Chapter 4 on a concrete level. A confusing element in the area of exclusion clauses is that a specific type of exclusion clauses already deals with deliberateness. Parties sometimes attempt to limit their liability for damages caused by intentional or grossly negligent behavior. They may do so by incorporating a specific clause mentioning damage caused after intentional or grossly negligent behavior or they may attempt to persuade the court that damage caused by intentional or grossly negligent behavior is also covered by a general exclusion clause. An example is the plumber who deliberately throws a pipe down the stairs after a reconstruction of a bathroom. When the pipe hits the wall, the wall gets damaged. If the plumber attempts to rely on an exclusion clause in his contract with his client, a court will generally deny the defense of the plumber referring to his intentional behavior which

[116] For Dutch law see HR 19 mei 1967, *NJ* 1967, 261 (Saladin/HBU).
[117] See e.g. Lawson 2005, Fontaine 2006.

causes the damage. This situation is an interesting one, but it is slightly different from the core perspective of this thesis. In the example the plumber does not commit breach of contract in the sense that he deliberately demolishes the bathroom or in the sense that he does not show up at all because he accepted a better paid job. The question this thesis is primarily interested in is whether the plumber in the example can rely on the exclusion or limitation clause once he deliberately avoids performance of the core obligation or deliberately underperforms and how courts should react to this type of deliberate breach of contract.

2.7 Conclusion

After examining the general notions of contract and breach, some important conclusions can be learned before embarking on the core topic of this thesis: deliberate breach of contract.

The general concepts discussed in this chapter, such as 'contract', 'breach of contract' and various remedies cannot easily be described and defined, because of terminological and systematical differences within and between every jurisdiction mentioned. A contract in a common law jurisdiction may be comparable to a contract in a civil law jurisdiction, but it is a different concept in both types of jurisdiction. Expectation damages may be a more or less similar remedy in common law jurisdictions as in civil law jurisdictions, but the remedy itself has another position in the remedial hierarchy in the jurisdiction concerned. Attempting to compare various notions in various systems inevitably leads to a certain degree of confusion. The creation of confusion is not an objective of this chapter, but the acceptance of the impossibility to create absolute clarity helps the reader in the process of understanding that deliberate breach of contract will likewise be difficult to handle.

A general characteristic of the notion of *contract* is that this term in all legal systems describes a legal relationship whereby parties may bind themselves voluntarily. Within this overall concept, the notions mutual agreement, promise and obligation are used in different ways in various legal systems. It is especially interesting to note that the concept of promise, which has an intrinsic moral value in daily vocabulary, is paramount in common law jurisdictions. Traditionally, it is the exchange of promises – and the accompanying consideration with it – with obligations attached which make these promises enforceable. This legal relationship can be qualified as a – common law – contract. The common law of contract is preoccupied with the question of enforceability of the contract and the underlying promises. This type of question often refers to matters of for example unconscionability or consideration issues. In the common law, the intention to be legally bound is not necessary for enforceability in this perspective. The relevance of this element is historically limited, because of the commercial, 'bargain' view on the contract as a set of promises which are binding as long as consideration is provided. The emphasis on the enforceability of the contract should not be confused with the right of parties to performance of the mutual contractual obligations. Contractual obligations cannot generally be enforced by the remedy of enforced performance, but only by paying damages. If these damages live up to the expectation of the aggrieved party on the basis of the contract, the contract is also enforced in common law terms.

The continental contract seems to be much more concerned with the notion of mutual agreement and the fact that contracts create obligations. The enforceability of a contract is treated as a theoretical problem in a double sense. On the one hand, the principle of the binding force and enforceability is approached from the perspective of the questions why a contract is binding for the parties and what the exact content of the contract is. On the other hand, the enforceability of the

contract in continental jurisdictions is not an issue on the level of the possibility to claim actual performance of the contractual obligations. In German and Dutch and to a certain extent in French law, as well as in the PECL and the DCFR, the primary position of this right does – at least in theory – not cause much discussion.

Therefore, the concept of contract can be defined in many ways and these differences are important, but every jurisdiction always uses the term 'contract' for comparable legal relationships.

Breach of contract generally describes the situation where a party does not correctly perform his contractual obligations. In the common law, breach of contract triggers liability without any further requirement. Liability in contract is strict and fault is not required. In continental jurisdictions, fault is generally required, albeit that the party in breach may have to prove that the breach was *not* caused by his fault. The fault requirement supersedes the element of personal fault – circumstances in the sphere of risk of the party in breach may also constitute fault. Therefore, 'breach of contract' is a slightly unclear term in continental law perspective. The term non-performance is the most neutral term. Non-performance for which a party is liable – i.e. a non-performance which is caused due to the fault of the party who does not perform correctly – may be the closest synonym for breach of contract.

The natural and primary position of the right to performance in continental jurisdictions may not be present very prominently in case law, but is of eminent importance to realize that this primary position has also effects on thinking about breach of contract and remedies. On the one hand, continental jurisdictions are designed to keep a contract alive. Damages are in theory the second best option. The right to performance arises out of the contract itself and is not necessarily preceded by breach of contract. The choice for keeping the contract alive has also consequences for the approach to the remedy of damages. In continental jurisdictions, damages seem to be quite strictly limited to compensation purposes.

Common law jurisdictions are less attached to the idea that contractual obligations should be performed. Enforceability of the contract is not a guarantee for getting the contractual obligations performed. The primary way to achieve enforcement in common law jurisdictions is the award of expectation damages. The restrictive attitude towards actual performance may be somewhat levied once it becomes clear that common law jurisdictions, especially US law, are more open for other monetary relief, such as restitution or account of profits, than continental jurisdictions.

This chapter finally mentions the distinction between standard remedies and remedies incorporated in the contract. These 'party' remedies are often included in order to distribute risks in advance, such as the liquidated damages clause and the exclusion or limitation clauses. Parties may have an interest in pre-estimating damages in order to avoid costly litigation. The eventual penalty element of the liquidated damages clause – penalty clause may also be used as a synonym – creates a distinction between common law – penalty clauses are not allowed – and civil law – penalty clauses are allowed. The relevance of this distinction and 'party' remedies in general emerges in the subsequent chapters once it becomes clear that these 'party' remedies are also potential weapons to use against deliberate breach of contract.

The differences between common law and civil law jurisdictions in the law of remedies are classic and in itself not new. As the next chapters will show, from the perspective of deliberate breach of

contract, these difference are relevant for understanding how common law and civil law jurisdictions approach deliberate breach of contract.

3 Deliberate breach of contract: a notion to be explored, but not defined

3.1 Introduction

This chapter attempts to answer the following research question:

What is deliberate breach of contract?

This chapter approaches the concept of deliberate breach from various perspectives. The notion of deliberate breach will be explored and potential characteristics will be described. This exercise does not necessarily lead to a clear, one-sentence definition of the notion of deliberate breach of contract. In the course of this chapter, it becomes clear that an authoritative definition created by for example one or more higher courts, lawmakers or by influential academic contributions does not exist. Courts and authors of academic contributions use various synonymous wordings for the notion of deliberate breach, describing in general similar phenomena, but they do certainly not draw a clear one-dimensional picture. Lack of unanimity in the legal domain on the content of this term leads to the conclusion that the objective of this chapter cannot be to provide a single-sentence definition of deliberate breach of contract. Nevertheless, in order to create a point of reference, this chapter introduces a working definition, which is as follows:

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or which he would have incurred in the case of performance of the contract."

Every section starts with the reiteration of the working definition. The working definition of deliberate breach will subsequently be analyzed against and compared with the perspective in the specific section.

First, the notion of deliberate breach of contract is briefly introduced. Only US law developed a – relatively recent – history in analysis of this phenomenon in academic debate. Second, the relation between deliberate breach and the distinction between excusable and non-excusable breaches will be explored. Third, a comparison between deliberate breach and the law and economics theory of efficient breach is inevitable, because the notions of deliberate and efficient breach may seem comparable, they are not equal. Fourth, the relation between deliberate breach and tort is explored. The core question in this section is whether deliberate breach may also be a tort. Fifth, the perception of deliberate breach in empirical legal studies will be briefly analyzed. How do parties perceive breach of contract and do they distinguish between types of breach of contract with respect to the level of fault? Sixth, criminal law often deals with the notion of deliberateness. Insights from this area of law are especially relevant in order to tackle the problem of proving deliberateness, one of the most poignant problems in criminal law as well. Seventh, the relation between deliberateness and procedural evidence is explored. After the lessons provided by the previous section on evidence, the notion of deliberateness is briefly explored from civil procedure perspective.

This chapter approaches the notion of deliberate breach of contract from a primarily theoretical perspective. The next chapter attempts to find traces of acknowledgement of deliberate breach of contract by courts in concrete case law. Inevitably, the various interpretations on the meaning of

deliberate breach will also be part of the analysis in Chapter 4. Therefore, the question what deliberate breach is will be partly answered in this chapter and partly in Chapter 4.

3.2 Introducing the concept of deliberate breach

In the past decades, deliberate breach has proved to be a legal phenomenon which is subject to discussion in academic contributions in US law.[118] Nevertheless, it is not a well-established unambiguous legal notion.[119] This section starts with the working definition provided in the introduction:

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or which he would have incurred in the case of performance of the contract."

A crucial element of the provisional definition is the economic motive of the party committing breach. He commits breach of contract to achieve a financial gain or to avoid an economic loss. This section shows that the economic element in the decision to commit breach is a returning feature in many manifestations of deliberate breach in the various contributions. This section eclectically analyzes several of these contributions in order to get a first general idea what the concept of deliberate breach ought to imply.

While studying a number of US contributions to the topic of deliberate breach, a first conclusion must be that the notion of deliberate breach cannot be positioned in an existing framework of US contract law as one term with one common meaning. It takes some time to discover this feature, because many US legal scholars design their own definition of deliberate breach. Within a specific contribution, such a self-designed definition gives the impression that the term cannot be defined otherwise, but a broader overview reveals that this conclusion would be premature. Furthermore, although the boundary between law and law and economics as two distinctive scientific disciplines is not sharp in the US, the difference in approaching the notion of deliberateness is visible. Several law and economics scholars, such as Posner and Shavell, have difficulty to discuss the sole notion of deliberate breach next to inadvertent breach or excusable breach. They do not consider this distinction very relevant for the construction of contract law, because they focus on the dichotomy of efficient versus inefficient breaches.[120] Others, such as Shiffrin and Dodge opt for an approach which emphasizes the importance of the contractual bond. Both 'camps' – and there are many

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[118] See various contributions which mention this notion in different ways, inter alia Marschall 1982; Baumer & Marschall 1992; Craswell 2009; Thel & Siegelman 2009; Shiffrin 2009; Shavell 2006a; Shavell 2009; Bar-Gill & Ben-Shahar 2008; Roberts 2009; Roberts 2009a; Posner 2009;Perlstein 1993; Dodge 1999; Johnson 2000; Schwartz 1991; Cavico 1990; Curtis 1986; Sebert, 1986; Farber1980; Smith 1995; Mitchell Polinsky & Shavell 1998; Cohen 1994.

[119] From a linguistic perspective, the range of synonyms seems to be virtually endless: 'willful' (the US equivalent), 'intentional' (the DCFR equivalent), 'opportunistic', 'cold-heartedly', 'cynical'. Marschall in her early contribution referred to Webster's Dictionary and presented the following alternatives 'unwarranted', 'unjustified', 'knowing', 'voluntary' and 'bad faith' in Marschall 1982. In foreign languages, 'deliberate' may be translated as e.g. 'vorsätzlich' (German), 'dolosif' or 'lucratif'(French), 'opzettelijk', 'bewust' or – more archaic – 'arglistig' (Dutch). It should be taken into account, that not all synonyms represent exactly the same phenomenon. 'Dolosif' for example may also include includes gross negligence, whereas 'intentional' in the DCFR does not.

[120] Posner 2009; Shavell 2006a; Shavell 2009. See for an elaboration on efficient breach section 3.4.

authors who take an own position somewhere in this debate – have difficulties in coping with the notion of deliberate breach.[121]

The definition of deliberate breach entails many difficulties. A first question is whether deliberate breach can be defined as a separate phenomenon. According to Johnson in his contribution about extracompensatory relief in cases of deliberate breach, all breaches are possibly deliberate breaches:

"The entire universe of contract breaches is exposed to that (*i.e. 'willful', MvK*) designation."[122]

The attentive reader may have noticed that this thesis attempts to use the term 'deliberate' consistently, whereas the commonly used equivalent in US legal systems is 'willful'. The connotation of willful breach is definitively negative. Willful breach in US is not an applauded phenomenon. 'Deliberate breach' on the other hand at this moment seems to be a slightly more objective term. As a starting point, this thesis uses the term 'deliberate'.

According to Johnson the risk for parties who plan to conclude contracts is too large, when they cannot estimate properly whether they will be confronted with punitive damages or another remedy with a large impact, because they do not know what deliberate breach exactly is. The objective of contract law is to stimulate economic transactions. This objective is frustrated by incorporating in the law several harsh remedies for types of breach which are not clearly defined. Following this line of reasoning, it is only useful to introduce new remedies for specific types of contract and specific types of deliberate breach.

Craswell analyzes deliberate breach as a sequence of facts, whereby it is relatively arbitrary to label such a sequence as deliberate or not. He also concludes that specific remedies for deliberate breach should be used in specific situations.[123]

Farnsworth generalizes his statements about deliberate breach, whereas his contribution is about a specific type of contract, namely building and construction contracts and a specific type of deliberate breach, i.e. using deliberately wrong materials. Farnsworth deviates from the term willful breach and he uses the adjective 'abusive'.[124]

Bar-Gill en Ben Shahar are also conscious of the lack of clarity of the term 'willful breach'. They oppose willful breach against inadvertent breach, but they conclude that this dichotomy should not be defined in terms of internal state of mind, because this state of mind cannot be determined by outsiders. The notion of deliberateness tells something about the will of the party to abuse a certain information advantage at the cost of the other party.[125]

Other writers are less scrupulous and attempt to define deliberate breach as well as providing legal responses on it. For example, Dodge elaborately argues that from an economic perspective punitive

[121] Shiffrin 2009; Dodge 1999.
[122] Johnson 2000, p. 192.
[123] Craswell 2009, see also section 3.8.
[124] Farnsworth 1970, p. 1384, 1385.
[125] Bar-Gill & Ben-Shahar 2008, p. 1499.

damages should be available for every type of deliberate breach, be it efficient breach or 'opportunistic' breach without being too scrupulous about the concept of deliberate breach.[126]

Marschall also defines willful breach in a more general way, because she does not connect deliberate breach with specific types of contracts or specific types of deliberate breach. Every type of conscious breach for which the party in breach can be held accountable and which does not confer benefit on the other party, can be classified as deliberate breach.[127]

In a recent contribution Thel and Siegelman recognize that Craswell thoroughly analyzes the difference which may be logical at first sight, between deliberate and inadvertent breach. They may have overlooked this difference too quickly.[128] Nevertheless, they conclude that not all "intentional" breaches are also willful breaches and not all willful breaches are "especially injurious to promisees".[129]

On the contrary, Posner links willful breach with wrongful breach, although he does not attach legal consequences to willful breach, even though it may be immoral.[130] According to Posner, the most important interest is always that breach of contract is efficient. He even argues that in a consistent system of fault liability more severe remedies should be available in cases of inadvertent breach when they are not efficient.

Another example in case law illustrates that the term willful breach in US law may indicate a strong attachment to tort law. In the case of *Metropolitan Life Ins. Co. v. Noble Lowndes International Inc.* the court found that, as a matter of law, willful means a level of intent that rises to the level of an independent tort. This definition attaches to the willfulness a certain malicious component.[131]

This account of opinions on the term deliberate breach is not limitative. It only illustrates that deliberate breach is in fact a term without a conclusive meaning, whereas some contributions at least let the reader believe that is a settled term. A particular definition can make sure that within a specific contribution terminology and content may be coherent, but comparing articles becomes more difficult if everyone uses his or her own definition. It is even arguable that any categorization in types of contract breaches is impossible due to the wide variety of definitions and use of synonyms. Nevertheless a provisional conclusion on this point should be that such a categorization is inevitable to be able to answer the research questions of this thesis. The alternative would be that every breach of contract, perhaps except for the excusable breach, is deliberate. From the perspective of revising remedies in contract, such a conclusion would not be useful. Any additional sanction to the existing body of remedies would mean, that the entire body of remedies should be increased. The relevance of such a proposal and the effectiveness are doubtful, because contract law as an instrument in order

[126] Dodge 1999, p. 698.
[127] Marschall 1982, p. 733.
[128] Thel & Siegelman 2009, p. 1526.
[129] Thel & Siegelman 2009, p. 1531.
[130] Posner2009, p. 1363.
[131] *Metropolitan Life Ins. Co. v. Noble Lowndes International Inc.* 192 A.D.2d 83, 90. The Court of Appeal did not confirm nor deny the definition used by the Appellate Court, but signaled that willful acts in this specific contract could be compared more convincingly with truly culpable, harmful conduct than with mere deliberate or intentional breach. See for an analysis of this case and its follow-up De Leeuw & Howard 2006.

to enhance smooth economic transactions would be in danger. More importantly, this approach at least denies a certain reality, because it is not the approach followed by many authors and because there is some empirical evidence that not every type of breach is considered similarly.

3.3 Deliberate breach and the distinction between excusable and non-excusable breach

This section compares the notion of deliberate breach with the notion of excusable breach. Again, the starting point is the working definition:

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or which he would have incurred in the case of performance of the contract."

The definition does not say anything on the question whether the party committing deliberate breach of contract is liable. At first sight, it seems safe to argue that the liability of the party committing breach is assumed. The distinction between excusable breach and inexcusable breach marks the difference between the breaching party being liable for its breach or not. If the breach can be excused – or in other words – if the breaching party has a lawful excuse at his disposal, he is not only excused from performing the contractual obligation, he is neither liable in damages. In other words, if the assumption is true, a deliberate breach cannot coincide with an excusable breach. A deliberate breach in that situation would be a special manifestation of the inexcusable breach and excusable breach is not relevant for the definition of 'deliberateness'. A closer look at the construction of the borderline between excusable and inexcusable breach reveals that this line of reasoning is not without difficulty.

A lawful excuse is an umbrella term for all possible situations where non-performance of the debtor is justified. As the previous chapter mentioned, UK law defines breach of contract as breach which is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract or performs defectively or incapacitates himself from performing.[132] The debtor is always liable for damage caused by breach of contract. In other words, under UK law liability for breach of contract is considered to be strict, which means that only in exceptional circumstances the debtor is released from performance of his obligations. By contrast, at least in theory in continental legal systems the debtor's fault is generally assumed, although he may evade liability for damages for breach of contract if he proves he is not at fault.[133]

The party who is obliged to perform may somehow be legally relieved from his obligation to perform. Numerous examples can be provided. One example is the buyer who refuses to pay the price, because the goods delivered to him are defective. The buyer fails to perform his contractual

[132] Peel 2011, p. 828.

[133] See e.g. § 280 s.1 BGB (Germany): "Verletzt der Schuldner eine Pflicht aus dem Schuldverhältnis, so kann der Gläubiger Ersatz des hierdurch entstehenden Schadens verlangen. Dies gilt nicht, wenn der Schuldner die Pflichtverletzung nicht zu vertreten hat." or art. 6:74 s. 1 BW (Netherlands): "Iedere tekortkoming in de nakoming van een verbintenis verplicht de schuldenaar de schade die de schuldeiser daardoor lijdt te vergoeden, tenzij de tekortkoming de schuldenaar niet kan worden toegerekend." The fault requirement includes more than only subjective and personal imputability. In general, every breach causes liability except for lawful excuses.

obligation, but he has a lawful excuse for doing so. A second example is the employee who falls ill. He cannot perform his obligation to go to work, but he is nevertheless excused.

Parties are also relieved from performing their obligations when the purpose of the contract is frustrated. Frustration is a typical English law term. Frustration of (the purpose of) the contract means that it does not make sense any longer to perform the contract, if performance is possible at all. However, only in very exceptional circumstances the doctrine of frustration can be invoked.[134]Although the doctrine of frustration is a typically English law term, continental systems do have more or less comparable legal structures in order to fill in this part of the domain of the lawful excuse, often indicated with terms as 'force majeure or the most neutral term 'impossibility'.[135]

Excuses for non-performances may be party-related, such as the first example. Excuses may also be derived from an external source, such as the third example. The second example, with the ill employee is somewhere in between. This thesis does not elaborate extensively on these notions or on the differences per legal system. The purpose of this section is to establish a link between thinking in terms of excusable breach and inexcusable breach and the idea of deliberateness.

Therefore, another matter has to be discussed in the sphere of lawful excuses. An excuse for performance may mean that a debtor is justified not to perform. He cannot be forced to perform the contractual obligation. In other words, the creditor may not invoke his right to enforced performance or – for that matter – the court may not order specific performance in a common law jurisdiction. However, a debtor may still be liable in damages. In such a case, the excuse is lawful in the sense that the debtor is allowed not to perform, but it is not lawful in the sense that he should not compensate the creditor.

The debtor may be incapacitated from performing, but the cause of the incapacitation may lie in his own sphere of risk. Consider the example of the ill employee, who is the only one to produce the ordered goods by the creditor. Dependent on the circumstances of the case and the applicable legal system, all situations may occur. The debtor may be forced to perform anyway, because the illness of his employee falls within his own sphere of risk. Maybe he is forced to rely on the services of an external party in order to fulfill his contractual obligations, but he may nevertheless be compelled to do so. It may also be that the debtor is excused in the sense that he cannot be forced to perform the contractual obligation. Performance depends on the ill employee, there is no reasonable alternative and in the circumstances of the case, the debtor would be unreasonably burdened if he is faced with a claim for enforced performance. In continental legal systems, where enforced performance is generally qualified as a right, it is at least in theory not easy to block a claim for performance. A relative impossibility – i.e. a situation where the debtor may be able to perform but against increased costs – is in principle not sufficient to defend against a claim for performance.[136] If the costs

[134] Until halfway through the 19th century many contractual obligations were considered absolute: *Paradine v Jane* (1647) Aleyn 26. In 1863 the House of Lords allow application of the doctrine of frustration in *Taylor v Caldwell* (1863) 3 B&B 826 and extended the doctrine in the famous coronation case *Krell v Henry* [1903] 2 K.B. 740. However, the scope was narrowed down again in the Suez case: *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93. See for a complete overview Peel 2011 a.w., Chapter 19.

[135] See for an extensive account of cases in various European legal systems on supervening circumstances which may block performance Beale 2010, Chapter 23 ff.

[136] See e.g. §275 BGB in German law, but also art. 3:296 BW in Dutch law.

outweigh the foreseen costs to a large extent, this problem may be overcome. In general, in common law jurisdictions this theoretical problem is less urgent, because actual performance is in theory generally not available as of right.

Nevertheless, the illness of the employee may still fall within his sphere of risk, so he may be liable in damages. It may also be that the illness of the employee provides the debtor with a lawful excuse in the sense that he is released from his contractual obligations and not liable in damages either. In general, in this case, the debtor is not at fault if he does not perform. Only in the case he caused the illness of his employee, this may be the case. As we have seen, for the matter of liability, the role of *personal* fault in rendering the debtor liable for breach of contract is not that relevant.[137] It is often a matter of risk distribution. The relation between lawful excuse and deliberateness in the example of the ill employee is interesting. If the debtor is completely dependent on the efforts of the ill employee he is simply not able to perform. He has not a deliberate choice not to perform. The moment he may acquire help from another source, although this is obviously more expensive, the clear distinction between excuse and deliberateness starts to blur. Even though the debtor may be excused for performance and for liability in damages in the case of the ill employee, he may have a choice to perform or not. If performance is very expensive – because he has to hire another employee who claims a large sum of money for example – he may have justified reasons to do so, but non-performance is in such cases deliberate. The second example is quite a difficult one, because it is not clear beforehand who is primarily responsible for the illness of the employee. It is not clear either what the exact consequences of the illness are. These circumstances may all exercise influence on liability and on the level of deliberateness in choices to perform the contractual obligation. However, it is generally clear that even if the debtor has a choice to perform, the event of choosing to perform is not deliberate and indeed involuntary. He is forced to choose, because initially he wanted to perform according to the contract and in principle he still wants to do so.

Consider the first example of the defective goods delivered to the debtor. The debtor is in this case not the seller, but the buyer. The relation between liability, excuse, fault, risk and deliberateness is completely different. The similarity between the second and the first example is that both cases may give rise to a lawful excuse under circumstances. However, the situation is completely different. The justification for non-performance lies within the reciprocity of the contractual relationship. Non-performance of the buyer is justified, because he does not receive what he is entitled to according to the contract. It is fair to say that non-performance in this case is neither the debtor's fault nor an event which falls within the sphere of risk of the debtor. The non-performance or breach of the obligation is therefore entirely justified and the debtor is excused for performance and for liability in damages. However, the decision not to perform is a deliberate one. The debtor is perfectly able to pay the agreed price. He does not want to and that is justifiable, but the refusal to pay remains deliberate. Again, as in the first case, initially the debtor does not want to non-perform, but the voluntariness of the choice is somewhat larger, because he is able and at liberty to pay if he wants to. A slight adaptation of the case may change the whole picture. If for example the defects are very small, or the non-performance of the seller is in general minor (he delivers an hour after the agreed performance), it is questionable if the debtor is justified not to pay the price. The basis for

[137] However, the level of damages may be affected by the degree of fault of the debtor. See chapter 4. See Asser/Hartkamp & Sieburgh 6-I 2010/340 ff.

establishing a lawful excuse may fall away and then the deliberate decision not to perform turns into a breach of contract for which the buyer is liable. The distinction between presence of lawful excuse and deliberateness of the decision not to perform is quite sharp. That may be one of the reasons why the decision not to pay is not without risks.

The third example is the common example to illustrate the idea of a lawful excuse. If the debtor agrees to deliver goods by contract and after conclusion a war in the country concerned breaks out or the goods are destroyed due to the consequences of an earthquake, the debtor may be released from his contractual obligations. He has a lawful excuse and he is not liable in damages either. Again, it depends on the exact facts of the case whether the decision not to perform is deliberate or not. If the goods are destroyed, the non-performance is not deliberate. However, if the area from which the goods are transported is dangerous because of war, the decision not to perform is deliberate, not to mention that the decision is justified. The deliberate non-performance is also involuntary as the debtor would have performed if the supervening event had not taken place. However, there is another difficulty with this type of cases. Because the cause of the non-performance lies outside the sphere of the parties and has a large influence on the content of the contract, it may well be that the contract would never have been concluded the same way, had parties known about the supervening event. Due to unforeseen circumstances, the contract and the according intent and interests of both parties have changed. Whereas the contract itself is partially concluded as a mechanism in order to legally fix parties' intentions at the moment they concluded the contract, this function finds its limits in the doctrine of unforeseen circumstances. It may be questionable whether a supervening event as mentioned before such as war or an earthquake may be qualified as lawful excuses at all, because excuses are only necessary in the case of the breach of an obligation and if the contractual obligations are not enforceable anyway due to the supervening event, we may find ourselves in another doctrinal box. It goes without saying that the doctrines of unforeseen circumstances and lawful excuses go hand in hand. A fundamental difference is often that the party confronted with the supervening event not rarely invokes the doctrine of unforeseen circumstances not as a defense, but in order to be able to change the contract or to be released from the contract altogether.

The notion of deliberate non-performance is not easily compatible with the distinction between excusable and non-excusable breach. Deliberateness suggests a form of free choice of the debtor. In some cases, the choice is indeed free, but not very attractive, such as in the case of the buyer not willing to pay for defective goods. In other cases, the choice *seems* free in the sense that a party makes a conscious decision, but the choice is hardly voluntary as the costs may be unbearable. The case of the supervening event blocking delivery is the most evident example, but in this case the basis of the contract may be at stake as well. The case of the ill employee is tricky in this sense. It depends on the circumstances of the case and on the specific rules of the legal system involved whether the decision not to perform is deliberate, but also whether this case qualifies as a case for a lawful excuse. Lawful excuses depend not only on absence of fault, but also on circumstances which fall or do not fall within the sphere of risk of the debtor. Furthermore, it is wise not to forget that lawful excuses not to perform are not always similar to lawful excuses which release the debtor from being liable in damages.

In conclusion, the borderline between excusable and non-excusable breach of contract shows that the existence of a lawful excuse does not always mean that the excused party did not realize he was committing breach of contract. In other words, even excusable breach may be deliberate in the sense

that a party knew what he was doing, but also in the sense of the definition. He may have had a lawful excuse to commit breach in order to prevent a substantial loss. A deliberate breach need not always be a non-excusable breach, but this thesis elaborates on the non-excusable breaches, because the essence of this thesis is to determine the potential effect of deliberateness of the breach on the availability and extent of remedies of the aggrieved party. This step is not possible any longer once the party committing breach has a lawful excuse for committing breach of contract. The borderline between deliberate and non-deliberate breach gets a new dimension especially if the last part of the provisional definition is focused upon. When a breach is deliberate in order to avoid a financial loss which would be large but bearable or so large that financial breakdown is inevitable is not so easy to determine. A first shade of grey in defining deliberateness is established.

3.4 The theory of efficient breach: a belief with supporters and opponents

This section elaborates on the theory of efficient breach of contract. The next section compares the notions of deliberate breach and efficient breach, but it is relevant to start with the working definition of deliberate breach anyway, because it is inevitable to make some references to the notion of deliberate breach in this section:

“Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or incurred in the case of performance of the contract.”

The comparison between deliberate breach and efficient breach is relevant for finding an answer to the question what deliberate breach is, but also for the objective this thesis aims to achieve. Efficient breach theories influence the debate on the potential ‘bad’ nature of deliberate breach. The potential ‘bad’ nature of deliberate breach may also have consequences for the remedies available to the aggrieved party. Before anything useful can be said on the comparison between the two concepts, the notion of efficient breach needs to be explained. A few preliminary remarks are necessary in order to explain the relatively modest analysis of the notion of efficient breach.

First, this thesis does not elaborate on the theory of efficient breach in all its aspects. Many authors have mentioned the theory of efficient breach before and discussed it thoroughly.[138] Adding another extensive overview of the literature is in itself not a valuable academic contribution. The added value of discussing the theory of efficient breach is the analysis in perspective of deliberate breach which follows in the subsequent sections. Again, terminology turns out to be a major factor while discussing efficient breach of contract.

Second, the notion of efficient breach of contract is more than a familiar notion in the area of law and economics. As far as law and economics of contracts is concerned, it is safe to assert that efficient breach is a key notion which defines law and economic thinking in the area of contract.[139] However, in legal doctrine and in case law in general, the concept of efficient breach is neither common nor accepted. The exception is US law. Efficient breach is on the one hand a well-

[138] See for an overview of relevant literature for example Hardy & Hesen 2008; Craswell 1987; Zhou 2008; Adler 2008; Friedmann 1989; Markovits & Schwartz 2011.
[139] See e.g. Cooter & Ulen 2004; Craswell 1987.

established notion in academic literature and it is on the other hand as a tool accepted in court decisions. As well-established as the notion of efficient breach in the area of law and economics is, the exact features and implementation of efficient breach have caused many academic contributions, because there are many authors who define efficient breach in their own way.[140] Efficient breach of contract, though as a concept definable in a few lines, is a term with many specific elaborations depending on the aspect subject to research in a specific project.

Although there is no single concept of efficient breach, because it can be presented and elaborated in many ways, the core idea nevertheless remains more or less the same throughout the years. In US law and economics, but also in judicial decisions, the efficient breach theory is a widely acknowledged theory with supporters and opponents.[141] This section will not deal with the exact meaning of efficient breach theory and certainly not with all theoretical differences within the theory of efficient breach. It is sufficient to know that according to Posner, one of the founders of the efficient breach theory, efficient breach occurs in a situation where the debtor commits breach, because he can make a larger profit when he contracts with a third party. However, the breach can only be considered efficient, if the debtor supplies the original debtor with full compensatory damages.[142] Posner does not make a principled difference between the performance of the obligation itself and the economic value of the performance. Friedmann has elaborated on this so-called indifference principle. According to this principle the aggrieved party will become indifferent between performance and damages. He notices that – apart from the intrinsic truth of the principle – a problem may be that additional costs of claiming damages should be included in the calculation.[143] If breach is efficient, the law should not impose sanctions on the debtor, because every party involved benefits from the efficient breach. The core of the efficient breach is an economic and calculated decision not to abide by contractual obligations, under the condition that the debtor fully compensates the creditor.

Two questions represent the core of the efficient breach debate. The first question is why a party to a binding contract should be allowed to choose to commit breach at all, be it an 'efficient' breach or not? From a legal perspective, this question is highly relevant, because any potential answer to this question requires formulating a notion of contract and the purpose of contract law and the law of remedies. From a law and economics point of view, this question is not being considered as an interesting one, because the question does not attack the notion of efficiency itself. This question is the core of the clash between legal scholars and law and economists. Furthermore, in the United States it is not common or logical to draw a sharp distinction between these two branches of academic debate, whereas in Europe the legal academic debate in general is not intertwined with other areas of academic research. The theory of efficient breach can only be implemented in legal practice in a system where contracts are considered to be a bargain and nothing more, because the efficient breach theory applies the indifference principle. Otherwise, it would be impossible to buy out the creditor if something which cannot be valued in money is part of the contract – or, more

[140] See for example MacNeil 1982; Ulen 1984; Brooks 2006; Adler 2008; Medina 2005; Scalise 2007.
[141] Posner 2011, Ulen 1984; Shavell 2006; Eisenberg 2005; Craswell 1987; Brooks 2006.
[142] Posner 2011. p. 150 ff.
[143] Friedmann 2008, p. 65-90.

precisely, the decision to commit breach would not be in the hands of the debtor considering breach, because he would be dependent on the will of the creditor who has the initiative to negotiate.

Consequently, the question of whether efficient breach is a viable theory or not is also an object of debate in the common law versus civil law debate. Again, caution is necessary. Whereas one would think that every major common law system should support the efficient breach theory, because in general common law tends to approach contract law as a system to enhance economic transactions, this is certainly not the case. UK common law, generally, tends to take a hostile attitude towards the efficient breach theory for reasons to be explained. Furthermore, whereas the notion of efficient breach is most developed in the US legal debate, several authors question the role of contract law as a sole catalyzing tool for commercial enterprise and therefore also the notion of efficient breach. Lastly, the commercial notion is naturally not absent in continental systems. There may be some space for efficient breach as a serious option within contractual relations in continental systems as well.

The second question is according to law and economic scholars the more interesting one: when is a breach efficient? The core debate on this matter is to define and distinguish between efficient and inefficient breaches. The first type of breach should be allowed and even encouraged, whereas the second type should not be allowed and even deterred. The body of literature covering this topic is largely the territory of law and economics scholars. The discussion presupposes a recognition of a certain viability of efficient breach theory, which may partly explain why in Europe – and in the doctrine of continental legal systems – this topic is not much discussed in European legal doctrine.

The efficiency question triggers a debate on an economic level. Superficially, a transaction is efficient when the benefits outweigh the costs of the transaction, but this statement does not solve the matter whether breach is efficient or not, because this principle does not reveal who bears the costs and who takes the benefits. A yardstick which does not take into account the localization of the efficient distribution of wealth after the transaction may not be adequate, as for example Ogus notices:

"The key question is whether the apparatus of law enforcement is sufficiently flexible to accommodate "wrongdoing" when, in this sense, it turns out to be beneficial. The economic approach, although it does not provide definitive answers, generates valuable insights for the very reason it abstracts the moral dimension from the analysis."[144]

Every yardstick has its own advantages and drawbacks. The Kaldor-Hicks efficiency criterium implies that an outcome is more efficient if those that are made better off could *in theory* compensate those that are made worse off without the requirement that compensation is actually paid out to the 'victims'. A problem of the Kaldor-Hicks efficiency test is that it is too rude. By applying the Kaldor-Hicks test to the efficient breach theory, the party committing breach in general accrues the benefits. In the case of Pareto efficiency, an outcome is more efficient if at least one person is made better off and nobody is made worse off. This efficiency yardstick seems to be more adequate in covering the ground for efficient breach theory, but even in this case a few drawbacks may be pointed out. Apart from the problem of transaction costs – how much additional costs are involved to transfer the

[144] Ogus 2008, p. 125.

losses from the party committing breach to the party bearing the losses? - the problem of *subjective loss* is not solved directly by using a Pareto efficiency yardstick.[145]

The idea of subjective loss together with the aforementioned indifference principle is the core element of the statement that efficient breach is not a factual construction, but a matter of belief.

First, supporters of the efficient breach theory believe that breach can be efficient in the sense that every party participating in a contractual relationship values performance and damages as equal remedies without preferring one above the other as long as damages fully compensate the loss. The indifference principle is an *assumption* underlying efficient breach theory. This assumption needs elaboration as far as the mentioned remedies are concerned. Authors on efficient breach, supporters and opponents, differ on the position of enforced performance as a remedy in a legal world where efficient breach is a serious option. Many academic contributions on efficient breach assess the relation between enforced performance – or specific performance in a common law context – and damages.[146] The indifference principle distinguishes the moralists from the economists. The moralists believe that parties only conclude contracts because they want performance of the contractual obligations and that parties acquire a strong right to performance once the contract is concluded. The decision to commit breach for economic reasons in itself is a fact which can be established, but the idea that the efficient breach is justified is a belief.

Second, the idea that a breach can be efficient may be a fact as well depending on the yardstick applied. Efficiency may be achieved in Kaldor-Hicks or Pareto terms, but the core idea that full compensation to the victim of the breach must be provided may be in serious danger.[147] On an individual level, the level of the parties concerned, efficiency is hard to achieve because of the notion of subjective loss. A party may attach an incalculable value to a specific obligation. The trigger to increase the amount of subjective loss is even more interesting after the breach occurred and the party in breach vows to provide full compensation – forced by the law or not. To a certain extent, damages may be objectively assessed. Tools such as the market price, remoteness tests and other generally justified limitation concepts such as the requirement of foreseeability may provide an estimate of the losses concerned. However, in many contractual relationships, parties have a subjective interest in performance which cannot be calculated. The father who misses his plane by deliberate overbooking may be compensated for a delay and he may be offered a certain amount to cover inconvenience. However, if he misses the graduation ceremony of his daughter due to the delay, this damage cannot be calculated.[148] Even within law and economic thinking, this problem of

[145] Coase 1960, p. 15

[146] The impact of these contributions will largely be dealt with in the next chapter, when remedies are discussed. See for example: Kronman 1978; Schwartz 1980; Yorio 1982; Linzer 1981; Ogus 2008; Shavell 2006; Eisenberg 2005.

[147] See i.a. Ogus 2006, p.208.

[148] The attentive reader may ask the legitimate question whether the father in this example would be able to recover his 'loss' of missing the graduation ceremony in case of a non-deliberate breach for which the airline company was nevertheless liable – e.g. the delay was caused by an unexpected technical malfunction. The loss mentioned was not foreseeable for the airline company, so is there a sufficient causal link between damage and breach at all? Indeed, this is exactly the type of situation this thesis focuses on. Deliberateness of the breach may be the triggering factor to overcome generally justified limits such as foreseeability – taking into account the basic principle of causality that the breach was inevitably connected to the loss, the 'condicio sine qua non' principle – and open the doors for a more generous box of remedies.

subjective loss is a serious one. The problem is that the aggrieved party may be tempted to exaggerate the extent of the subjective loss, asserting that he will never be fully compensated as long as the subjective loss is not covered. Within this scenario, efficient breach is not an effective tool, because it cannot be seriously applied. On the one hand, subjective loss must be acknowledged as a serious type of loss, on the other hand, the assessment of the amount may not be an ex post decision in the hands of the aggrieved party in order to prevent exaggeration. A solution may be a hypothetical construction before breach has occurred at the time of the conclusion of the contract. If parties in advance decide on the amount of damages they want to receive in the case a specific loss occurs (or for any unforeseen, subjective loss), they may anticipate an efficient breach situation involving subjective loss. The analysis of Calabresi and Melamed in their influential article on property and liability rules may be helpful for this solution. Property rules improve the position of the right-holde in the negotiation process in order to release the wrongdoer for the amount he needs to be fully compensated.[149] If the negotiation process may be streamlined along these lines, Pareto efficiency, or the closest point to that, can be achieved. [150]This solution may solve part of the problem, but not the whole problem, because the circumstances of the case may influence the way such a hypothetical construction arises. The instability of the idea is illustrated by the overbooked airline case, mentioned by Ogus. Clients or passengers are not in the position to negotiate a good overbooking fee which may cover potential subjective losses. If efficient breach is allowed, they practically must rely on the good intentions of the airline operator in order to provide for a reasonable 'full' compensation.

This section introduced the concept of efficient breach. A party decides to commit breach because it is economically advantageous and he compensates the aggrieved party in full. This section argued that efficient breach as such is not a construction of fact, but a matter of belief. This argument proves to be relevant in the next section, once the notions of deliberate breach and efficient breach are compared, but it is already clear that the two notions have similar features based on the provisional definition of deliberate breach of contract.

3.5 Deliberate breach and efficient breach compared: similar but not equal

This section compares efficient breach and deliberate breach. Studying the similarities and differences between the two concepts contributes to a better understanding of the notion of deliberate breach, whereas the comparison also illustrates the variety of ways the notion of deliberate breach is appreciated.

Again, the provisional working definition provides the starting point for the comparison:

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or which he would have incurred in the case of performance of the contract."

According to the provisional working definition, every efficient breach is deliberate, because the essence of efficient breach is the deliberate foregoing of the performance of the contract in exchange for a Pareto improvement. However, not every deliberate breach is efficient. The incentive

[149] Calabresi & Melamed 1972.
[150] Ogus 2006, p. 189-216.

for a party to commit deliberate breach is the prospective of a financial advantage for him exclusively, a larger advantage than he would obtain by performing the contract.

So far, the main characteristic of deliberate breach is an element of calculation on the debtor's side. Therefore, it is inevitable to discuss the borders between deliberate breach and the law and economics notion of 'efficient breach'. If breach is efficient, the law should not impose sanctions on the debtor, because every party involved benefits from the efficient breach. According to this definition, it goes without saying that an efficient breach is also a deliberate breach. The core of the efficient breach is an economic and calculated decision not to abide by contractual obligations, under the condition that the debtor fully compensates the creditor.

A first remarkable dichotomy to analyze is the generally negative connotation attached to the term 'willful' or 'deliberate' breach. These terms are associated with bad faith and bad intentions, whereas in the United States efficient breach is in theory not approached in a hostile way.[151] In a US case a court defines 'opportunistic breach' – note that the court in this instance does not use the term 'willful – and contrasts it with notions of efficiency, because in the case of opportunistic breach the debtor exploits the inadequacies of the remedy of "ordinary" damages.[152] However, as Craswell rightly points out, no one knows what 'exploiting' means, so the line between opportunistic and efficient may be quite thin.[153] In addition, if damages are always considered as a second best solution compared to actual performance of the contract – which is the case in European continental law systems, but of course not in the common law –, every efficient breach is opportunistic or willful or deliberate.

The difference in attitude towards the concept of 'efficient breach' and 'deliberate breach' can be redirected to the indifference principle and it is necessary to analyze this principle again against the concept of contract in general. Is a contract 'only' a bargain – i.e. a guarantee to the financial value of the contract and nothing more – or does a contract also imply an ethical duty to perform, which can be legally enforced? The Anglo-American lawyer would be inclined to support the first version, however the recent literature on deliberate breach does not unisono support this approach.[154] The (continental) European lawyer is likely to support the second option. The law and economics theorists do not consider this first question as an interesting one, because it is assumed to be a 'theoretical' one and not an intrinsic argument against efficient breach theory itself. They assume that efficient breach is economically justified, just because it is efficient. Commercial private law is not primarily about ethics or good faith, it is about achieving efficient results with Pareto improvements. Nevertheless, for the Anglo-American lawyer, the continental lawyer and the law and economics scholar, this issue is certainly not without problems.

Core questions are whether deliberate breach is a distinguishing factor on the level of remedies in concrete court decisions at this moment and why. Even Posner, one of the most ardent supporters of

[151] Modest empirical evidence for this statement is provided by Macaulay 1963; Baumer & Marschall 1992.
[152] *Patton v, Mid-Continent Systems, Inc.,* 841 F.2d 742, 751 (7th Cir. 1988). Posner was the Circuit Judge in this case. See also Restatement (Third) of Restitution & Unjust Enrichment § 39 (Tentative Draft Current 2009) about profit derived from opportunistic breach.
[153] Craswell 2009.
[154] See e.g. Shiffrin 2009; Roberts 2009.

the efficient breach theory, has some difficulty in discussing the theory of efficient breach next to the notion of deliberate (or willful) breach.

In his standard textbook *An Economic Analysis of Law* Posner elaborates on his theory of contract law and on the efficient breach theory. It is remarkable that one of his first remarks on breach of contract in general is about 'opportunistic breach'.[155] The terminology issue is one of the indicators that deliberate breach of contract is a highly debated issue. According to Posner, willful breach seems to cover all intentional breaches including the efficient breach, whereas opportunistic breach is reserved for the inefficient intentional breach. Other authors seem to use willful breach and opportunistic breach as synonyms. Legal scholars who are not familiar with efficient breach theory or who do not recognize efficient breach theories as a viable legal theory use the term willful or intentional breach for every deliberate breach including the efficient breach.

However, it is quite difficult to distinguish between the different variants in this respect. Posner provides a good example. His first comments regard opportunistic breaches, which he defines as actions whereby

"the promisor breaks his promise merely to take advantage of the vulnerability of the promisee in a setting (the normal contract setting) where performance is sequential rather than simultaneous (…)."[156]

According to his analysis such conduct has no economic justification and should simply be deterred. In these cases restitution is an attractive remedy, because breaking the contractual promise would then be worthless for the promisor. The next section starts with a sentence which summarizes the line of reasoning of Posner:

"Most breaches of contract, however, are not opportunistic. Many are involuntary; performance is impossible at reasonable cost. Others are voluntary but (as we are about to see) efficient – which from an economic standpoint is the same case as that of an involuntary breach."[157]

Efficient breaches are 'voluntary', but should be treated as 'involuntary' breaches, because they are efficient. Is Posner suggesting that the choice to break a contractual obligation is unavoidable if it is efficient? One could argue he does not, because he adds the words "from an economic standpoint".

However, in his latest contribution he seems to deviate slightly from his approach in the text book, where he says that efficient breach is deliberate rather than compelled.[158] Although he argues in his contribution that contract law is not about morals, the following quotation seems to suggest otherwise:

"There is an element of perversity, moreover, in arguing that efficient breaches, being deliberate rather than compelled, should be discouraged. Efficient breaches are efficient. Involuntary breaches are often inefficient: the promisor miscalculated his ability to comply with the contractual terms to which he had agreed. I am not suggesting he should be "punished"; but if fault were taken seriously

[155] Posner 2011, p. 149.
[156] Posner 2011, p. 149.
[157] Posner 2011, p. 149.
[158] Posner 2009, p. 1353.

in contract law, he, like a negligent injurer sued in tort, would be thought at fault, whereas a party that committed an efficient breach and thus increases the social product would not be."[159]

The core conclusions from this analysis are that efficient breach is regarded as a positive notion in US law and economics scholarship, whereas deliberate breach is generally not. Efficient breach can generally be circumscribed as deliberate breach plus the efficiency aspect which means that the aggrieved party should be paid full compensation after deliberate breach. Once the efficiency component is stripped from the definition, willful breach generally remains according to many academic contributions. The problem of determining the exact meaning of 'efficiency' and the problem of undercompensation are well-known arguments to question the efficient breach theory. However, the law and economics theory tends to neglect the intentional aspect of the act of breach. Only recently in several contributions the aspect of deliberately neglecting the contractual bond between the parties triggered authors to discuss this particular aspect, resulting in a fierce discussion between legal scholars such as Posner, Shavell and Shiffrin.[160] The implications of efficient breach and deliberate breach on remedial relief and its extent in concrete cases will be discussed in the next chapter.

3.6 Deliberate breach of contract from a tort law perspective

In the previous sections, the notion of deliberateness has been viewed from a primarily US doctrinal perspective. The interconnection between deliberate and efficient breach attributes a strong economic aspect to the notion of deliberateness. In essence, the working definition also reflects this economic notion. The costs of performing the contractual obligation do not outweigh the benefits for the debtor: that is the core of 'deliberateness' so far, as the provisional definition shows:

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or which he would have incurred in the case of performance of the contract."

The economic perspective of cost and benefit thinking may be a logical first step, it remains a matter of construction. In order to get a better grip on the meaning of deliberateness it is also useful to look into situations in which deliberate breach constitutes a tort or an unlawful act. This perspective offers a better insight on the variety of interpretations of the term 'deliberateness'. A deliberate breach which is also a tort may cause a more extensive possibility for the aggrieved party to invoke remedies, in particular the remedy of damages, because the basis of an eventual claim shifts from contract to tort or the two claims may be accumulated. Especially interesting is the possibility for the aggrieved party to claim punitive damages. Punitive damages are more or less out of the question in civil law jurisdictions in contract *and* in tort, but in US law especially, tort law offers the claimant the possibility to claim punitive damages, whereas punitive damages are in general available in contract.[161]

Within the framework of this thesis, the tort law perspective on breach of contract should be approached with a certain 'boldness'. Several fundamental issues need to be mentioned, but they

[159] Posner 2009, p. 1353-54.
[160] See Posner 2009, Shiffrin 2009, Shavell 2009.
[161] Farnsworth 1970, p, 1145,1146; Cavico 1990, p. 360.

are not elaborately addressed in order to stay focused on answering the core research questions. As mentioned above, it is only relevant to know whether deliberate breach of contract constitutes a tort, when such a conclusion has remedial consequences. If a claimant can invoke exactly the same remedies – in type or in extent – the qualification of a deliberate breach as a tort is not a useful exercise. A preliminary issue in this perspective is whether *every* breach of contract – without the connotation of deliberateness – constitutes a tort. As a matter of principle, a tort or unlawful act is the most basic ground for remedial relief. Breach of contract could therefore be construed as a specific manifestation of a tort. However, systematically, this standard accumulation would not be useful, because it would be unclear why the distinction between liability in contract and tort exists at all. Breach of contract is generally considered as a different ground for liability than tort. That does not mean that liability in contract cannot concur with liability in tort. In case of breach of contract, liability in tort must generally be established *independent* from liability in contract.[162] The first important question is whether the element of deliberateness in the breach of contract can constitute such a separate liability in tort. In order to answer the question, what deliberateness exactly is, this question should be ideally reversed: which breach of contract situations lead to liability in tort and can some of these situations be qualified as deliberate breach? The second question is then, whether such 'tortious' deliberate breach is a whole new category of deliberate breach. In other words, are there similarities between the 'tortious deliberate breach' and the 'economic deliberate breach'? The third question of relevance is the one with which this paragraph started: does the qualification as a tort open new or extra ways for the aggrieved party to invoke remedies, and if so, which ones? The last question will be answered in more detail in subsequent chapters.

So far, deliberateness has mainly been discussed as an act of economic egoism of a debtor who balances the odds of non-performance against performance. From the perspective of tort law, this type of breach of contract will generally not constitute liability in tort. The unlawfulness cannot be separated from the breach of the contractual obligation. Something more should be added in order to 'upgrade' a breach of contract to a tort. The situation of a complete separate tort next to breach of contract is not of interest for this section. The seller who punches the debtor after he told him he would not deliver the goods as promised, naturally commits a tort next to breach of contract. In order to upgrade the breach itself to a tort, something extra should be added. This may be the case when committing breach of contract is not a means to achieve the end of economic welfare, but an end in itself in the sense that breach hurts the creditor *without* taking into account the economic consequences.

If a plumber agrees to fix a broken sink and he destroys the kitchen, because he wants to upset his contracting partner, breach is not only deliberate, but it is also 'malicious' and this type of behavior constitutes a separate unlawful act. A debtor commits a malicious breach if he deliberately or very recklessly aims at causing damage to creditor with the *primary intention* to cause damage to the creditor. This type of breach also qualifies as an independent tort (unlawful or wrongful act).[163] The

[162] Asser/Hartkamp-Sieburgh 6-IV 2011/9-10.

[163] It is vital to point out that some (though not all) continental law systems recognize a general concept of tort (unlawful or wrongful act), such as French law and Dutch law, with general requirements (usually unlawfulness, imputability, damages and causality) whereas the common law determines a range of specific torts, such as libel, trespass wrongful interference. See also Jolowicz & Winfield 2007.

difference between malicious breach and deliberate breach in the sense of the working definition is fundamental, because the debtor in committing a malicious breach is not primarily interested in gaining any economic advantage or avoiding economic loss. He just wants to inflict harm to the other party. The element of calculation seems absent in these cases of breach. In the area of plumbing contracts, the plumber deliberately or recklessly destroys the sink without considering any economic advantage resulting from his behavior. In the area of sales contracts, one could think of selling a rare painting to a third party, not because the third party offers a higher amount of money, but because the debtor does not want the original creditor to acquire the painting, although he had concluded a contract with him. In principle, this category of breach seems to be an exceptional category of deliberate breaches. One could hardly imagine that committing a malicious breach would be a tempting business decision for a debtor who makes choices based upon economic calculation. Moreover, the breach of contract is in this type of cases not that relevant any longer, because it is completely 'overtaken' by the unlawful act, so it is even questionable whether it is useful to qualify such breaches as deliberate breaches of contract. Therefore, from the perspective of answering the core research questions of this section and of the thesis as a whole, in particular the connection between deliberate breach and remedial relief, the objective of any possible adjustment of the debtor's behavior as a consequence of the availability of more severe remedies in contract for the creditor is not feasible.

The exploration so far shows a clear difference between economic and malicious or tortious deliberateness. The second question of this section needs a more serious look into potential similarities between economic and malicious deliberate breach. A slight change in approach may already blur the border between deliberate and malicious breach. An example is the situation where the debtor enters into a contract in bad faith in order to exploit the other party.

Sometimes one of the parties 'only' negotiates in bad faith and withdraws from negotiations at a very late stage. In this specific situation, negotiating in bad faith implies that the party concerned never had the intention to conclude a serious contract with the other party in the sense that he expected to perform his own obligations. This particular situation falls outside the scope of this section, because a contract is not concluded and breach of contract does not come into play.

However, sometimes parties conclude contracts without the intention to perform obligation at all. The previous examples analyzed situations where the debtor faced a situation where he has a choice between performance and non-performance after the conclusion of the contract. The conclusion of the contract itself is considered to be done within the limits of fair behavior in the sense that both parties originally created the contract in order to perform the obligations resulting from the contract. However, there may be situations where one of the parties concluded the contract, but never considered performing the obligation at all or at least considered the possibility he would not perform as a serious probability in the future. Because generally all contracts are about distribution of monetary interests, the drive behind this behavior is financial. Therefore one could imagine breach being considered as a financially attractive option not only *after* conclusion of the contract – e.g. because a third party shows up offering a higher amount of money for the sold object to the buyer - , but also *before* the conclusion of the contract.

An example of this type of breach is the so-called bad faith breach in insurance cases. In the 1970's some States in the US started to recognize in law a new concept with contract and tort elements:

‘bad faith breach’ or, as Slawson puts it, “the tort of bad faith breach”.[164] A general concept of tort is not recognized in common law jurisdictions. The common law ‘only’ recognizes a range of various, specifically circumscribed torts, such as the torts of libel, slander, trespassing and tortious interference. The approach of several civil law jurisdictions – i.e. to test whether a certain act is unlawful – is a completely different one.

It is vital to attempt to understand the notion of bad faith breach. The essential element in the bad faith breach is the absence of belief in the mind of the breacher that he has a viable defense against a claim based upon a contract. The party in breach knows he is liable in contract, but he willfully attempts to escape liability. The tort of bad faith breach had initially been developed for insurance law cases. The insurer who knows he has to pay a sum of money according to the insurance contract, but who instead does not and forces the insured to start legal proceedings to obtain the right – and the financial translation of this right – he indisputably has.

The key element of the US concept of bad faith breach is that it is a specific tort. US law primarily recognizes the contractual character of a first party insurance. The refusal to perform any obligation according to the contract should primarily be considered as breach of contract. The available tools for the aggrieved party are the remedies for breach of contract, primarily expectation damages. Expectation damages are only available to the extent of compensation of the losses. These losses must be foreseeable and not too remote. In addition, any costs made with respect to legal representation are generally not recoverable under expectation damages. However, parties to an insurance contract are not only bound by the wording of the contract, they are also bound by an implied covenant of good faith and fair dealing, which sounds in contract as well as in tort.[165] The gateway to the tort qualification is essential, because remedies in tort also include punitive damages, whereas remedies in contract generally do not. The question is whether breach of the insurance contract in this case could also be classified as a tort. If that result is achieved, remedies in tort are also available, under which punitive damages. The route from contract damages to tort damages – in other words the equation of breach of contract with a tort – has generally, historically and traditionally been cut off firmly. In the words of Gilmore, classical contract theory on this issue is

“dedicated to the proposition, that ideally, no one should be liable to anyone for anything.”[166]

Gilmore used this exaggeration to emphasize that damages in contract have a history of constant limitation and restriction. The whole idea of contract and its narrow conception of damages would be in danger if damages in tort could be easily obtained by qualifying every breach of contract as a tort.

A breach of the covenant of good faith and fair dealing may sound in contract and in tort, but the difficult question arises whether a breach of contract as such should be qualified as against good faith. That is apparently not the case. Breach of contract as such is in principle part of the freedom of contract. A party may commit breach of contract, even consciously. For a breach against good faith, a bad faith breach, something more is required. According to the *Fletcher* case and later cases, the essential element in order to label a breach as a bad faith breach is a special relationship between the contracting parties. The position of the insured is vulnerable. In a leading US case the court

[164] Slawson 1996, p. 104.
[165] See e.g. *Jackson v. American Equity Insurance Company* 90 P.3d 136 Alaska, 2004.
[166] Gilmore 1974, p. 3.

decided that the insurer commits bad faith breach of contract, which can be qualified as a tort, if the insurer consciously abuses the vulnerable position of the insured by denying liability, even though he knows he does not have a viable defense against a claim speculating on the ignorance of the insured or his inability to fight for his rights.[167] In this situation, tort remedies are also available, because this type of behavior of the insurer should be subject to retribution on the one hand and be deterred on the other hand. This particular behavior makes breach of contract tortious. The tort addition is necessary to trigger a new box of damages, such as punitive damages.

In conclusion, the borderline between deliberate breach and tort adds another perspective to the meaning of the notion of deliberate breach of contract. The notion of deliberateness in this respect may have a sharp edge. An element of maliciousness may be added to the deliberate economic consideration to commit breach of contract. Although maliciousness and economic reasoning at a first glance may be two separate manifestations of deliberateness, they may also coincide and catalyze each other as the example of bad faith breach of contract in insurance cases shows. The remedial aspects of categorizing deliberate breach as a tort are also briefly discussed, but these aspects deserve more structural attention in the next chapter. An interesting aspect of the bad faith breach is that it is a phenomenon which is subject to actual debate in American jurisdictions as well as in European jurisdictions. The example of bad faith breach shows in its own way that the dynamics of defending against a claim by an insured cannot be completely shut down by awarding high punitive amounts for delay in payment. The freedom for parties to litigate and build their own defenses according to the applicable procedural rules may not too easily be set aside. On the other hand, the example of bad faith breach already shows that proving deliberate misconduct is extremely difficult.

3.7 Deliberate breach in empirical legal studies

In order to explore the features of deliberate breach, another approach which should be taken into account, is an empirical one. In other words, do parties themselves make a distinction in the way they are being treated by their contractual opponent in case of breach of contract? Are they offended more severely when they feel that the breach is not a simple breach, but a deliberate act of the debtor in order to avoid performance? If parties make such a distinction, it is relevant to find out which features are essential according to the parties – who are obviously not lawyers themselves – to qualify as a deliberate breach. A subsequent question may be whether the aggrieved party in case of deliberate breach of contract would like to have more severe remedies at his disposal than the standard remedies in case of breach of contract.

Again, the working definition of deliberate breach serves as a point of reference:

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or which he would have incurred in the case of performance of the contract."

The empirical approach is relevant, because if parties – the users of the law of contract – feel deceived or betrayed as a result of breach of contract, they may also want to express this feeling in the reaction towards the party in breach. If parties distinguish between types of breach in terms of

[167] *Fletcher v. Western National Life Insurance Co.* 10 Cal. App. 3d 376, 89 Cal. Rpter. 78.

degree of fault, this is a serious indication for the law to adequately respond to the needs of contractual parties.

Empirical research is in legal scholarship not widespread in civil law in general, and certainly not in the law of contract. The empirical research projects and their results which are relevant for the answer to the question how breach is perceived are mainly done in the US. A core element of these studies is often that the parties' approach towards a contractual relationship is not a 'friendly' one. Parties know that a contract is necessary, but the process of legal negotiation is perceived as the domain of the lawyer, who is not part of the real deal between the parties. The conclusion of a contract allowing parties to have access to remedies in the case of various kinds of behavior of the other party is generally viewed as a necessary evil, a formality which allows the lawyers concerned to obtain substantial gains from creating massive contracts with legal content the parties themselves cannot understand. The core of the contract, the agreement on the content of the obligations in legal terminology, is not perceived as a primarily legal affair by parties. The key word in lay perspective in this sense is 'trust'.[168] When parties negotiate about contracts and decide whether they want to conclude a contract with each other, it boils down to the question whether they trust each other enough to proceed. In general, this approach is sound for practically any voluntary contractual relationship[169], for consumers and professionals. Naturally, this approach is most accurate when professional parties conclude a large and complicated transaction, such as a transfer of shares of a large company. Negotiations between the parties on the specific terms have to fill the gaps which trust cannot fill in the specific situation. However, even if a consumer buys a loaf of bread, he trusts the baker in the sense that he delivers fresh-baked bread.

In his influential article in 1963, Macaulay states that contract law might promote rational planning of transactions, but only when the value of the exchange is great. The most important reason for this empirical finding is the lack of necessity.[170] In business, the decision-makers do generally not care about small print contracts, but about trust. They value trust more than any concrete contract related issue, only until the moment trust is violated. In such a situation, a contract may become important. This empirical study, albeit limited in extent, has been very influential for future research.[171] The empirical study in North Carolina from 1992 seems to confirm some of Macaulays findings. Businessmen are not charmed with the idea of willful breach. They rather expect their counterparties to perform their contractual obligations. The availability of damages does not take away parties' preference for performance of the obligations. For parties, although they may not always be aware of it, the law of damages fills gaps in the contract, because it is inefficient to draft 'complete' contracts.[172]

The construction and mechanism of trust and its psychological and sociological consequences not only between parties in contractual situations, but also outside contractual situations has not been a topic which has been studied in-depth in legal research, at least not in relation to breach of contract.

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[168] See e.g. Buskens 1999, Buskens & Raub 2006, Macaulay 1963, Baumer & Marschall 1992.
[169] A different situation occurs when forced contracts, such as energy contracts or public transport contracts are concerned. See Houben 2005.
[170] Macaulay 1963.
[171] Kornhauser 1983; Macaulay 1985.
[172] Shavell 1980.

How trust works has been subject to in-depth research in the area of social sciences.[173] This thesis is not the place to discuss these works thoroughly. Some scholars who operate on the verge between legal and social sciences executed empirical research in order to establish that trust is essential in concluding contracts.[174]

One of the most recently published studies is relatively sharp in its conclusions. It revealed empirical evidence that individuals may view breach as moral harm. Even compared to standard tort situations, individuals under circumstances perceive breach as a more serious infliction on a moral level. Wilkinson-Ryan and Hoffman assert:

"Breach creates an injury distinct from the economic loss created in tort. Breaches for gain are perceived as worse than breaches to avoid loss".[175]

In these cases, the individuals who took part in the experiments could not deny a sense of being exploited. The idea that subjects may experience breach in various ways even though the economic losses are similar, is therefore not only an assumption, but at least on a basic level a tested empirical fact. Wilkinson-Ryan and Hoffman also indicate the limitations of their research. They do not say anything on the potential answers of the law in the sphere of remedies. In other words, they do not propose a larger award of expectation damages or an easier access to specific performance as a remedy. A further limitation of their research is that their experiments only included individuals. The perception of (large) companies may be different, because the economic considerations to conclude and to forfeit contractual obligations may be stronger than in the case of an individual initiating a contractual relationship. Nevertheless, a less recent and modest empirical review also shows that companies may experience feelings of deceit once they are confronted with deliberate breach of contract.[176] Wilkinson-Ryan and Hoffman explicitly deny the Holmesian premise that a contractual party is indifferent towards the remedy of specific performance, because expectation damages suit the aggrieved party as well, as long as damages are adequate. They contend that parties tend to incorporate more than only economic considerations in their assessment of the question which remedy suits them as most appropriate in a case of breach of contract.[177]

In conclusion, contracting parties experience a serious feeling of deceit once they discover the other party deliberately committed breach of contract in order to achieve a larger financial gain. It is not to be said that an immediate increase of legal remedies would be a good solution in all cases – it is too early for such a conclusion – because parties would like to postpone the moment they have to invoke legal assistance almost at any cost, especially when more forceful extra-legal remedies are available, such as causing reputation damage. On the other hand, parties may experience a feeling of understanding once they discover the other party had to breach in order to avoid a destructive financial loss. The empirical legal studies mentioned in this section seem to cover the ground for the assumption that deliberateness of the breach in the sense of a more severe loss of mutual trust is a factor which should be taken into account in the assessment of legal remedies after the breach occurred.

[173] Rooks 2002; Buskens 1999; Jettinghoff 2001.
[174] Beale & Dugdale 1975; Listokin 2005; Wilkinson-Ryan & Baron 2009.
[175] Wilkinson-Ryan & Hoffman 2010, 1045.
[176] Baumer & Marschall 1992.
[177] Wilkinson-Ryan & Hoffman 2010, p. 1046..

3.8 Proving deliberateness? A comparison between deliberate breach and criminal intent

A brief comparison between the notion of criminal intent and the specific manifestation of deliberateness in civil law is relevant in two ways. First, the notion of criminal intent and the way this notion is approached by criminal law provides private law a new perspective on the notion of deliberateness. Second, the notion of criminal intent is especially relevant to highlight a problem occurring in both areas of law, a problem of evidence. The question in both areas of law is how the aggrieved party is able to prove that the criminal behavior of the perpetrator was intentional or that the breach committed was deliberate. Criminal law has more experience in dealing with this problem than civil law. The way the notion of 'criminal intent' is approached by criminal law helps to acknowledge and solve this problem in the area of civil law.

For purposes of consistency, the working definition of deliberate breach of contract is again repeated:

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or incurred in the case of performance of the contract."

In criminal law, thinking about degrees of blameworthiness is one of the essential elements of academic research. Several dissertations and other substantive contributions have been written on the topic of criminal intent.[178]The problems of adequately describing the notion of deliberateness is also recognized in criminal law. In criminal law the notion of intent, intention or intentionality is not easy to define either. Criminal law generally uses the term 'intent' when the suspect acts 'willingly and knowingly'. He must want to act and he must know that he acts criminally.[179] The idea of intent as a pure subjective state of mind as a requirement for criminal liability is difficult, because it is impossible to detect and, therefore, impossible to prove that the suspect is criminally responsible for an act for which criminal intent is necessary.

De Jong does not define the term criminal intent, but he describes some well-known lines of thinking in criminal law on criminal intent:

"In relation to the meaning attributed to intention in colloquial language, the concept of intent in criminal law is characterized by a rather wide scope of applicability, mainly because of the development of the notion of conditional intent. The furnishing of proof of intent by strongly objectivizing and normativizing tendencies."[180]

De Jong argues that intent is not a static state of affairs and cannot be localized somewhere. It must be established while studying subjective and intersubjective moments. This highly theoretical approach should be contrasted with the view of Van Dijk, who – more down to earth – asserts that

[178] See for a German account on criminal intent ('Vorsatz') Safferling 2008. See for some contributions on criminal intent in UK common law Duff 1990; Moore 1997; see for a deep theoretical account on the notion of criminal intent ('strafrechtelijk opzet') in Dutch law De Jong 2009; Van Dijk 2008.
Kugler 2002.

[179] See e.g. Moore 1997.

[180] De Jong 2009, p. 446.

criminal intent is a state of mind of the defendant.[181] Safferling comparatively studies the various degrees of criminal blameworthiness from German as well as English perspective. On intent Safferling concludes that the elements of malicious intent on the result of the act ('Absicht') are not necessary to qualify as criminal intent. It is sufficient when it can be established that the suspect could have foreseen the result of his act. In general, German and English law both recognize a more generous interpretation of 'intent' than the pure 'willingly and knowingly' manifestation of intent, because – as in Dutch law – conditional intent is also a manifestation of criminal intent.[182]

The category of conditional intent is an important one in criminal law. The man who drank too much alcohol and caused a collision with a pedestrian, did most likely not have the intent to cause a collision. Nevertheless, the risk at a collision vastly increased by deliberate acts of the man. Causing the collision could not only be qualified as 'culpable', but also as 'conditionally intentional', which increases the severity of the criminal act.

It seems that criminal law needed to develop a tiered structure of the notion of intent in order to overcome problems of evidence. The strongest manifestation of intent, the 'willingly and knowingly' committed criminal act without restrictions is the one most difficult to prove, because intent is a subjective state of mind which in itself is very difficult to detect. The development of the notion of conditional intent helps to avoid the situation in which criminal intent becomes a dead letter due to problems of being able to prove intent. On the one hand, criminal law solves the problem of evidence by distinguishing different categories of intent. On the other hand, criminal law also has to deal with external manifestations, external events, which thereafter have to be qualified as intent or not.[183]

Returning to the provisional definition of deliberate breach of contract, the cost and benefit idea resulting from the definition is a matter of construction. The idea that deliberateness can be construed – an idea developed by criminal law – by the way facts are presented and described is helpful to understand what deliberateness in civil law may imply, but it is *also* helpful to overcome problems of evidence. The definition indicates that deliberateness is assumed once the debtor commits breach with the idea of achieving financial advantage as a result of the breach. Various questions arise once deliberateness is derived from a construction. Is breach according to the definition also deliberate if financial advantage is not achieved although the party committing breach *intended* to achieve financial advantage? The answer will depend on the circumstances of the case, although the latter situation is exactly an example of a situation which is difficult to prove, because the internal state of mind of the party committing breach should be examined. In order to make the notion of deliberateness a notion with which the aggrieved party can achieve something, the necessity to prove the internal state of mind should be avoided. In that sense, deliberateness should *always* be a matter of construction in the legal sense of the word, because deliberateness as a

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[181] Van Dijk 2008, p. 481. See also for an old, but interesting essay on the meaning of criminal intent and the possible differences with the term 'motive' Wheeler 1917.

[182] Safferling 2008, p. 483. Or as Duff describes this difference in degree as a difference between direct and oblique intention. Duff 1990, p. 75. See also a theoretical account on this issue by M. Moore in Moore 1997, p. 449 ff.

[183] See for a concise contribution in Dutch with many references Kwakman 2007. See for example an Dutch contribution on specific interpretations of the term 'bewuste roekeloosheid' - 'conscious recklessness' – in contract law as one of the fault degrees in Dutch civil law Duyvensz 2011.

subjective state of mind is not recognizable for anyone except for the debtor who commits breach of contract. If he denies having the intent to commit breach, and proof of the subjective intent would be the only allowable evidence, the practical significance of this research project would be minimal.

The connection between criminal and civil law can be made by looking carefully at the facts of the case, when deciding if breach can be considered as deliberate. A deliberate act of the debtor which does not directly precede the moment of breach or can be qualified as the breach itself does not a priori mean that the breach cannot be qualified as deliberate.[184]

Bar-Gill and Ben-Shahar developed a theory according to which deliberate – in their terms 'willful' – breach is a tag attached to behaviors that reveal information about some underlying bad trait, distinct from the breach itself. What makes a trait bad is that it is associated with a pattern of undetected value-skimming conduct.[185]Essentially, it comes down to *labeling* specific situations as deliberate or not. This is a mechanism to avoid examining the state of mind of the debtor committing breach.

According to Craswell, who also sought inspiration in criminal law, breach of contract is not an action, but a state of affairs. He argues that a state of affairs is the result not of one action, but of a whole sequence of actions.[186] Therefore, it matters how the sequence of these actions is presented on the assessment of the type of breach. Craswell rightly points out, that in practically every breach a voluntary element can be detected – this is an aspect which has also been mentioned in section 3.3 on excusable breach – , whereas at the same time parties at the time of signing the contract do not intend to breach the contract. The emphasis on different events leading to the breach can influence the assessment of the type of breach. He discusses the cases of *Peevyhouse v. Garland Coal & Mining Co*. and *Jacob & Youngs, Inc v. Kent* to illustrate his point.[187] The first case was about a mining company who promised to repair the land he used for mining purposes. Once he discovered that the costs of repair were much higher than he expected, because the coal lay deeper than foreseen, he did not abide by his contractual obligations. Whereas the decision not to repair the land may be considered as deliberate, the involuntary or unexpected element is the position of the coal, which influences the cost of repair. In the second case a builder uses a wrong brand of pipe, apparently by accident as the court assumes. The building of the house is finished – it is not unsafe nor useless as a result of the use of the wrong pipes– and replacing the pipes would only be possible if the house is demolished. However, elements of deliberateness can be discovered as well: the builder could have taken more (and more costly) measures to prevent the accident in the first place and furthermore, he could have demolished the house to correct his mistake (even more costly). The presentation of the sequence of facts is relevant, because – as section 3.7 showed – some empirical research has been done on the assessment of parties themselves of specific breaches as deliberate. Breach to obtain greater profit is generally considered as deliberate, whereas breach to avoid losses is not.[188] In order to correctly label these situations, it may be helpful to refer to empirical studies which reveal

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[184] See e.g. Craswell 2009.
[185] Bar-Gill & Ben-Shahar 2009, p.1499. The authors deliver interesting economic insights on the justification of higher damages for deliberate c.q. willful breaches. This element will be explored in Chapter 4.
[186] Craswell 2009.
[187] *Peevyhouse v. Garland Coal & Mining Co*. 382 P.2d 109 (Okla. 1962); *Jacob & Youngs, Inc v. Kent* 129 N.E. 889 (N.Y. 1921).
[188] Wilkinson-Ryan & Baron 2009.

attitudes towards certain breaches and differences between types of breach. Even within these parameters, the presentation of the facts may lead to the situation that the same breach may be presented as a 'profit' or an 'avoid loss' case, depending on the way of presentation. For example, the two cases just mentioned may factually be presented as avoidance of loss – by emphasizing the costly repair of land respectively the demolishing of a new building – , but the same events can also be presented as attempts to maximize the profit – avoiding a loss in business may also create a profit for the party committing breach respectively emphasizing the lack of preliminary research to the depth of the coal or the lack of preventive measures.

Summarizing, this section introduced a criminal law approach to the notion of deliberateness. The criminal law approach is relevant because of its thorough and in-depth research on the notion of criminal intent. The relevance of criminal intent and intentional behavior from a criminal law perspective is obvious, because it may be relevant to establish whether a suspect is for example criminally liable for intentional manslaughter or death by negligent behavior. Criminal law tends to focus on the problem of deliberateness that it is generally perceived as a state of mind of the acting person. He acts deliberately, because he internally decides to act. However, the internal state of mind in itself is not externally visible. Therefore, from this perspective deliberateness would be impossible to prove. However, authors from several jurisdictions have shown that there are numerous ways to circumvent this problem in order to make the notion of deliberateness legally relevant. By normativizing and externalizing the features of specific behavior, it may be possible to label a specific, factual sequence of acts as deliberate. In fact, the provisional definition of deliberate breach of contract proves to be an example of this strategy. In this provisional definition, the act of deliberateness is connected with economic outcomes of certain behavior, which are externally visible. The notion of criminal intent is useful in helping the civil law solving the puzzle of evidence in this respect. Moreover, the notion of criminal intent may also prove to be useful when establishing borderlines of deliberateness in another way. Criminal law also recognizes the notion of conditional intent. Even if the suspect did not foresee the negative consequences of his act, but acted in such a way that he reasonably could have foreseen these consequences, but apparently did not care too much, his act may be qualified as conditionally intentional. In the context of deliberate breach of contract, this perspective may for example open doors to take into account examples of defective performance due to cost cutting in servicing machines for example, which may cause a large amount of damage to the aggrieved party. As we shall see in the next chapter, the notion of remoteness of damages may also be affected by the inclusion of conditional intent.

3.9 Conclusion

This chapter attempted to answer the following research question:

What is deliberate breach of contract?

This chapter shows that the question is slightly misleading, because it suggests that after thorough research an unequivocal answer will be provided. Although a single definition could be provided as a definitive answer, it is not a satisfactory answer. The notion of deliberate breach can be approached from various perspectives and the variety in perspectives shows that it is not useful to catch the notion in a one-sentence definition. Nevertheless, as a starting point this chapter in every section uses a provisional working definition.

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or which he would have incurred in the case of performance of the contract."

This definition may have seemed to be adequate at the beginning of this chapter; it has lost its clarity at the end of it. Various perspectives on deliberate breach differently emphasize and contextualize specific aspects of the definition.

First, section 3.3 shows that the classic borderline between excusable and non-excusable breach of contract does not represent the same borderline between deliberate and inadvertent breach. In other words, an excusable breach may be deliberate in the sense that a party knew what he was doing, but he may have had a lawful excuse to commit breach in order to prevent a substantial loss. On the other hand, a deliberate breach need not always be a non-excusable breach. At the same time, an inadvertent breach needs not be an inexcusable breach. The baker who delivers the wedding cake, but ruins it by accidentally stepping into a hole in the pavement, is liable in contract, although the breach was inadvertent. The borderline between deliberate and non-deliberate breach gets a new dimension especially if the last part of the provisional definition is focused upon. When a breach is deliberate in order to avoid a financial loss which would be large but bearable or so large that financial breakdown is inevitable is not so easy to determine. A first shade of grey in defining deliberateness is established.

Second, the definition consistently uses the term 'deliberate' in order to describe a breach which is somehow premeditated. This chapter shows that courts as well as academic contributions use a variety of terms which all describe phenomena similar to the type of breach suggested in the definition, but not without differences. Terminological chaos regarding deliberate breach is paramount, although two notions represent two manifestations of deliberate breach: willful breach and efficient breach. The core conclusions from this analysis must be that efficient breach is regarded as a positive notion in US law and economics scholarship, whereas willful breach is generally not. Efficient breach can generally be circumscribed as willful breach plus the efficiency aspect which means that the aggrieved party should be paid full compensatory damages in case of (willful) breach. Once the efficiency component is absent, the breach only remains 'willful', a type of breach which is associated with opportunistic behavior which should not be encouraged.

Third, an important conclusion is that efficient breach theory leads to serious economic debate on the notion of willful breach itself. Classic law and economics theory tends to neglect the intentional aspect of the act of breach, focusing on the efficiency of the breach. Especially Posner and Shavell advocate the development and application of deliberate breach, as long as it is efficient. Opponents of this development, such as Shiffrin, emphasize that efficiency is hard to achieve and that even if efficiency is achieved – the question still remains whether the aggrieved party would not rather have been more satisfied when the original obligation had been correctly performed.

Fourth, the borderline between deliberate breach and tort needs to be examined. The notion of deliberateness in this respect may also have a sharp edge which goes beyond a financial motive of the party committing breach. An element of maliciousness may be added to the deliberate economic consideration to commit breach of contract. Although maliciousness and economic reasoning at a first glance may be two separate manifestations of deliberateness, they may also coincide and catalyze each other, as the example of bad faith breach of contract in insurance cases shows.

Fifth, the perceptions of the parties concerned are also relevant in determining the meaning of deliberateness and, moreover, its potential legal relevance. Empirical research on contracts, in the socio-legal experiments in the US, but also in sociological experiments in Europe, shows that the element of trust in the contractual relationship is very important. Contracts and trust are not synonyms. Contracts are partly used to fill in the gaps trust cannot fill between the parties. However, a contract between parties may only be concluded once there is an element of trust between the contracting parties. Contracting parties experience a serious feeling of deceit once they discover the other party deliberately committed breach of contract in order to achieve a larger financial gain. The empirical legal studies mentioned in this section seem to cover the ground for the assumption that deliberateness of the breach in the sense of a more severe loss of mutual trust is a factor which should be taken into account in the assessment of legal remedies after the breach occurred.

Sixth, attention should be paid to the problem of proving deliberateness, a problem which is implicitly present in the provisional definition. Deliberateness suggests that a party knows what he is doing, it is generally perceived as a state of mind of the acting person. He acts deliberately, because he internally decides to act. The internal state of mind in itself is not externally visible. Therefore, from this perspective deliberateness would be impossible to prove. Nevertheless, criminal law may help to overcome this difficult issue, because criminal law has to deal with the notion of criminal intent. By normativizing and externalizing the features of specific behavior, it may be possible to label a specific, factual sequence of acts as deliberate. In fact, the provisional definition of deliberate breach of contract proves to be an example of this strategy. In this provisional definition, the act of deliberateness is connected with economic outcomes of certain behavior, which are externally visible.

Finally, this chapter has shown that the provisional working definition may be used in order to communicate in one sentence what a general interpretation of deliberate breach may imply, but it definitely falls short in providing a complete account of the range of aspects deliberateness as a notion may imply. En passant, this chapter already makes clear that the notion of deliberateness seems to be relevant, at least where deliberate breach implies efficient breach or a tort. The main shortcoming of this chapter may be that it is still slightly too general. Examples are mentioned, but not elaborated in detail. The notion of deliberateness starts to live in practice, once remedial consequences are attached to deliberate behavior in concrete cases. A start of a more detailed analysis of the concrete features of deliberate breach of contract is only possible after discussing the remedial consequences. The next chapter reveals on a concrete level the diversity in solutions in dealing with deliberateness, sometimes explicitly, but in most cases in a more implicit way.

4 Deliberate breach of contract and its influence in (legal) practice on core remedies in contract: an exploration

4.1 Introduction

The research question this chapter attempts to answer is the following:

Does deliberateness of the breach of contract play a role in existing contract law, more specifically in contract law related legal provisions – 'law in the books' – or in case law –' law in action' – , in the sense that deliberateness as a relevant factor influences the choice or application of remedies in contract and if so, how?

This chapter continues to build a picture of the notion of deliberate breach by searching *concrete* examples in case law. Is the notion of deliberate breach recognized by courts and lawmakers, and if so, how? In this sense, this chapter continues the quest started in Chapter 3. Furthermore, this chapter investigates the role of deliberate breach in the application of contract remedies. The answer to the descriptive research question in this chapter is a relevant and necessary step in order to start building a credible and reliable analytical framework which is necessary to answer the normative research questions. It is relevant and necessary, because it is pointless to criticize court decision making on sanctioning deliberate breach of contract, when the current status of deliberateness as a possible relevant influential factor on remedies in contract in existing case law is not addressed.

The research question of this chapter has a strong exploratory character. The term exploration suggests that the reader will be faced with choices made by the author. Not every possible case of deliberate breach will be mentioned – that would be neither useful nor desirable -, but the choices made should be justified as well as the structure of this chapter.

First, this chapter opts for a structure in types of core remedies in contract – i.e. focusing on enforced performance and several manifestations of damages. With regard to all the chosen remedies, case law illustrations from various jurisdictions will be presented in order to detect whether deliberateness is a relevant factor in applying the analyzed remedy.

Second, it is important to emphasize that this chapter opts for an illustrative approach and does not strive for completeness. After this chapter, the reader should have a more concrete idea of the current relevance of deliberateness on application of remedies in contract in several major jurisdictions. A *complete* picture of cases in all analyzed jurisdictions where deliberateness plays a role is not an objective of this chapter, because it is impossible in practice and not relevant either, taking into account the research objective of this thesis as a whole. Furthermore, it is impossible, because the notion of deliberateness is not an established legal concept, which may differ between jurisdictions, but also within jurisdictions – i.e. courts of the same jurisdictions may differ on the idea of what deliberate breach is. Therefore, the possible influence of deliberateness on applying remedies in contract may vary accordingly and a clear complete picture is therefore not possible to provide. The aim of this thesis is to create an analytical framework on which basis deliberateness of the breach may be implemented as a factor of relevance in applying remedies in concrete cases in a more coherent way than it is currently done. In order to create such a framework, a basic idea of the

current influence of deliberateness on remedies in concrete breach of contract case law is relevant and necessary, but a complete overview is not essential to create this framework.

Third, this chapter deals with three core variables, i.e. the notion of deliberateness (1), the type of remedy on which deliberateness may have a certain influence (2) and the specific jurisdiction where this connection is found (3). One of the main difficulties is that the first two variables do not only *predictably* vary – i.e. every section of this chapter discusses deliberateness as a possible relevant factor for another remedy and every subsection deals with an example from another jurisdiction – but they are also *intrinsically* vague. Deliberate breach of contract, as explained previously, is not a term always used in the same way in legal provisions, by courts or in academic contributions. The analyzed remedies have their own specific, jurisdiction-related meaning. Even without taking into account the comparative difference, the remedies lack intrinsic clarity. The specific meaning of 'expectation damages' for example is not always clear in advance, because it can be questionable which types of damages are part of this definition and which are not. The uncertainty embedded in this chapter emphasizes the need for a clear structure on the one hand and a modest objective of this chapter on the other hand. This chapter analyzes examples of deliberate breach and court remedial solutions on situations of deliberate breach and it does so by a cherry-picking approach. This approach is justified as explained previously, but it is necessary to mention that any answer to the research question will provide only a raw sketch of the way deliberateness is embedded in the current law of remedies in contract.

Fourth, the concrete structure of this relatively extensive chapter is presented as a roadmap in order to help the reader to find his way. Section 4.2 explores the relation between deliberate breach and the remedy of enforced performance. The most relevant specific question is whether the element of deliberateness influences the lawmaker or the court in deciding on the availability of enforced performance for the creditor. Section 4.3 explores the effect of deliberateness on contractual arrangements regarding breach of contract. This section focuses on the connection between deliberateness of the breach and the validity of penalty clauses and on the validity of exclusion or limitation clauses. Deliberateness of the breach may also influence the court to mitigate the consequence of invoking the specific clause. A specific common law versus continental law issue is that deliberateness may influence the choice of the court of labeling a clause as liquidated damages clause or as a penalty clause. The effect of being able to invoke the clause is enforcement of the clause; therefore this section is situated near the section on the remedy of enforced performance. Section 4.4 explores the influence of deliberateness on the 'classic' remedy of expectation damages. Section 4.5 and 4.6 respectively explore the influence of deliberateness on the availability and extent of damages for non-pecuniary losses or punitive damages. Section 4.7 explores the relation between deliberateness and the remedy of account of profits. Section 4.8 explores some examples where deliberateness may influence the attitude of the lawmaker or the court towards the remedy of termination. Deliberateness may also play a role in the decision whether partial termination or price reduction may be available. Section 4.9 explores the relation between deliberateness of the breach and the possibility to recover costs for legal representation. Section 4.10, as a second step outside the area of standard remedies next to the section on penalty clauses, briefly explores the relationship between deliberateness and the application of exclusion clauses. Finally, section 4.11 ends with a conclusion, which summarily recollects the main findings of this chapter and answers the core question of this chapter.

4.2 Deliberateness and enforced performance

4.2.1 Introductory remarks

This section presents examples in case law where deliberateness of the committed breach influences court decisions to award the claim of performance. In common law jurisdictions, the courts will generally have to decide whether deliberateness of the breach influences the decision to deem an award of expectation damages as 'not adequate', because 'adequacy of damages' is the general requirement for allowing the aggrieved party to the remedy of specific performance. In civil law jurisdictions, it is generally more difficult to deny the aggrieved party a claim to performance. However, considerations of practice may persuade parties not to claim performance at all, because damages are easier to claim. Nevertheless, in case of a deliberate breach, in civil law jurisdictions the court may under circumstances lower its thresholds to honor the claim of enforced performance.

Surprisingly, deliberateness may influence a decision on awarding specific performance in a completely other way as well, namely in the situation where the party committing deliberate breach *himself* claims specific performance. This situation occurs when the other party also commits breach of contract. The specific question arises, whether the deliberateness of the breach influences the availability of claiming specific performance as a reaction to breach of contract of the other party. Especially in US law and in English law, some interesting examples with direct references to deliberateness are analyzed. Again, in civil law jurisdictions it is more difficult to find some concrete examples in this area.

4.2.2 English law Ia: Raphael v Thames Valley Railway Company

English law does not offer many direct clues which link deliberateness of the breach to an eventual easier access to the remedy of specific performance. Nevertheless, some clues for the existence of such a connection may be found, at least implicitly. Two examples, an old one and a new one, reveal that deliberateness of the breach may influence the decision to award specific performance or not.

In the 19th century case *Raphael v Thames Valley Railway Company*[189] a railway company negotiated with a landowner to build a railway on his estate. The railway company promised to build the railway in a particular manner and the landowner in turn promised not to vote against the bill which allowed the construction of the railway company. The bill was filed pending the works and the railway company altered the course of the line during building. At the time of proceedings, the railway was already open for the public, but the landowner claimed specific performance of his agreement with the railway company and asked the court to order the company to rebuild the railway according to the agreement. The railway company argued that the public would be unnecessarily disadvantaged if the railway had to be rebuilt. The court in first instance allowed this defense and denied the order for specific performance with a reference to possible danger and inconvenience to the public. In appeal, the court repeats the argument of the court of first instance, where it says that there is another class of persons whose interests should be taken into account – i.e. the public – and it argued that the public could not be subject to such a disadvantage because of an eventual order for specific performance in a private contract between an landowner and a railway company. The Court of

[189] *Raphael v Thames Valley Railway Company* (1866-67) L.R. 2 Ch. App. 147.

Appeal, represented by Lord Chelmsford, denied this argument and started its argument with the following quote:

"Whether in a case where there has been a determined and willful breach of an agreement by a railway company, the element of public convenience ought to be introduced to prevent a decree for specific performance, is at least questionable; but I can hardly think it ought to have been permitted to influence the judgment of the Master of the Rolls in the present case."

Apparently, Lord Chelmsford considers the factor of inconvenience for the public as a relevant element in deciding on the award for specific performance as exceptional, but in a case of deliberate – willful – breach he definitely denies the possible relevance of public inconvenience. Lord Chelmsford subsequently shows that damages would not be an adequate remedy under these circumstances. Without directly referring to the willfulness of the breach, but indirectly hinting on its presence, he again summarizes what leads him to award the claim of specific performance:

"The company, however, persevered in deviating from the agreed line, so as, in the opinion of the Plaintiffs' witnesses, materially to damage the estate, and to interfere with the safety of the access to it, and then, having obtained permission to continue and complete their works, which have not been disputed to be a departure for the agreement, they bring forward the public convenience as a ground why their undertaking should not be enforced, nor a specific performance of their agreement decreed."

For a second time, Lord Chelmsford, uses the willfulness of the breach – or at least the calculating decision of the railway company to deviate from the agreement – to support the decision of the Court of Appeal and to award the decree of specific performance.

The secondary position of specific performance in English is illustrated by this case. The court needs all arguments to award specific performance, especially if it needs to turn down an earlier decision on the same case. Although this case is not a recent one – even old-fashioned with an eye on the facts – the same struggle with awarding specific performance is visible in more recent cases.

4.2.3 English law Ib: Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.

The element of deliberateness is also visible in the landmark case on specific performance *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.*[190]

The case is on the question whether a company can be forced to run a loss making business, in this case a supermarket, because it commits breach of a contractual obligation as a tenant of a building which he agreed with the owner to a rent for a long period of time. The facts of this case are based on the statement of facts of Leggatt LJ in the Court of Appeal decision. The property in question comprises 30% of the total letting area of the Hillsborough Shopping Centre. It is let to Argyll for use as one of their Safeway supermarkets. It is the anchor unit in the shopping centre and it plays a key role. The lease is for a term of 35 years from 4 August 1979 with periodic rent reviews. The contract contains the following obligation:

[190] *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.* [1996] Ch. 286.

"To keep the demised premises open for retail trade during the usual hours of business in the locality and the display windows properly dressed in a suitable manner, in keeping with a good class parade of shops ..."

Until May 1995 the store was open for trading. But in its last trading year it made a loss of £70,300, so Argyll decided to close the supermarket. That decision was made well knowing of the 'keep open' covenant. When the landlords learned of the intention to close, their regional surveyor wrote Argyll a letter dated 8 May 1995, in which he said that he did not wish to pursue legal remedies, but asked Argyll to keep the supermarket open for trading until an assignee had been found. He offered the prospect of a temporary rent concession and asked for an immediate response, but the response never came. Instead, on 19 May 1995, the shop was stripped out. It would cost £1m to reinstate. The landlords referred to their insurance company and legal proceedings followed.

In the Court of Appeal decision, the Lord Justices Leggatt and Roch both recognize that in the past an order for specific performance in cases like these had been seldomly awarded. The problem is, as being recognized by both justices, that calculating defendants can breach their contractual obligations, because they know they will not be ordered to actually perform their obligations. A claim for damages is the only thing the victim of the deliberate breach has. However, both justices qualify the conduct of the supermarket chain as a deliberate and knowing breach. Leggatt LJ qualifies the facts as follows:

"Until May 1995 the store was open for trading. But in its last trading year it made a loss of £70,300. So Argyll decided to sell it together with 26 of their other supermarkets. That decision was made well knowing of the "keep open" covenant."[191]

Leggatt LJ identifies the problems of a claim for damages and he gives full credit to the motive of the breaching party as a factor to be taken into account when deciding an order for specific performance should be available:

"The plaintiffs (*the insurance company as the owner of the premises, MvK*) would have very considerable difficulty in trying to prove their loss. An award of damages would be unlikely to compensate them fully; and the losses of the other tenants of the shopping centre would be irrecoverable, except in so far as they might be mitigated by reduced rents. Argyll have acted with gross commercial cynicism, preferring to resist a claim for damages rather than keep an unambiguous promise. This is not a court of morals, but there is no reason why its willingness to grant specific performance should not be affected by a sense of fair dealing."[192]

Roch LJ concurs with his colleague. He is even less amused about the conduct of the supermarket chain:

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[191] *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.* [1996] Ch. 286, 291.

[192] *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.* [1996] Ch. 286, 295. Leggatt LJ heavily relies on *Braddon Towers Ltd v International Stores Ltd* [1987] 1 E.G.L.R. 209 and in a certain way on *Greene v West Cheshire Rly Co* (1871) LR 13 Eq 44. In both cases the attitude of the breaching party is cynical in the sense that he relies on a law, that normally only offers a claim for damages for the victim of the breach. These damages are extremely difficult to assess, which makes the decision to walk away from the contractual obligation to run a certain business definitely easier.

"One matter that has been quite apparent in this appeal is that the defendants have behaved very badly."

The question is whether the way Argyll handled his contract affects the judgment. Is motive relevant for ordering specific performance or not, as Leggatt LJ affirmed in his opinion?

In first instance, Roch LJ seems to cover the same ground as his colleague, but he deviates and reaches the same conclusion – specific performance should be ordered – but he does not attribute much value to the element of deliberateness of the breach. He rather chooses a more classic approach:

"The purpose of the civil law is not to punish, save in certain limited and narrowly defined circumstances, but to compensate. The basic issue in this case, in my opinion, is whether damages are an adequate remedy. If they are, then no order for specific performance could be made. (…)"[193]

In addition, he concludes that damages are not an adequate remedy in this case and he furthermore denies the idea that specific performance would not be possible and desirable because performance of the order could not be supervised or would be too costly. In his decision he refers to the conduct of the supermarket chain, albeit not the act of breaching itself, but to the rather clumsy way the supermarket chain behaved after the breach by not replying to letters sent by the owner of the building.

The reason to pay attention to the opinion of Millett LJ is that his minority opinion seems to be the basis of a House of Lords decision which quashes the decisions of Leggatt and Roch LLJ. It is also clear he relies on the judgment of the judge who decided the case in first instance, leaving the owner of the building with a damages claim and not awarding the specific performance claim:

"The judge carefully reviewed the facts and concluded that there was nothing which required him to treat the case as exceptional. He thought that it was one in which the ordinary practice should be followed. He acknowledged that the defendants had closed the store in deliberate and conscious breach of its obligation, but it did so openly and in the light of the practice of the court not to restrain breach of a covenant of the kind in question but to award damages instead. That, he considered, was a further reason for him not to depart from ordinary practice."[194]

The fact that Argyll is openly taking advantage of the legal situation at the cost of fulfilling his contractual obligation and at the expense of his contractual counterparty is considered as *positive* by Millett LJ. Millett LJ builds the foundation for Lord Hoffmann to downplay the role of the deliberateness of the breach in assessing the claim for specific performance:

"In my opinion there is a fundamental objection to such an order (*to compel Argyll to run a business, MvK*). If granted for any length of time or for an indefinite period it is oppressive. To compel a defendant for an indefinite period to carry on a business which he considers is not viable, or which for his own commercial reasons he has decided to close down, is to expose him to potentially large

[193] *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.* [1996] Ch. 286, 295.
[194] *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.* [1996] Ch. 286, 304.

unquantifiable and unlimited losses which may be out of all proportion to the loss which his breach of contract has caused to the plaintiff."[195]

The interesting element of this part of the opinion of Millett LJ is that the assessment of the breaching party of fulfilling his part of the contract as 'not viable' seems to be leading for his own decision that compelling him to do so is 'oppressive' and might expose him to 'large unquantifiable and unlimited losses'. However, the court does not know what happens if the order is granted. It is clear that the owner of the building is losing grip on the situation. He might be left with a claim for damages, although he cannot claim all damages he suffered, let alone that other parties concerned can recover any damages – such as the other stores in the shopping mall – because they do not have any contractual relationship with the supermarket chain.

Lord Hoffmann, who wrote the opinion of the House of Lords, avoided all questions about the meaning of the binding force of the contract and a deliberate breach of the contract. The House of Lords unanimously refused to order Argyll specifically to run a loss- making supermarket in a shopping mall, although Argyll was obliged to run the supermarket according to the contract.[196] All in all, the House of Lords overruled the decision of the Court of Appeal and denied the order for specific performance. Lord Hoffmann approached the case quite factually and focused completely on the general question under which circumstances specific performance might be awarded by the court instead of damages. Where all justices of the Court of Appeal at least mentioned the difficulty of claiming full compensatory damages if the order of specific performance had not been granted, Lord Hoffmann largely ignores this point by saying there is a 'plausible alternative' available in the form of damages.

The House of Lords reversed the decision of the Court of Appeal and eventually denied the order for specific performance. For the purposes of this chapter, the decision of the Court of Appeal deserved special attention, because in this decision several Lords Justices mentioned the link between deliberateness and the order for specific performance. The House of Lords in turn – and somewhat unfortunately – approached the case on a more practical level without paying too much attention to the factor of deliberateness.[197] More specifically, Lord Hoffmann explicitly toned down the element of the (mis)conduct of Argyll by calling the label attached by the Court of Appeal an 'exaggeration'. The analysis of the reversed decision of the Court of Appeal is therefore not an indication of the state of the law, but it nevertheless indicates that the English judiciary sometimes realizes that deliberateness plays a certain role in the application of remedies in contract.

The *Railway* case is a good example of a case where deliberateness indeed seems to have pushed the Court of Appeal to award specific performance. In the *Argyll* case, the Court of Appeal decision definitely incorporates the element of deliberateness, but the overruling House of Lords decision tones down the relevance of deliberateness, which makes the real influence of deliberateness on decisions of specific performance in English law in this respect not all too convincing.

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[195] Note that Millett LJ refers to the American case *Union Pacific Rly Co v Chicago, Rock Island and Pacific Rly Co* (1896) 163 US 564 at 600 and he quotes Fuller CJ who wrote that "it is an intolerable travesty of justice that a party should be allowed to break his contract at pleasure by electing to pay damages for the breach."

[196] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

[197] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 18.

4.2.4 *English law IIa: Rankin v Lay, deliberate breach and relief against forfeiture?*

The factor of deliberateness may also be connected to the remedy of specific performance in a completely different way. In English law, cases can be found where the party claiming specific performance is confronted with a defense that specific performance should not be granted, because the party claiming specific performance committed deliberate breach. In other words, the party claiming specific performance forfeited on the contract and the other party seeks relief against forfeiture. Two examples clarify the exact position of deliberateness in this situation, one older example and one recent case.

Rankin as a lessee issued a claim for specific performance of a farming lease. Lay, the lessor, had started proceedings to eject Rankin from the farm as he had allegedly not performed his obligations according to the conditions of the lease. Rankin had promised to farm the land properly and according to Lay he failed to do so. That is why Lay attempted to forfeit her obligations on the covenant and subsequently terminate the lease and eject Rankin from the farm. Rankin argued he had performed his obligations correctly. The Lord Chancellor had to decide whether the decree for specific performance should be granted and why Rankin should be relieved from forfeiture. His main argument is worth quoting, because it indicates the relation between deliberateness and specific performance:

"I am not satisfied that there has been a breach of the covenants which would have worked a forfeiture of the lease, and would have entitled the landlord to maintain an action for a breach of the covenants, and so, as upon the forfeiture to recover possession of the premises. The inclination of my mind at present is on the other side. It is not every breach that will be sufficient; it must be a serious, willful, deliberate breach, which would work a forfeiture, and would render the lease void."[198]

He awards the decree for specific performance, because he concludes that in this case Rankin had not committed a deliberate and willful breach, partly because there is contradictory evidence on the actions of Rankin. The claim for specific performance could only have been denied in the case Rankin himself committed a deliberate breach of contract.

The clear connection between deliberateness and specific performance in this case is visible, but it remains to be seen if such a connection can be found in a more recent case. At least the connection between relief from forfeiture and deliberateness can be found in the following recent case *Celestial Aviation v Paramount Airways*.[199]

4.2.5 *English law IIb: Celestial Aviation v Paramount Airways*

The case is about Paramount Airways who leases three airplanes from Celestial Aviation. Once the airplanes are delivered, Paramount repeatedly fails to pay the rent according to the lease contract. Celestial sends several default notices and urges Paramount to pay according to the contract, but Paramount fails to do so. As a consequence, Celestial wants to terminate the contract – i.e. forfeits on the contract – Paramount claims relief from forfeiture.

[198] *Rankin v Lay* 1860 2 De Gex, Fisher & Jones 65, 73.
[199] *Celestial Aviation v Paramount Airways* [2010] 1 CLC 165

First, the court of first instance decides on the matter of jurisdiction – i.e. whether this contract is a type of contract where relief from forfeiture may be asked. In this case it becomes evident, that this particular equitable defense is only allowed in a limited type of cases, the most important of which is whether the contract involves the transfer of proprietary or possessory rights.[200] The court in this case finds that there is no jurisdiction to grant relief anyway, but fortunately the court also provides a decision in the case it had made a wrong decision on this point.

More importantly, the court elaborates in a detailed way on the substantive requirements to allow the relief from forfeiture and soon comments on the requirement of the breach being deliberate. The court, personified in Hamblen J, starts with a quote from the House of Lords case *Shiloh Spinners Ltd v Harding*[201], specifically the from the speech from Lord Wilberforce. Lord Wilberforce stated that on the question whether relief against forfeiture should be granted involves:

"a consideration of the conduct of the applicant for relief, in particular whether his default was willful, of the gravity of the breaches and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."[202]

Hamblen J heavily relies on this case, but the choice for this simple High Court case is justified by the fact that it is recent and a very good example of an elaborate motivation on the aspect of deliberateness. He uses this criterion and applies it to the current case. He analyzes whether the conduct of Paramount could be labeled as willful. It is also interesting to notice that willfulness and seriousness or gravity of the breach are mentioned in the same sentence, as in the *Rankin v Lay* case. Although seriousness of the breach is not the same as willfulness of the conduct leading to breach, they both seem to stay close in this line of cases.

Hamblen J motivates the way he applies the facts of the case on the requirement of willfulness as formulated in the Shiloh Spinners case by summing up the amounts Paramount had to pay for the aircraft, followed by the defaults in payment – Hamblen J labels the defaults as "persistent" – and he also mentions all the notices sent by Celestial to remind Paramount being in default. He states:

"This is not therefore a case where the default in question arose by surprise, accident or ignorance. Paramount knew what its obligations were and knew that it was going to default on those obligations. (…) It is clear that willful breaches will only exceptionally be relieved against."[203]

The last sentence is also based on the opinion of Lord Wilberforce, who is quoted again and this quote is also worth mentioning here:

"Established and, in my opinion, sound principle requires that willful breaches should not, or at least should only in exceptional cases, be relieved against, if only for the reason that the assignor should not be compelled to remain in a relation of neighborhood with a person in deliberate breach of his obligations."[204]

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[200] *The Scraptrade* [1983] 2 AC 694
[201] *Shiloh Spinners Ltd v Harding*[1973] AC 691
[202] *Shiloh Spinners Ltd v Harding*[1973] AC 691, 723
[203] *Celestial Aviation v Paramount Airways* [2010] 1 CLC 165, 192
[204] *Shiloh Spinners Ltd v Harding*[1973] AC 691, 725

Hamblen J concludes that relief against forfeiture should not be granted in this case. Effectively, in my opinion, this means that Celestial may lawfully terminate the contract and that due to the deliberateness of the breach on the side of Paramount, the latter is not able to claim specific performance from Celestial in the sense that Celestial still needs to keep the airplanes at the disposal of Paramount.

This case is another explicit illustration of the role of deliberateness. Contrary to the previous case, this time the court concludes that there is a deliberate breach of contract which in turn blocks the possibility of relief from forfeiture. Deliberateness and specific performance in English law are explicitly connected in two different, specific ways. Deliberateness plays a role in English law in the sphere of the remedy of specific performance. The extent of the influence varies. Deliberateness does not seem to influence the court in the sense that the court grants specific performance because of the deliberateness, although the factor of deliberateness is sometimes mentioned. In the sphere of defenses against invoking relief against forfeiture, deliberateness has a clear and explicit role in awarding or denying relief.

4.2.6 US law: two case law examples indicating an implicit influence of deliberateness

A direct reference to the relevance of deliberateness in combination with the award of the remedy of specific performance is not easy to find in US law. In a more indirect way, a connection can be established. US law seems to have developed two instruments in order to anticipate on a possible deliberate breach situation. These instruments show the way US law values performance of the contractual obligations. These instruments are ‘substantial performance’ on the one hand and ‘material breach of contract’ on the other hand. In applying both legal notions the element of deliberateness may play a relevant role. Both notions also play a role if the court has to decide whether a party may terminate the contract, so it is inevitable to mention the remedy of termination in this section as well. Section 4.9 provides a further elaboration on the connection between deliberateness and termination.

According to the case of *Hardin, Rodrigueze & Boivin Anesthesiologists Ltd v Paradigm Insurance Company*, the doctrine of substantial performance provides that when a party performs the essential, material parts of a contract in good faith, the other party will be required to pay or perform even though there has not been strict compliance with the terms of the contract.[205] The doctrine of substantial performance usually applies to building contracts, where it is regular that the contractor may not be able to comply with all the specific terms of the contract. It is possible to amend this doctrine of substantial performance by upgrading specific terms to a *condition*. In such cases, performance can only be substantial if the specific condition is also fulfilled. A way to exclude the working of this doctrine is to incorporate a full performance clause as a condition into the contract. In that situation, only full performance is substantial.

In the aforementioned case, a group of anesthesiologists attempted to buy medical insurance in a time (the late 1980’s) when this was not an easy task. Hardin & Co negotiated with Paradigm, but insisted that they would only conclude a contract – buy the policy – when Paradigm provided them with the policy and a financial statement which confirmed the financial stability of the company. Paradigm failed to do so, because it did not effectively run an insurance company. They sent Hardin a

[205] *Hardin, Rodrigueze & Boivin Anesthesiologists Ltd v. Paradigm Insurance Company* 962 F. 2d 628.

provisional policy (a 'binder'), but never sent a policy. Hardin paid one installment and then stopped paying demanding termination of the contract. The court concluded that Paradigm may have said that it would provide coverage, but actually never did.

Against this background, it comes as no surprise that the court denied the validity of the argument of substantial performance on the side of Paradigm which would block termination of the contract, because the court found that that there was no contract. The court explicitly states, citing the case of *Jacob & Youngs's Inc v. Kent* that the doctrine of substantial performance does not extend to cases where one of the parties has always insisted upon strict compliance with its conditions and has never waived them.[206] The counterparty is not free to adapt the contract in order to create space for application of the doctrine of substantial performance in such a case.

The relevance of this case and its elaboration on the doctrine of substantial performance for the position of deliberate breach is that deviation from specifications of the contract may be allowed, even if they are willful. However, the doctrine cannot be used in order to avoid liability for deliberate non-performance of primary contractual obligations. In this case, Paradigm did not perform at all, so substantial performance cannot be claimed by Paradigm.

The doctrine of material breach partly represents the mirror of the doctrine of substantial performance. According to this doctrine, a party is only able to terminate the contract, if the breach is "material". Material breach may also be a relevant legal nuance in a more complicated matter relating to the remedy of specific performance, namely where both parties did at a certain moment not abide by their contractual obligations. The party who claims specific performance – or requesting an order for specific performance from the court, which is more adequate – of a restrictive covenant which is part of the contract, may only successfully do so, if this party did not commit a material breach of this covenant himself. In the case *Polk Bros. Inc. v. Forest City Enterprises, Inc*., parties concluded a lease contract including a restrictive covenant which constituted a horizontal restraint on the sale of major products. The lessor sought an injunction which should compel the lessee to abide by the covenant by not selling specific goods listed in the covenant. The court logically denied the claim of the lessor, because the restrictive covenant itself constituted a violation of a specific antitrust act in Illinois. Moreover, the court denied the claim of the lessor, because the lessor himself had violated the covenant by deliberately selling products on the (prohibited) covenant for several years. Had the covenant be valid, the lessor would have had no case against the lessee, because his own material and deliberate breach blocks the possibility to claim specific performance.[207]

4.2.7 French law: the Pool case

French law, as a representative of civil law jurisdictions, in general recognizes a right to enforced performance. The connection between deliberate breach and the exercise of the right to performance is in advance more difficult to establish, because a party may have a right to performance as a result of the contract and at least in case of practically any form of breach of contract. Nevertheless, the following example illustrates potential relevance of deliberateness for exercising the right to performance.

[206] *Jacob & Youngs's Inc v. Kent* 230 N.Y. 239, 129 N.E. 889 (N.Y. 1921).
[207] *Polk Bros. Inc. v. Forest City Enterprises, Inc.* 1985-1, No.83 C 895 1985-1 Trade Cas. (CCH) P66, 450.

This example shows remarkable similarities with an English case, dealt with in one of the subsequent sections. The constructor in this case builds a swimming pool with three steps. In the specifications, the assignor specifically indicated an entrance consisting of *four* steps. The assignor claims rebuilding the pool according to the specifications – i.e. he claims performance of the contract. The constructor refuses to adapt the pool and argues that the assignor cannot prove that the entrance with three steps is less convenient or unsafer than an entrance with four steps. Whereas the Court of Appeal follows the constructor in his defense and denies the claim of enforced performance, the Cour de Cassation rejects the decision of the Court of Appeal. The Cour de Cassation argues that the assignor simply does not have to prove any disadvantage as a consequence of the breach of contract. Based on art. 1134 Cc the assignor has a right to enforce the contractual obligation independent of the consequences of the breach of contract.[208] This decision is confirmed by a more recent decision by the Cour de Cassation in 2005.[209] In that specific case, a building was constructed several centimeters too low. This deviation from contractual specifications did not cause any noticeably disadvantageous consequences for the assignor, but he nevertheless could enforce the contract. This decision has been subject to criticism, because it is argued that this decision may be somewhat too harsh on the debtor and that a cost-benefit analysis is useful.[210]

It should be noted that motive in these cases is not mentioned as a relevant circumstance, so it is very difficult to draw any conclusion on the relevance of motive for remedies. Nevertheless, French law without doubt offers the creditor in this type of cases a strong position. In general, if the right to performance is strong, motive of the breaching party is less relevant. In the end, the creditor has always means to have the original contractual obligation performed. If he has a strong right to performance, which French law apparently provides, he will be less concerned that breach of contract may occur deliberately, whereas the debtor may think twice before considering breach of contract as a lucrative option.

4.2.8 German law: the Window case

In a German case, the creditor concluded a contract for the construction of very specific windows, which provided maximal insulation.[211] The loss of heat was contractually specified. When the windows were installed, the loss of heat proved to be larger than contractually agreed. In other words, the debtor performed defectively. The creditor claimed correct performance which meant complete replacement of all windows. The debtor refused to do so, because complete replacement meant doing the same job again without additional payment. The court paid much attention to the difference between 'Nachbesserung' - reparation – and 'Neuherstellung' – replacement. In the end, the court decided that replacement is the ultimate manifestation of reparation, because both actions should lead to correct performance of the contractual obligation. In cases like these, where contractual specifications in detail provide the core of the contract, the creditor has every right to

[208] Cass. Civ. 17 november 1984. Not reported. Compare Ch. Mixte, 26 May 2006, above p. 370, n 46 which is interpreted as not requiring the creditor to prove that he has suffered any loss before being able to enforce performance. This case is mentioned and analyzed in Beale 2010, p. 856.
[209] Cass.civ. III, 11 mai 2005, pourvoi no. 03-21136, RTDciv 2005, 596 obs J. Mestre et B. Fages, RDC, 2006, 323, obs D. Mazeaud. See for an English recapture Beale 2010, p. 857.
[210] Cass. Civ. 17 november 1984; Beale 2010, p. 857.
[211] BGH 10 October 1985, BGHZ 96, 111.

demand what he is entitled to. He may claim full replacement, because this is the only way the obligation can be correctly performed. Partial reparation does not suffice.[212]

Again, the strong right to performance in German law relieves the court from mentioning potential motive of the party committing breach as an immediate reason to award the right, because the aggrieved party may easily have access to this right.

4.2.9 Dutch law I: limited relevance of deliberateness for a claim for enforced performance

The right to performance is a strong right in Dutch law. It is, as explained in Chapter 2, the primary right of the contracting parties resulting from the contract. In other words, the right is not 'just' a remedy as a reaction on a breach of contract, it is a contractual right. The initial strength of the right to enforced performance is an important element to take into account, once the question is asked whether deliberateness of a breach of contract may influence the decision of the court to decide whether enforced performance may be awarded. Because parties in general always have a right to performance, *because* they concluded a contract, deliberateness of a breach of contract does not seem to be a too relevant element to influence the availability of this remedy. Taking into account the starting point, two considerations may make a certain influence possible. First, a court will only enforce performance of the contract, once parties claim performance of the contract. The amount of case law on exercising the right to performance is not overwhelming, because parties rather claim damages instead of performance, once their dispute has reached the stage of legal proceedings. Furthermore, the right to enforced performance, though strong, is not absolute. Exceptions exist, as Chapter 2 has shown. In general, the court only confirms the right of a party to enforce a contract, but in practice the Hoge Raad created a possibility for the court to decide whether a party may exercise his right to performance. In the landmark case *Multi Vastgoed/Nethou* the Hoge Raad confirms the strong right to performance of the creditor after breach of contract, but also states that the creditor is not always free to choose between performance and damages after breach of contract. The following examples show that court may take deliberateness of the breach into account while assessing a claim for performance.

4.2.10 Dutch law II: NSI Kantoren BV / Ernst & Young Accountants

Many cases which incorporate questions about the breach of duty to run a business in a rented premises are somewhat 'hidden', because the law concerning lease and rent is a specialization of the general contract law[213]. Althugh the core problem is exactly the same as in the *Argyll* case, the dynamics in this type of contract are different. At least in general, the owner of the building can in most cases rely on the contract and he has the right to claim performance, even though this is

[212] In his dissertation Haas shows that German law recognizes a general principle of proportionality when the right to performance is exercised, so although the right is strong, it is not absolute. See inter alia Haas 2009, p. 159.

[213] A point beside the scope of this thesis is that a distinction should be made between a *contractual* duty to run a business and an eventual duty *in law* to keep a premises open. Under Dutch law, the lessee is expected to behave as a good lessee according to art. 7:213 Cc. The question is then if the duty to run a business in a leased premises can be expected to be an implied term following from this more general formulated duty. This issue is even more relevant, if the party who can be considered as the lessee has leased the premises himself to subcontractors. If the sublease contract differs from the main lease contract in the respect that the sublease contract does not contain a direct duty to run a business, can the sublessor force the subcontractor to run a (loss-making) business in the leased premises?

disadvantageous for the lessee. The case *NSI Kantoren BV / Ernst & Young Accountants* provides a good illustration.[214]

Since 2002, Ernst & Young has leased part of premises owned by NSI. In the lease contract Ernst & Young promised to stay in the building for a period of 10 years. In 2007 Ernst & Young announces to NSI that they are going to leave the building. They also promise to seek a new tenant. According to the contract, they have the right to sublet the premises. NSI is not impressed by this announcement and reminds Ernst & Young of their contractual duty. Furthermore, NSI is not impressed by the proposed subletting party, because the sublessee apparently did not have any employees. NSI fears to be left with a premises decreasing in value. NSI claims performance in advance, because Ernst & Young would not be leaving until 2009 and NSI also attempts to obtain an assurance from the court that it does not have to accept the proposed new tenants.

In a summary judgment, the court partially allows the claim of NSI. The court states that NSI has a justified interest in being assured that the premises continue to be used. Even the likelihood that the premises will be left in the near future without the prospect of a future tenant may decrease the value of the premises. Because Ernst & Young at the moment of the decision of the court is still present in the premises, the possibility of future losses is the trigger to make this case relevant. However, according to the contract NSI cannot make any specific demands as far as the capacities of the future, subletting tenant are concerned. Ernst & Young may decide to whom they sublet the premises, but they are responsible for the way their 'candidate' for subletting will use the premises. Therefore, the court already decides that Ernst & Young has to perform the obligations according to the contract and awards a provisional penalty payment if Ernst & Young does not fulfill its contractual obligations.

It is clear that the term 'deliberateness' is not mentioned in this decision. The question is why this case is in any sense relevant for an answer to the question in this section. The assumption in this case is that the decision of Ernst & Young to leave the premises is a conscious and deliberate one. Whether this decision amounts to a breach of contract is somewhat uncertain, because Ernst & Young is allowed to replace the vacancy with a sublessee. If the breach of contract occurs, it is certainly deliberate. For the purpose of illustration, this example suffices. The court anticipates on a possible breach of contract by reaffirming the right of NSI to performance and secures the right with a penalty payment. This example shows that Dutch law enforces the contract at least as a starting point. Deliberateness of the breach is indirectly relevant, because of two reasons. First, within this type of contracts and cases in Dutch law, the decision of the court to award the claim for performance depends on the circumstances. If economic circumstances force one of the parties to move out of a building and the same party sincerely attempts to perform its obligations according to

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The Court of Appeal Leeuwarden has decided negatively on this issue. (Hof Leeuwarden 14 July 2004, NJ 2006, 182 (Laurus/Schuitema); de Supreme Court has denied the appeal of the sublessor, because the legal issues were not relevant in the interest of legal uniformity or legal development: HR 23 December 2005, RvdW 2006, 27 (Schuitema/Laurus).) The main argument for this decision in this particular case was that the sublessor (main lessee) was responsible to look for a new sublessee to run a business in the premises. The sublessee had looked for and found a new sublessee, but the main lessor did not accept him. The sublessee should not be responsible for this attitude.

[214] Rb Zutphen 1 april 2008, *LJN* BC8394 (NSI Kantoren BV / Ernst & Young Accountants).

the contract, it is questionable whether the court will award the claim for performance.[215] The decision of one of the parties to leave the rented premises deliberately without a compelling financial reason is certainly a circumstance to take into account. In that sense, deliberateness may influence the decision of the court to honor the claim to enforced performance.

4.2.11 Concluding remarks

In general, the influence of deliberateness of the breach on the availability or award of the right or remedy to enforced performance is not crystal clear. The explicit recognition of a breach being deliberate is in some legal systems not even present. English courts at least explicitly mentions deliberateness of the breach as a potential factor of relevance, but the attitude of the courts towards the influence of deliberateness on the availability of specific performance remains somewhat unclear. In the leading *Argyll* case, deliberateness is not considered a relevant factor by the House of Lords. A look into English law revealed that specific performance may not only be claimed by the victim of deliberate breach, but also by the party who commits deliberate breach – for example in the *Celestial Aviation* case. Deliberateness of the breach may block the claim for performance and in this sense the connection between deliberateness and specific performance is visibly present. In US law, the connection between deliberateness and specific performance is not clear either. In civil law jurisdictions, the relation between deliberateness and enforced performance is more difficult to establish, because enforced performance is generally available as of right, resulting from the contract itself. Direct references to the relevance of deliberateness in combination with the right to enforced performance on the continent are hard to establish.

4.3 Deliberateness and its influence on the validity of penalty clauses and the court's discretion to mitigate or to increase the penalty

4.3.1 Introductory remarks

Deliberateness of breach may also influence the approach to the use of penalty clauses. The debate in civil law jurisdictions differs from the debate in common law jurisdictions. In civil law jurisdictions, the most relevant question is whether deliberateness of the breach should influence the decision of the court to mitigate the amount mentioned in the penalty clause. In common law jurisdictions, the distinction between liquidated damages clauses and penalty clauses may influence a party's decision to commit breach or not. Moreover, especially in US law, the question arises whether the attitude

[215] Vzr. Rb. Arnhem 15 October 2007, *LJN:*BB5919 (Apotheek); Vzr. Rb. Dordrecht 7 May 2007*, LJN:*BA 4655 (Tenstone/Mikro Beheermaatschappij); Hof Amsterdam 1 June 2006, *LJN:* AY7023 (Perry Sport e.a./SBZ); Vzr. Rb. Middelburg 26 October 2004, *PRG* 2005, 44 (Maison Zen/Fortis Bank); Vzr. Rb Groningen 16 April 2004, *NJF* 2004, 370 (Leyten/Oil & Vinegar); in an earlier case the court concluded that the lessee could not be forced to run the business; see Ktr. Tilburg 21 December 2000, *PRG* 2001, 5639 (Venmans/De Boer Unigro). See for a (limited) overview Wong 2005. If a party enters into a lease contract for a specific period and voluntarily accepts a duty to run a business in the same period or to use the building concerned in another specific way, he also bears the risk for eventual negative financial consequences coming up during the lease period. Dutch case law primarily focuses on the circumstances under which the leasing party may walk away from his contractual obligations. A relatively recent example is HR 1 february 2008, *RvdW* 2008, 182 (Amicitia). According to the Supreme Court a disappointing level of customer attendance to the concerned shopping mall, because the location turned out to be not that successful, is a circumstance in the risk sphere of the party leasing the premises. A relatively recent research specifically on the influence of the economic crisis on case law regarding the duty to run a business did not produce any results that courts changed directions in favor of the lessee. See Oosterling-van der Maarel 2009.

towards efficient breach of contract – which is considered to be a specific type of deliberate breach as Chapter 3 established – should have consequences for the distinction between penalty clauses and liquidated damages clauses.

4.3.2 English law: Bridge v Campbell Discount Co. Ltd

The distinction between liquidated damages clauses and penalty clauses reveals an interesting incentive for parties to consider breach of contract as a profitable option. It is not the alleged deliberateness of the breach which may trigger the courts or the law to adapt its remedial approach, but it is the other way round. The system sometimes seems to stimulate parties to consider deliberate non-performance.

In the Bridge case parties concluded a contract to hire-purchase a car.[216] The buyer paid the first installment, but terminated the contract afterwards. The contract foresaw the possibility to terminate in a certain way in exchange for payment of a certain amount of money. This clause in the contract ordered the buyer to pay a variable amount of money to the seller, depending on the decrease in value of the car: the lower the value decrease, the higher the payable amount. The point in this case is that the House of Lords decided that the hirer did not rely on the termination clause, but terminated on his own conditions. The non-contractual termination qualified as breach of contract. Against this background, the House of Lords had to decide whether the payment clause was an allowed liquidated damages clause or a forbidden penalty clause. The House of Lords decided that the clause did not contain a correct pre-estimate of the damages, because the payable amount increased further when the value of the car decreased less. The House of Lords declared the clause to be penal and denied the validity of the clause.

As Lord Denning justifiably remarks, this case contains an interesting paradox. If a party correctly cancels the contract against a certain payment, he seems to be in a worse position than if he commits breach of contract. In the latter situation, the court will assess the validity of the clause. If the clause is declared invalid, the party committing breach walks away without having to pay the amount according to the contract.[217]

Although at first sight it seems that the system of structuring penalty clauses In English law stimulates calculating behavior of the debtor, Lord Denning immediately shows that this conclusion would be too simple. In the first place, the validity of the clause would most probably *also* be subject to judicial review if the hirer would follow the route of *contractual* termination. Moreover, the hire—purchase company still has the possibility to claim damages after the decision to declare the clause invalid, because the case if referred to a lower court in order to assess an eventual claim for damages. Whether a decision of the hirer to commit deliberate breach in such a case is really profitable for him remains therefore unclear. However, it is evident, that the emphasis of the law to distinguish between liquidated damages clauses and penalty clauses may lead to unexpected results in case of deliberate breach.

The influence of the distinction between liquidated damages and penalty clauses on concrete remedies in case of deliberate breach of contract is most aptly demonstrated by exploring US law

[216] *Bridge v Campbell Discount Co. Ltd* [1962] AC 600.
[217] *Bridge v Campbell Discount Co. Ltd* [1962] AC 600, 631 ff.

4.3.3 *US law: a call for a different approach towards the penalty clause, but on which grounds?*

The debate on the penalty clause and its (in)validity is an intense discussion, in which the notions of deliberate and efficient breach of contract play a significant role.[218] Nevertheless, the core of the debate is not always clear for the reader. The relevant discussion takes place in academic debate, not so much in concrete court decisions

The current rule which renders penalty clauses invalid, because they are incorporated *in terrorem of* the offending party, is generally justified by three arguments. First, allowing penalty clauses would increase the risk of overcompensation of the aggrieved party, because a penalty could be considerably larger than the value of the breached obligation. Second, the current role allows the parties to commit efficient breach of contract, which serves the economic purpose of the law of contract. A rule which validates penalty clauses would interfere with the possibility to commit efficient breach, because the party who considers committing breach faces a penalty which could be well above the amount of expectation damages he would have to pay under the current rule.[219] Third, the more classic justification for the rule is the historical role of the law of contract and, more specifically, the role of damages in contract. The law of contract primarily serves commercial interests and the law of contractual damages aims to compensate the victim of breach of contract. From this perspective, there is no room for a type of clause which contains an element of punishment or vindication beyond compensation. This argument seems to block a connection between deliberateness of the breach and allowing penalty clauses, especially when the amount mentioned in the clause is much larger than the suffered losses.

Over the last few decades, it is the law and economics approach towards the law of contract which has become paramount in US legal doctrine. Law and economic scholars have a critical attitude towards the current rule of penalty clauses, but on different grounds. One of the problems law and economists signal is a time and cost increasing discussion on the question which clauses may be defined as penalty clauses. Successful evasive maneuvers have been invented over the past years in order to incorporate a monetary sanction on non-performance into the contract without the label 'penalty clause', e.g. bonus clauses. These clauses confer a bonus on the debtor who performs correctly and on time. The current rule stimulates deviation tactics without looking at the reality and wishes of the parties.[220] Moreover, allowing the penalty clause could be reformulated as an insurance on performance which is an economically viable construction, because parties also pay a price to incorporate the penalty clause into the contract.[221]

The reasons mentioned so far against the current penalty rule are all quite 'practical'. The most principled reason for being against the invalidity of penalty clauses is that this rule directly interferes with the principle of freedom of contract.[222] Parties should be able to incorporate a clause into their contract which secures performance of the obligation.

The problem with this approach is that an incongruence within law and economic thinking reveals itself if this line of reasoning is introduced. It is the reluctant attitude of common law towards the

[218] See inter alia Goetz & Scott 1977; DiMatteo 2001; Wilkinson-Ryan 2010.
[219] Goetz & Scott 1977, p. 556.
[220] Cooter & Ulen 2004, p. 252.
[221] Cooter & Ulen 2004, p. 252.
[222] See e.g. Goetz & Scott 1977, p. 555.

penalty clause – next to the secondary nature of the remedy of specific performance – which allows parties to break the contract without running the risk of paying a penalty if a third party offers a higher price. A more lenient approach towards the acceptability of the penalty clause could make access towards efficient breach more difficult. Freedom of contract is also a primary reason for law and economists to justify the possibility to commit efficient breach. According to DiMatteo, reconciliation of the two lines can be acquired by arguing that penalty clauses should only be allowed if they are incorporated into the contract on the basis of full and fair negotiation of the specific clause. Parties should be able to avoid the penalty clause on the grounds of 'unconscionability'.[223] DiMatteo emphasizes the role of negotiations. If negotiations are not fair – e.g. because one of the parties does not have the possibility to negotiate on a standard contract with a penalty clause – the penalty clause should not be enforced. If parties nevertheless wish to enforce the clause, the court should be able to modify the clause.[224]

In English law the efficient breach component is virtually absent in the discussion, but the interference of the current rule with the principle of freedom of contract is also a reason to follow the development of the rule critically.

4.3.4 French law: the notion of 'dol' and penalty clauses

For the relationship between deliberateness – 'dol' – and penalty clauses in French law, the following case is relevant. The decision of the Cour de Cassation in 1969 is also important for the development of the meaning of the notion of 'dol' in French law specifically.[225] In this case, an actor who was employed exclusively at the Société des Comediens francais, accepted a role in a movie produced by another company. The actor knew he was not allowed to do so according to the contract with the Société, because this contract incorporated a penalty clause, which imposed a penalty on him if he worked for other employers than the Société. The actor admitted he committed breach of contract, but he argued that the breach was not deliberate, because he did not intend to inflict harm on the Société. However, the Cour de Cassation assessed the breach of contract as deliberate, because the actor knowingly committed breach because of opportunistic reasons. According to the Cour de Cassation, the breach being committed knowingly was sufficient to qualify as deliberate. This assessment proved to be relevant, because the case was decided against the background of art. 1150 Cc.[226] This case shows that not only clauses excluding or limiting liability may be influenced by the rule of art. 1150, but also penalty clauses. In this particular case, the Cour de Cassation by holding that the breach is deliberate, also decides that the Société is entitled to damages above the amount mentioned in the penalty clause. Apparently, the Cour de Cassation considers the penalty clause as a limitation of damages to foreseeable damages. Because the limit of foreseeability of damages does not apply when the breach is deliberate, the amount of the penalty is not the upper limit of damages.

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[223] DiMatteo 2001, p. 733. Note that DiMatteo emphasizes the question of enforceability of the specific clause without being too principled on the terminology: liquidated damages or penalty clause.
[224] DiMatteo 2001, p. 733.
[225] Cour de Cassation (1e Ch. Civ.) , 4 févr 1969, Dalloz 601-602 with note J. Mazeaud.
[226] "Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée." See section 4.4.5 for a more elaborate analysis of this provision.

4.3.5 German law: mitigation and motive connected

As Dutch law, French and German law as major representatives of continental law systems recognize the relevance of the degree of fault as a factor which influences the decision of the court to mitigate a penalty. In all these systems, comparable ideas on the existence of penalty clauses exist. Penalty clauses are acceptable, but courts in general have a discretionary power to mitigate the penalty in concrete circumstances.

German law recognizes that a debtor who deliberately commits breach of contract cannot expect the court to mitigate the penalty. Two comparable cases in the area of employment contracts illustrate the connection between deliberateness of the breach and the refusal to mitigate the penalty. [227] In both cases an employee deliberately concluded a contract with a new employer contrary to the non-competition clause in the settlement agreement with his former employer. The non-competition clause provided for limits in time and place where the employee could have a comparable, job. In both cases, the former employees clearly violated the clause. In one of the cases, the employee even used information and client lists from his former employer. The penalty clause accompanying the non-competition clause contained a penalty which was not subject to mitigation after the established deliberate breach of contract.

4.3.6 Dutch law: deliberateness and mitigation; NVB/Helder and the Buck case228

Recalling from Chapter 2, Dutch law as a civil law jurisdiction recognizes the existence of clauses with a specific penalty character, although the court has a discretionary power to mitigate the penalty. The power of the court to mitigate is not without limits.[229] The deliberateness of the breach is one of the factors which should be taken into account.

In the NVB case a bank – NVB – does not pay commission to an agent he has a contract with – Helder. The delay in payment is a breach of contract. In the contract between NVB and Helder a penalty clause is incorporated. NVB argued that because Helder received at least a large part of the provision, the penalty should be mitigated. The Dutch Court of Appeal does not follow this line of reasoning and the Hoge Raad concurs. Although deliberateness of the breach is not explicitly mentioned as the reason not to mitigate the penalty, the Court of Appeal reasons that the breach of contract is neither sufficiently partial nor small to mitigate the penalty. Schelhaas interprets this

[227] BGH 5 October 1965, *BGE* 91 II 372;BGH 24 March *BGE* 82 II 142.

[228] HR 27 april 1984, *NJ* 1984, 679, m. nt. G (NVB/Helder)**;** Hof 's-Hertogenbosch 3 juni 1997, *NJ* 1998, 162 (Buck/Technische Universiteit Eindhoven). Note that Dutch law also recognizes the possibility to award damages additional to the penalty. Art. 6:94 s 2.: "The court may award supplementary damages upon the demand of the obligee if it is evident that fairness so requires; these are in addition to the stipulated penalty intended to take the place of damages due by law." (Translation by Warendorf 2009, p. 660). According to Schelhaas, the court may only add supplementary damages to the level of expectation damages, not any further; Schelhaas 2004, p. 103, 104.

[229] HR 13 juli 2012, *NJ* 2012, 459 (Van de Zuidwind/Faase). According to the Hoge Raad the court should be reluctant in mitigating penalties. There is also some discussion on the question whether the court has a *discretionary* power to mitigate. The provision seems to exclude this possibility, but according to several Dutch legal scholars the principle of good faith nevertheless attributes the discretionary power to the court. Schelhaas 2008, 3.

decision as an indication that this "deliberate" action of the bank could have been the reason for the refusal of mitigation.[230]

A more explicit example is the Buck case.[231] Buck was professor at the Technical University of Eindhoven. After a conflict on alleged carelessness regarding certain research projects Buck was forced to resign. Part of the resignation was a contract with the university with – inter alia – a financial settlement. Parties agreed not to make any public statement on the contents of the contract. However, Buck appeared on TV and spoke about the settlement. The obligation to remain silent was secured by a penalty clause. The Court of Appeal in this case not only mentions the seriousness of the breach, but also the motive of the party, because the Court argues that Buck deliberately and consciously violated the obligation of secrecy. This way of violation justifies the refusal of the court to mitigate the penalty.

It is not easy to distinguish the correct questions with regard to this topic. Absence of mitigation means that the party relying on the clause may demand complete specific performance of the obligation to pay the penalty. The relevance of the penalty clause only becomes clear when the debtor committed breach of the primary obligation. In general, it is not possible to claim performance of the primary obligation *and* of the penalty clause. The penalty clause is incorporated in order to stimulate performance of the primary obligation. This objective is a *preventive* objective. After the breach has occurred, this objective cannot be achieved for that specific case. However, for future cases it remains relevant that the amount mentioned in the penalty clause should not be mitigated to an extent that it does not provide any incentive for parties to perform the original contractual obligation. The influence of deliberateness of the breach on mitigation is therefore especially relevant.

4.3.7 Concluding remarks

Does deliberateness of the breach influence the way the court deals with application of penalty clauses? In common law jurisdiction, the answer to this question is seriously difficult to provide, because the discussion on the validity of the penalty clauses opposed to liquidated damages clauses blurs a good analysis of the question, as the academic debate in US law shows. In civil law jurisdictions, deliberateness may influence courts to deal with penalty clauses in two ways. First, the court does not mitigate the penalty in case of deliberate breach of contract. Examples in Dutch and German law show this explicit connection between deliberateness and the absence of mitigation. A critical approach of this manifestation may be that the influence of deliberateness is only limited, because the most a party can achieve is enforcement of the penalty clause. A second manifestation is that the court allows a claim for additional damages next to enforcement of the clause. This would be a serious enlargement of the remedial possibilities in case of deliberate breach of contract. French law recognizes a possibility for the court to deviate from the contract in favor of the aggrieved party, but for example Dutch and German law may allow such a theoretical possibility in the law in the books, but no concrete indication that such a connection is made by the courts can be found.

[230] Schelhaas 2004, p. 93, 94.
[231] Hof 's-Hertogenbosch 3 juni 1997, *NJ* 1998, 162.

4.4 Deliberateness and expectation damages

4.4.1 Introductory remarks

The core question of this chapter is whether the factor of deliberateness influences the law or the court in applying a certain remedy in contract, in this case the remedy of damages. As far as the remedy of damages is concerned, three options are possible. Either the factor of deliberateness is not relevant, or the factor of deliberateness influences the level of damages in the sense that a deliberate breach would give the creditor a claim for a higher level of damages, or the factor of damages gives access to another, extra type of damages. An example of the last option is an eventual availability of punitive damages or account of profits. Level of damages and type of damages seem to be two different things, but they can overlap as well. Last but not least, a question of evidence may also come into play. It may be difficult to establish that a certain type of damage was caused by the deliberateness of the breach.

This section provides legal rules or case law examples where deliberateness influences the remedy of 'normal' contract damages. In most legal systems, the creditor who claims damages after breach of contract is entitled to a level of damages which virtually brings him in the position as if the contractual obligation had been correctly performed. In common law jurisdictions, as mentioned in the first chapter, this type of damages is labeled as 'expectation' damages. Naturally, differences between continental and common law jurisdictions may exist, but this concept is also generally accepted as 'normal' contract damages in continental jurisdictions. However, this simple statement is only the beginning of the exploration of what exactly is part of this definition. In many systems, expectation damages comprise incurred losses as well as missed profits as a result of the breach of contract. For example, as far as the incurred losses are concerned, the party in breach is generally only liable for foreseeable losses. Unforeseeable losses are not automatically covered under general rules of contract liability. Deliberateness of the breach may for example result in incorporating unforeseeable losses into the claim of the creditor. In terms of finding an answer to the core question of this chapter, such a finding would deliver an affirmative answer. Nevertheless, it is not easy to qualify such a finding. It is not easy to say whether unforeseeable damages are another, extra type of damages or whether they may be incorporated into the definition of expectation damages after all and, when awarded, mean a higher level of damages. Even more important, the definition of foreseeability is not a solid one. Every legal system has its own rules on this point and even within legal systems it is not always easy to assess which type of damages is foreseeable and which is not. 'Damages' is a legal term with many manifestations and in this section, it is only possible to detect a superficial link between the notion of deliberateness and the award of expectation damages. In sections 4.6 and 4.7, the possible award of punitive damages and account of profits is dealt with separately.

4.4.2 English law I: Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)

Although the leading case on the relationship between specific performance and damages – mentioned in the previous section, the *Argyll* case – discusses the role of deliberateness to some extent, it does not forecast a major role for this element in future decisions about awarding specific performance. The explicit role of the motive seems to be downplayed in the eventual decision. Therefore, it is not unreasonable to think that parties may attempt to break their contractual obligations if they consider it economically viable to do so. An extra reason for the possibility of this

behavior is the reluctance of English courts to connect the level of damages to the motive of the party committing breach. A recent case illustrating this reluctance is a case on a long-term lease of another type, namely the seven-year charter of a ship, i.e. *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)*.[232] Although both the Argyll case and the Golden Victory case deny an explicit role of deliberateness in the area of breach of contract, analysis of both cases may nevertheless show an implicit connection between deliberateness and the remedy concerned.

In this case Nippon Yusen chartered a ship – the Golden Victory – owned by Golden Strait in 1998 for a period of approximately 7 years. Both shipowners and charterers agreed to a certain price scheme. They also included into the contract a provision that both parties had the right to cancel the charter – without any obligation to pay damages to the other party – if war or hostilities were to break out between any two or more of a number of countries including the United States of America, the United Kingdom and Iraq. English law was applicable under the contract and an arbitration clause was included.

On 14 September 2001 – a few days after the events on 'nine-eleven' – the charterers repudiated the charter and redelivered the vessel to the owners. Repudiation under English law is a form of termination, which has to be accepted by the other party. In this case, the owners accepted, but they claimed damages to the extent of the contract price for the charter time. The ending date of the charter was established at 6 december 2005, which means that the charterers had to pay for approximately 4 years. The charterers objected and went to the arbitrator. The arbitrator by an interim award decided in favor of the owners, but in the meantime the Second Gulf War broke out (In March 2003). Thereupon, the charterers held that the amount of damages could not exceed the limits of the contract price which should have been paid, had the contract not been cancelled. In that case both parties would have had the opportunity to cancel the contract according to the aforementioned provision. The arbitrator in his final decision decided against the owners and in favor of the charterers, although he had some serious doubts about his decision. However, his decision was upheld by the court in first instance and by the Court of Appeal.

In a rather controversial 3-2 majority the House of Lords rejected the appeal of the owners and again decided in favor of the charterers. According to Lord Scott of Foscote, who gives the leading majority opinion, the fundamental principle governing the quantum of damages for breach of contract – damages should compensate the victim for the loss of his bargain – had been long established and not in dispute.[233] This principle is not different for a contract for performance over a period. Therefore, the victim of the breach should get no less, but also no more than he would have had, if the contract had been correctly performed. This principle entails that there is no hard and fast rule that damages should be assessed at the date of breach. Lord Scott does not deny the existence of this rule in a wide range of cases, especially where contracts for sale of goods are concerned.[234] For a long(er)-term contract, this rule might not be apt. In essence, he simply says that the charterers could have cancelled the contract in 2003 according to the contract. Consequently, the arguments of the owner to receive full compensation for the period until 2005 would offend the compensatory

[232] *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353.
[233] *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353, 379.
[234] *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353, 381.

principle. According to Lord Scott the compensation principle cannot be overruled by a principle of certainty, because the latter cannot be considered as a principle.[235]

Furthermore, the concurring opinion by Lord Carswell emphasizes that the arbitrator, according to the general rule on calculation of damages on the day of breach, should alternatively have been obliged to estimate the likelihood of a breaking-out of war and calculate the damages accordingly. The chosen solution does justice to the contract and is much easier. Lord Carswell explicitly states that a risk exists that repudiating parties in future cases may attempt to delay the assessment of damages in order to see if a suspensive condition might come into operation.[236] He does not consider this risk as a problem, because courts and arbitrators can properly react on eventual abuse.

Lord Bingham delivered the leading minority opinion. He argued that damages should be calculated and established at the moment of breach and that this case should not be an exception to this rule. His line of reasoning is straightforward, especially when it comes to the justification of the point of view of the charterers that the owners would be overcompensated if the later event – the Second Gulf War – would not be taken into account. Firstly, according to Lord Bingham, contracts are made to be performed, not broken.

"It may prove disadvantageous to break a contract instead of performing it."[237]

With this statement Lord Bingham emphasizes that contracts are concluded to be performed. Damages could serve as an instrument to prevent debtors from breaching instead of performing. His second argument is that the charterers could have paid when the repudiation was accepted by the owners, because they now seem to have had a 'free ride in awaiting legal proceedings, because events after the breach such as the outbreak of a war in the reasoning of Lord Scott and Lord Carswell still count in the assessment of damages. His third argument is that there can be no misunderstanding about what the owners had lost on the date of breach: a charterparty with slightly less than four years to run. These arguments illustrate that the interpretation of the facts are crucial to this case. Lord Bingham emphasizes that at the time of the repudiation the likelihood of war was an outside chance, not affecting the market value of the charter. This approach is different from the one of Lord Carswell, where he offers the possibility that the arbitrator or the court should estimate the likelihood of war and accordingly decrease the level of damages.

All in all, the Golden Victory case does not reveal a court approved influence of deliberateness on the remedy of expectation damages. Nevertheless, especially the opinion of Lord Bingham seems to suggest that deliberateness of this particular breach is a serious problem for justifying the discount in damages, even though parties did themselves draft the contractual obligation on which this case is based.

4.4.3 English law II: Patrick v Russo-British Grain Export Company, Limited

The Patrick case seems to approach the attitude of English towards deliberate breach in a classic situation of breach of contract.[238] The case is simple. Russo-British sold Russian wheat to Patrick. At

[235] *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353, 383.
[236] *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353, 393.
[237] *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353, 377.
[238] *Patrick v Russo-British Grain Export Company, Limited* [1927] 2 K.B. 535.

the time of the sale, the sellers knew that the buyers were merchants and resold the wheat immediately, presumably at a profit. Russo-British could not deliver at the due date and Patrick suffered a loss from the resale, more specifically an amount of lost profit. The particular element which makes this case interesting is that at the time of the contract, there was no serious market for Russian wheat, so a market price could not be determined. Moreover, the buyers could not obtain Russian wheat from another source. The question for the court was whether Patrick could claim the difference between the contract price (with Russo-British) and the resale contract price, i.e. the lost profit.

Under normal circumstances, such a claim would be denied under English law, because the recovery of lost profits would stimulate overreliance. The buyer would be able to claim the market price at the time of the breach, maybe he would get compensation for buying new wheat on the market on short-term in order to be able to fulfill his own obligation of the resale contract, but he would not receive the profits of that resale contract. Because there is no market and no available substitute, the court awards the loss of profit as part of the claim of damages in this particular case.

The problem of this case is that the breach of the seller is not particularly considered. The buyer and/or the court are not aware of the circumstances of the breach or at least no attention is paid to these circumstances. It is not clear whether Russo-British sold the wheat to another party for a larger amount of money – that would be a classic double-sale situation. One could say that a last-minute failure to perform a relatively straightforward sales contract must be a deliberate failure. Even if this is the case – and the court does not provide any indication to objectively justify this conclusion – the considerations of the court to award lost profits of the resale contract as expectation damages do not depend on the nature of the breach. The court traditionally focuses on the position of the buyer and his financial situation and the court at all costs wants to avoid the idea that a buyer is stimulated to act passively, because he can easily claim all his losses from the non-performing seller.

In conclusion, English law in sales situations does not seem to pay much attention to the deliberateness of the breach as a factor to increase the level of expectation damages by including an award of lost profits as a result of a resale contract. English law may award such a claim, but on completely different grounds.

4.4.4 US law: a principled "no" on an explicit link between deliberateness and expectation damages

It is worth repeating from Chapter 3 that US law has expressed the most opinions on the status of deliberate breach. US law distinguishes between certain levels of deliberateness. According to the comments on the First Restatement of Contract on §357[239], the authors state that, on a first level, a breach may be committed knowingly and yet not be willful and deliberate. The Restatement of Contracts formulates the general rule that a person who defaults of lack of sufficient financing is held not to commit a *willful* breach. This case can be readily distinguished from situations in which a party makes a "bad bargain" and simply abandons the contract, which is the second level. This formulation reveals that deliberate and willful are more or less synonymous. A willful breach is, as stated in the previous chapter, a term with a negative connotation. In any case, the effect of the breach being

[239] Restatement (First) of Contracts § 357 (1981). This provision did not return in the Restatement (Second) of Contracts (1981).

deliberate and willful in the most negative sense on the remedy of expectation damages as compensation does not differ from the impact of a 'normal' breach of contract. According to the court in a New York case,

"Whether the breaching party deliberately rather than inadvertently failed to perform contractual obligations should not affect the measure of damages."[240]

And, somewhat further:

"Plaintiff has proved no more than a breach of contract, albeit deliberate. It is well settled that a breach of contract is compensable by contract damages alone."[241]

This last sentence is a tricky one. Apparently, US law recognizes contract damages, but also other damages. This distinction between contract damages and, for example, tort damages, is essential for understanding the US approach to willfulness. The third layer of deliberateness comes into play when the willful breach of contract may also constitute an independent tort. In such a case, not only contract damages are available, but tort damages may also be available, such as punitive damages. In a 'normal' contract case, even if willful breach is proven, punitive damages are not available for the aggrieved party. In an Illinois case, this point of view is illustrated.

"As a general rule punitive damages are not recoverable for breach of contract, even for a "willful" breach since the sole purpose of contract damages is to compensate the non-breaching party". [242]

Although at first sight this conclusion is as simple as it is disappointing for purposes of concluding anything interesting on deliberateness as far as US law is concerned, the structure of US damages leads to a more scattered picture once punitive damages and certainly account of profits are positioned next to the notion of deliberateness. Both types of remedies as manifestations of damages are certainly under some influence of the notion of deliberateness as the next sections will show.

4.4.5 French law I: deliberateness and the requirement of foreseeability

In France, with regard to the aspect of foreseeability of damage, the factor of deliberateness may come into play. French law also recognizes the notion of foreseeability as far as damages are concerned. The type as well as the extent of the compensable loss is limited to those which are foreseeable.[243] The practical question is whether damages are also limited to foreseeable losses if the breach is deliberate. French law is one of the systems which seems to recognize an exceptional

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[240] *Metropolitan Life Ins. Co. v. Noble Lowndes International, Inc*., 84 N.Y.2d 430, 435.

[241] *Metropolitan Life Ins. Co. v. Noble Lowndes International, Inc*., 84 N.Y.2d 430, 435.

[242] See for example *Morrow v. L.A. Goldschmidt Assoc.*, 112 Ill.2d 87, 492 N.E.2d 181 (1986); *Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 880 P.2d 300 (1994) (" the amount of recovery should not depend on the manner in which the contract was breached, and the nonbreaching party should not be able to extract an extra bonus from a breach characterized by a high degree of fault or resulting from a low degree of care"). See also several textbooks such as Dawson 2003, p. 27 ff. and Farnsworth 2004, p.737, 760. In English law, the attitude owards the award of punitive damages is more than reluctant, certainly where the breach of contract is not *also* an actionable wrong. See *Addis v Gramophone Co*., 1909 A.C. 488, 498.

[243] Le Tourneau 2010, p. 402.

position for deliberate breach in this regard. French law has even a specific provision in the Civil Code, art 1150[244]:

"Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée."[245]

The relevance of deliberateness in the sphere of remedies in contract seems to be very concrete when this provision is read in isolation. It goes without saying that French law recognizes foreseeability as a relevant criterion to limit the extent of damages. However, this provision also recognizes that the ordinary limitation to foreseeable damages may be set aside once the breach is committed intentionally. The French term 'dol' in this provision also encompasses 'gross negligence' or 'faute lourde'.[246]

Whereas 'dol' also incorporates gross negligence *in this provision*, it does not mean that the French notion of deliberateness conceptually incorporates gross negligence. According to the comments on the Civil Code, the term 'faute lourde' could be added to the provision. The definition of 'dol' in the sphere of non-performance has subtly developed. Historically, a debtor could only commit an intentional breach, when his intention was to inflict damage on the creditor.[247] However, in case law this strict interpretation of intention had been nuanced. Breach is considered to be intentional if the debtor knowingly decided not to perform his contractual obligations.[248]

Art. 1150 is an explicit example of a situation where deliberateness is relevant in establishing a contract remedy. This example is also illustrative, because it shows that deliberateness may be a relevant factor in determining damages without directly turning over the whole system of contract damages by incorporating categories of damages which were never part of contract damages, such as punitive damages.

Furthermore, the debtor who has restricted his liability to foreseeable damages cannot rely on this limitation once the established breach is deliberate because of this provision.[249]

The French Civil Code itself seems slightly worried about the potential consequences of the provision allowing unforeseeable damages entering into the arena of damages once deliberateness is established. The extent of the influence of deliberateness which is given by one hand, is partly taken away by the other hand according to art. 1151:

[244] In English law the leading case on this issue is *Hadley v Baxendale* (1854) 9 Exch. 341 containing a comparable rule English law without the 'dol' exception.
[245] See for an English translation also www.legifrance.gouv.fr:"A debtor is liable only for damages which were foreseen or which could have been foreseen at the time of the contract where it is not through his own intentional breach that the obligation is not fulfilled."
[246] Henry 2012, p. 1969; Le Tourneau 2010, p. 402. The idea of deliberate breach is explained within the framework of applicability of exclusion clauses, but the provision does not seem to be limited to these cases.
[247] Com. 17 janv. 1961 No 57-10.836, Bull. Civ. IV, No 37. (Aubert. Renaud (eds.) Répertoire de Droit Civil Tome 5 Dalloz 35)
[248] Com. 19 janv. 1993, No 91-11.805, civ. IV, No. 24; Com. 4 mars 2008 No 07-11.790, Bull. Civ. IV, No 53. Dalloz 35)
[249] Civ. 1Re, 24 fevr. 1993: Bull.civ. I, No 88; D. 1994 6, note Agostinelli; D. 1994 Somm. 249, obs. Hassler; JCP 1993. II.22166, note Paisant; Defrenois 1994. 354, obs. D. Mazeaud.

“Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention.”[250]

On the basis of art. 1150 and 1151 Cc, in the case of a deliberate breach of contract a creditor has a right to expectation damages which may incorporate incurred losses and missed profits. These damages need not be foreseeable, but they have to be an immediate and direct consequence of the breach.

The relation between art. 1150 and 1151 is not clear in advance. The difference between foreseeable damages and immediate and direct consequences is a subtle one. The directness test should be applied on a case by case basis. The message should be that even in a case of deliberate breach the creditor may not claim damages for any possible negative consequence of the breach even though it is very remote.

According to Le Tourneau, the widening of the scope of the term ‘dol’ to other situations than the intentionally inflicting harm-situation has been appreciated by the courts, because the first, very limited definition, would practically rule out the application of art. 1150. The comments mention that fortunately *(sic)* parties rarely decide not to perform because they directly aim to cause damages to the other party, let alone that this situation is very difficult to prove. Indeed, the reason not to perform is often egocentric, because the party committing intentional breach foresees an advantage taking into account the possible payment of damages. For these situations, a provision such as art. 1150 Cc should be reasonably accessible in order to achieve the possibility to claim unforeseen damages.[251] According to this definition the term ‘dol’ is more or less considered as the opposite of the performance in good faith. The intention to inflict damage may be absent, there is a calculated decision to perform incorrectly. According to art. 1150 Cc, the existence of dol overcomes the limit of foreseeability on the remedy of damages after breach of contract. The existence of this provision and the explicit reference to dol in connection with performance of the contractual obligation are further nuanced in several concrete case law examples. Before analyzing some of these examples it is necessary to remark that many of these cases are decided against the background of a clause limiting liability to foreseeable damages. If the victim of the breach proves the breach to be intentional, the exoneration clause cannot be invoked as a result of art. 1150 Cc.

A concrete example is the builder who installs a floor of inferior quality. The builder simply takes advantage of the ignorance of use by the assignor.[252] He substitutes the type of floor for another one with inferior quality without informing the assignor. This deliberate change has impact on the stability of the construction. Two questions were important in this case. The first one was whether this type of breach would qualify as a deliberate breach in the sense of art. 1150 Cc and the second question was which consequences the qualification of deliberateness would have in terms of sanctions.

[250] See www.legifrance.gouv.fr: “Even in the case where the non-performance of the agreement is due to the debtor’s intentional breach, damages may include, with respect to the loss suffered by the creditor and the profit which he has been deprived of, only what is an immediate and direct consequence of the non-performance of the agreement.”

[251] Le Tourneau 2008, No 3512.

[252] CA Douai, 16 mars 1977, *RTD* civ. 1977, p. 785.

According to Cornu who analyzed this case, the intention to inflict harm is not necessary to label this breach as intentional or deliberate. The same term in the area of tort law has the sharper meaning of malevolent, harm-inducing behavior. A professional and deliberate deviation from the contract without the aim to hurt the other party, but with the most probable aim to achieve a larger financial gain – the constructed floor was no doubt cheaper - , qualifies therefore as a 'faute dolosive', an intentional breach. He also emphasizes the idea of this case that labeling the breach as deliberate does not introduce the regime of tort law into contract law. The breach being deliberate does not make the breach 'delictual'.[253]

The most important consequences of the breach being committed deliberately is that, as a logical consequence of art. 1150 Cc, the exoneration clauses containing limits for foreseeable damages are not valid. It is remarkable that Cornu explicitly distinguishes the consequences of dol from faute lourde with regard to the absence of a foreseeability limit, especially because he says that in other cases the consequences of dol and faute lourde are generally similar.[254]

4.4.6 French law II: the airline case

The following case needs some introduction, because it centralizes the problem of damages suffered by passengers in case of delay or cancellation of flights. This problem is also object of legal instruments beyond national law, such as the Montreal Convention and within Europe, a Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.[255] These international rules are not taken into account, because the focus in this – slightly older – is not to provide a complete and up-to-date picture of the rules around compensation of passengers in case of overbookings or, somewhat broader, delay or cancellation

A compelling example of deliberate breach of contract is the case of an overbooked flight.[256] The case concerned three members of an organization specialized in medical assistance. They planned to fly to the African country Gabon via Brussels on 10 July 1988 in the hope of entering into a contract with the Gabonese authorities. They had received confirmation of the travel agency to board their flight at the airport, but when they arrived they were refused to enter the plane because the flight concerned was overbooked. The three were sent to the Roissy airport – near Paris, where they departed from that morning – and they arrived a day later in Gabon. However, the hosts were not amused by this delay and they cancelled the meeting. The three issued a claim against Sabena, the airline company, and they claimed damages for incurred costs for the delay and the useless trip to Gabon including expenses for hotel and food and for the loss of opportunity to enter into a contract with Gabon for an amount of FF 30.000 – approximately E 4500 – . The airline company did not deny that the flight was overbooked. As a defense, it invoked a clause in the conditions added to the contract with the passengers. In this clause the airline company limits the obligation to pay damages

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[253] CA Douai, 16 mars 1977, *RTD* civ. 1977, p. 786, 787.

[254] CA Douai, 16 mars 1977, *RTD* civ. 1977, p. 786, 787.

[255] Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999 (entering into force 2003); Regulation (EC) No 261/2004. See also e.g. the leading European case on this topic CJEU 19 November 2009, C-402/07, C-432/07 (*Sturgeon/Bock*)

[256] Paris, 15 sept. 1992: D. 1993, 98 Délébecque; See also Rappr., sur la notion de faute inexcusable dans de la cadre Convention de Varsovie sur le transport aerien, Com. 21 mars 2006: Bull.civ. IV, No 77; D. 2007 Pan. 114; obs. Kenfack; JCP 2006. II. 10090, note Mekki; RTD civ. 2006. 569, obs. Jourdain.

after breach of contract effectively to the price of the ticket plus E 50 per day the airline company is not able to provide an alternative for the overbooking.

The court decided that the airline company, by not being able to assure the passengers that they have a seat on the planes, committed an intentional or deliberate breach. According to the court, the airline company made a political choice being fully aware of the risk that it could not assure that every passenger would be able to board the flight.[257] The choice is internally justified on the basis of financial considerations, but it is also a choice at the detriment of the legitimate interests and expectations of the passengers. Therefore, this behavior qualifies as an intentional breach of contract as a result of which the airline company cannot rely on the exclusion clause. The court awards the claim of damages in full.

This is an explicit example of a situation where deliberateness is relevant in assessing the availability and the extent of a remedy in contract. This example is also illustrative, because it shows that deliberateness may be a relevant factor in determining damages without directly turning over the whole system of contract damages by incorporating categories of damages which are systematically not embedded such as punitive damages.

The case of the overbooking of flights triggers a debate on the influence of the degree of fault on the availability and extent of damages in French law. Délébecque feels some remarks are necessary, because the airline case is a case in the area of transport law. In the area of transport law in French law, the idea of 'faute inexcusable' plays a role. Délébecque attempts to position the faute inexcusable between the faute dolosive and the faute lourde.[258] Furthermore, he also mentions the 'faute lucrative', which can also be positioned between the faute dolosive and the faute lourde. The classic distinction between dol and faute lourde is easy to formulate. A faute dolosive only applies when the intention to inflict harm can be established. A faute lourde is established without reference to the intention of the party committing the faute lourde, because only the seriousness of the breach is relevant for establishing a breach as a faute lourde. Although in most cases the legal consequences of dol and faute lourde are similar, it is not clear whether this is also true in the case of art. 1150 Cc. Within this framework, the notion of faute inexcusable may have an added value, because the intention to inflict damage as a requirement of dol limits the applicability of this term. The faute inexcusable does not require this element. It is sufficient to make a 'faute' inexcusable when the party committing the faute takes a substantial risk that the aggrieved party suffers damages. The faute lucrative is more or less a synonym of the faute inexcusable making explicit the idea that the party committing the faute lucrative aims to get a financial advantage at the detriment of the aggrieved party. The intention to inflict harm is not required, whereas the seriousness of the breach by itself is not sufficient to qualify as a faute inexcusable. The party committing a faute inexcusable consciously takes into account the risk of inflicting harm on the aggrieved party, but that is all. On the other hand, he deliberately commits breach for other, often egocentric reasons.

[257] Paris, 15 sept. 1992: D. 1993, 98; La cour: "Considérant que le choix d'une telle politique, en connaissance du risque qu'elle implique de ne pouvoir assurer l'embarquement de la totalité des passagers ayant réservé dans un vol déterminé, est constitutif d'un dol pour ceux passagers, (…) à l'égard desquels le transporteur s'est mis, consciemment, dans l'impossibilité d'honorer ses obligations contractuelles;"

[258] Paris, 15 sept. 1992: D. 1993, 98. note Délébecque.

Whereas transport law – specifically maritime and air transport law - may use the intermediate variant of faute inexcusable, because it attaches specific remedial consequences to such 'fautes', in civil law within the framework of art. 1150 Cc the use of the intermediate variant does not seem to be necessary after the decision of the Cour de Cassation in 1969.[259] According to this decision, the scope of dol is widened as explained and dol actually incorporates the faute inexcusable and the faute lucrative. The problem is that the courts also use a stricter variant of dol where the intention to inflict harm is still a standing requirement, especially in tort cases. Systematically, French authors are reluctant to admit that they created two types of dol, a strict version and a more lenient version.[260] The latter is at least used in the art. 1150 Cc, which is a 'contractual' provision. It is the only way to explain satisfactorily the two way solution chosen by the courts.[261]

4.4.7 German law

In German law, the element of deliberateness as a potential factor influencing the remedy of damages can be found in several provisions in the Bürgerliches Gesetzbuch (Civil Code), including §276 BGB. The provision states that the debtor has to be at fault or has to act deliberately (i.e. 'vorsätzlich') in order to be liable for damages. The comments on this provision define the element of deliberateness as willingly and knowingly breaking an obligation.[262] Theoretically, the element of deliberateness is compared with criminal intent, for example in distinguishing between direct intent and conditional intent. Nevertheless, the comments recognize that the notion of deliberateness is not so relevant to establish liability, because the element of *fault* essentially provides the more relevant hurdle. No further distinction between (profound) negligence ((grosse) Fahrlässigkeit) and deliberateness (Vorsatz) is necessary in that case.[263] Several comments on this provision elaborate on the meaning of Vorsatz, but references to contract law situations are not made in the sense that intent as a factor may increases liability for damages, except for the fact that liability for intent cannot be excluded. The law does not seem to pay much attention to deliberateness as an important element. The reason for this lack of interest is that German law has a clear remedial hierarchy in contract law, where actual performance of the contract plays a large role on the one hand and the remedy of damages is strictly limited to compensatory damages, at least in the sense that German law is generally hostile towards punitive damages.[264] If the objective of paying extra attention to the motive of the contract breaker would be protection of the interest of the creditor, the remedy of

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[259] Civ. I 4 February 1969, D. 1969, 601 note J. Mazeaud.

[260] See e.g. Ghestin 1974, p. 32 ff with many references

[261] The French approach towards the overbooking problem in the airline transport cases substantially differs from the US approach. The US approach also recognizes the practice of overbooking. It is also acknowledged that the practice of overbooking constitutes a deliberate breach of contract in this particular case, but US law chooses to allow airline companies to exclude or limit their liability, because it is assumed the airline companies would not be able to survive if they are not allowed to have a reasonable overbooking policy. Nevertheless., some movements towards more passenger-friendly policy are visible in the US as well. See e.g. for a recent contribution on this topic Schoonover 2011.

[262] See for example PWW/*Schmidt-Kessel* (2006), § 276; KompaktKom-BGB/ *Willingmann/ Hirse*, § 276; MünchKommBGB/*Ernst* Bd. 2a, § 276.

[263] In § 826 BGB the notion of deliberateness returns in a more general sense. According to this provision the party who 'contrary to good faith' (sittenwidrig) causes damage to another party has to compensate the victim for its loss. In the comments it is clear that this provision does not only regard tortious but also contractual obligations. However, this provision by its wording covers damages caused by wrongful breach, which as explained in Section 2 falls outside the scope of this thesis. See for example PWW/*Schmidt-Kessel* (2006), § 826.

[264] MünchKommBGB/*Ernst* Bd. 2a, § 285; Markesinis 2006, p. 445, 446.

actual performance is the most adequate way to do so. However, if the breach is a fact and performance is not possible any longer, the level of damages might become relevant again, but whether motive plays any role in the award of damages is unclear.

4.4.8 Dutch law I: deliberateness in the Civil Code or not?

In Dutch law references in the civil code to potential significance of deliberateness of acting of the debtor are scarce. Under the old Civil Code, which entered into force in 1838, art. 1283 and 1284 explicitly referred to deliberate breach of contract. According to art. 1283 Cc (old) a party in breach has to pay for foreseeable losses. Losses are considered to be foreseeable, if the party in breach foresaw or could have foreseen the losses, as if the breach had been committed deliberately. In other words, this provision suggests that every breach should be treated as a deliberate breach. In addition, art. 1284 Cc (old) adds that in any case – i.e. whether a breach is deliberate or not – the aggrieved party can claim only 'direct' losses. Motive is fixated under the old civil code at 'deliberate', but with some side-notes**.** Case law illustrates that deliberate breach in the sense of these provisions does not require intention to inflict damage to the creditor.[265] Even more interesting is the fact, that the Hoge Raad does not require the debtor to foresee all damaging consequences of the breach to qualify as deliberate breach. The threshold to qualify as deliberate is therefore perhaps somewhat lower than expected, because any calculated breach can amount to a deliberate breach. It is also clear that the Hoge Raad distinguishes deliberate breach from wrongful breach, which yields an independent unlawful act. Nevertheless, the debtor can only act deliberately, if he is clearly aware of the fact that he commits breach of contract.[266]

The new and current civil code does not contain these provisions any longer, because they were considered to be outdated. Nevertheless, it is questionable whether these provisions do not return in the new code, because the creators of the new code thought that the element of deliberateness was not relevant any longer in determining remedial consequences of breach of contract.[267] On the contrary, as Krans in his dissertation noticed, a peculiar situation has been created, because he argues that intent or deliberateness as an element is certainly relevant in the area of assessment of damages. He explicitly mentions the bad intention of the debtor as well as the greater probability of foreseeing damage as reasons for increasing the level of damages.[268] This statement is not compatible with the abandonment of deliberateness in the law. However, the statement is not

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[265] HR 18 mei 1923, W. 11094; *NJ* 1923, 904. (Leon's Rechtspraak, deel II, Aflevering 3, 3[e] gedeelte: derde boek, p. 394). See for a more recent and quite broad interpretation of 'arglist' HR 10 augustus 1988, *NJ* 1989, 157: awareness of the fact that certain acts may lead to an appeal to breach of contract.
[266] Hof Amsterdam 6 juni 1923, *NJ* 1924, 1244.

[267] See again HR 10 augustus 1988, *NJ* 1989, 157 In this case, the Advocate-General – the adviser of the Hoge Raad –, Mok, quotes an unpublished advice of another Advocate-General, Hartkamp, who at the time foresees an interesting consequence of the disappearance of the provisions 1283 and 1284 Cc (old) and the 'new' art. 6:98 Cc. According to him, deliberateness of the breach could lead to a more lenient policy of art. 6:98 Cc in the sense that a party can be liable for other and more types of damages in case of deliberate breach of contract.
It is more likely, that the foreseeability criterion which is mentioned in these provisions in order to assess the amount of damages was considered to be outdated. This criterion is now replaced by the criterion of reasonable accountability (art. 6:98 Cc (new)). One of the factors to assess accountability is foreseeability of damages.
[268] Krans 1999, p. 141, 142.

supported by any case law.[269] The next section shows an example of a case in Dutch law which does not explicitly mention deliberateness as a relevant factor for assessing damages. Nevertheless, the case contains aspects which hint at deliberateness as an implicit factor having influenced the decision of the Hoge Raad.

4.4.9 Dutch law II: Vos/TSN Logistics

In the case *Vos /TSN Logistics*, the latter party could rely on a long-term contract consisting of the obligation to service a fleet of trucks for a period of 5 years.[270] Vos told TSN well before the end of the contract that TSN was released from its duties. TSN claimed the profits based on the agreed contract price for the whole 5 year term. During legal proceedings TSN had managed to obtain other assignments, so it could continue its business. Vos recognized liability for breach of contract, but refused to pay the expected profits based on the whole term, because he argued that he created an opportunity for TSN to obtain profits from new contracts with other parties, which it effectively did. Therefore, according to Vos, TSN could not claim full profits, because it would receive a double profit in that case. The profit made in contracts with other parties should be deducted as a financial windfall (advantage) from the damages claim of TSN, on the one hand because Vos should only be able to claim concrete losses – loss of profit minus the profit made in other contracts – and not the 'abstract' loss of profit and on the other hand because of the doctrine of 'voordeelstoerekening' according to art. 6:100 BW, which allows for deduction under certain circumstances. Furthermore, TSN was obliged to limit its losses according to the law. The Hoge Raad did not agree with this line of reasoning and decided that in cases like these, the principle that the aggrieved party should be brought in the situation as if the contractual obligation had been performed correctly prevails. Under these circumstances, the court is allowed not to take into account the fact that Vos concluded contracts with other parties. Furthermore, the Hoge Raad did not agree, because the damage and the advantage did not arise from the same source. The damage was caused by Vos due to breach of contract, whereas the advantage of TSN only occurred due to the efforts of TSN, which effectively ruled out application of art. 6:100 BW.

The *Vos /TSN Logistics* decision received critical comments from several authors, because one could say in brief that TSN indeed got an opportunity to make an extra profit due to the breach, so as damage should only be counted search costs for finding new assignments and costs for bridging the gap between the breach of contract and the start of the new assignment.[271] Lindenbergh argues that art. 6:98 BW provides a good reason to take into account the nature of the foundation of the claim – i.e. the contract.[272] Furthermore, he argues that art. 6:98 BW also mentions the degree of the fault leading to liability should play a role in deciding the availability and the amount of damages.[273] Beversluis on the other hand argues why later profits should or should not be deducted from the

[269] The only recent case, in which deliberate breach of contract is explicitly mentioned, but not in connection with art. 6:98 Cc s is a lower court case: Rb. Haarlem 11 February 2009, *LJN* BH6243, see. www.rechtspraak.nl.
[270] HR 10 July 2009, *RvdW* 2009, 847 (Vos Logistics/TSN). See for comments on this case e.g. Keirse 2009; Hartlief 2010; Beversluis 2011.
[271] See e.g. Beversluis 2011; Van der Kooij 2011.
[272] Art. 6:98 BW: "Reparation of damage can only be claimed for damage which is related to the event giving rise to the liability of the obligor, which, also having regard to the nature of the liability and of the damage, can be attributed to him as a result of such an event." (Warendorf 2009, p. 661).
[273] Lindenbergh 2008, p. 36.

amount of profits which is a technical matter of labeling according to his line of reasoning. The end of his contribution is ominous for the approach to deliberateness as a relevant element. He concludes his analysis by saying that *Vos/TSN* is not a precedent case which stimulates aggrieved parties to do nothing or to claim a 'double' profit after every breach of contract. Specific technical circumstances in this case justify the calculation of damages which lead to granted claim for 'double' profits. However in the penultimate sentence of his contribution, Beversluis contends that the Hoge Raad did 'apparently' not feel compelled to avoid this negative result for Vos, "probably with the idea that Vos did not deserve better".[274] The debate on this specific point is a sign that, although implicitly, the 'bad' conduct of the party in breach may be relevant.

The Hoge Raad seems to deliver a firm statement on the way parties should deal with long-term contracts. The message is that these contracts should be performed. If actual performance is out of the question due to lapse of time or other reasons, the victim of the breach should get an easy access to full compensation at the expense of the party who commits breach.

4.4.10 PECL, DCFR and CESL

As illustrated, French law is a typical example of an existing legal system where deliberateness *explicitly* plays a role in assessing the type of loss as well as the level of damages. Although the practical value of the provision is not easy to assess, because case law is not abundant, the drafters of the PECL and DCFR found it necessary to incorporate a comparable provision.

Art. 9:503 PECL says:

"The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as likely result of its nonperformance, unless the non-performance was intentional or grossly negligent."

And Art. III.3:703 DCFR says:

"The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent."

In both provisions, foreseeability is presented as the generally applicable rule, which is set aside in case of deliberate non-performance. Furthermore, it is interesting to note that the PECL and the DCFR do not contain provisions which limit the damages to immediate and direct consequences of the deliberate breach as French law does.

Both provisions offer a direct answer to the key question of this paper of whether deliberate breach compared to 'ordinary' breach of contract may lead to a higher amount of compensatory damages or to additional damages. In this provision, the motive of the contract breaker is linked with the 'foreseeability' notion. Foreseeable losses are always covered in case of breach of contract. In case of deliberate breach, unforeseeable losses are covered as well. Again, this provision mentions not only

[274] Beversluis 2011, p. 743.

intentional non-performance, but also reckless and grossly negligent non-performance. The distinction between these three terms is difficult to establish precisely.

Within the DCFR framework, the creditor can only claim compensatory damages for breach of contract.[275] Therefore, the unforeseeable losses, which cannot be claimed in a situation of 'ordinary' breach of contract must be claimed as part of *compensatory* damages. Deliberate breach gives access to a higher amount of compensatory damages than 'ordinary' breach. Moreover, this provision implicitly indicates that in case of 'ordinary' breach perfect compensation can often not be provided.

The comments also provide an original example to illustrate the potential role of intent in awarding damages.[276] A contracts with B to construct and erect stands for a major exhibition at which leading firms in electronics will display their equipment. A few days before the exhibition opens A demands a substantial increase in the contract sum and refuses to complete the stands. B does not only lose profits if the stands are not completed, but he also faces a serious liability claim from C, who contracted with B to expose a new device and would suffer large losses if he cannot display his device on the exhibition. A nevertheless withdraws his workforce. In such a case A is also liable for non-foreseeable losses on B's side, such as for the financial consequences of the liability claim, even though A could not foresee these consequences, because A's breach of contract was intentional. It does not matter in this case if B told A about his contract with C or not. The risk for such extra losses is always shifted to A because of the intentional breach.

Where the applicable provision, art. III.3:703 DCFR, states that the aggrieved party can only claim damages in case of breach of contract for losses which were foreseeable at the time at the conclusion of the contract, *except for the case when breach of contract is intentional*, the CESL contains exact the same provision, but without the exception referring to the deliberateness of the breach. Art. 161 CESL states the following:

"The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance."

Although the explanatory memorandum added to the CESL is quite elaborate, it does not comment in detail on specific provisions. It is clear that the CESL is based on the DCFR, but specific deviations are not explained. This deviation regarding the disappearance of the direct references to deliberateness of the breach and its influence on the remedies of termination or damages and the lack of any explanation is remarkable. The development in Europe concerning detection and collection of a common frame of reference of European private law in my opinion rightfully included the explicit reference to the relevance of motive – specifically deliberateness of the breach – where the application of remedies is concerned.

Again, in the absence of concrete case law examples, it is difficult to know what the relevance of the explicit link between deliberateness and foreseeable losses exactly means. The relevance of

[275] See art. III.3:702 DCFR: "The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived."
[276] DCFR 2009, p. 930.

deliberateness depends on the concrete meaning of foreseeable losses. Because foreseeability is a relevant element of assessing expectation damages, the PECL and DCFR are not specifically clear on the role of deliberateness in assessing expectation damages. Regarding the lack of references to deliberateness in the CESL, it is necessary to prelude on the argument made in Chapter 5. This thesis argues that deliberateness reluctantly plays and at least should play an explicit role in the process of seeking and awarding an adequate remedy. The systems where explicit reference to deliberateness lacks – such as Dutch or English law to a certain extent – visibly struggle with dealing with the notion of deliberateness. Consequently, the explicit reference to deliberateness in one or two instances in the DCFR could be considered as a good step forward to acknowledging the relevance of motive in the law of contract and breach of contract. In that sense, the CESL seems to do a step back in this process. Again, the exact reasons for omitting references to deliberateness are unclear yet, but they should be quite strong in order to convincingly counter the argument that deliberateness of the breach is a relevant element in the application of sanctions for breach of contract.[277]

4.4.11 Concluding remarks

This section presented several case law examples illustrating potential links between deliberateness of the breach and expectation damages. A first general remark must be that the explicit relevance of deliberateness on the court awarding expectation damages is not evident. One of the reasons may be that the concept of expectation damages is, though a common legal term, not a term with a universal and unambiguous meaning. The type of damage which is 'expected' and the relevance of the notion of deliberateness for awarding expectation damages depend on the interpretation of this legal term. The influence of the notion of deliberateness on damages is for example visible in art. 1150 Cc of the French Civil Code and in some provisions in the soft law bodies PECL and DCFR. Deliberateness of the breach as well as lesser degrees of fault open the gate for claiming unforeseeable losses as compensatory damage, whereas in any other breach of contract, only foreseeable losses could be recovered. The relevance of deliberateness depends on the concrete meaning of foreseeable losses. The *Golden Victory* case and the *Vos/TSN* case are both examples in respectively English and Dutch law representing the difficulty of establishing a good link between deliberateness and expectation damages, because no *explicit* reference is made.

4.5 Deliberateness and damages for non-pecuniary losses

4.5.1 Introductory remarks

This section describes some examples of cases where deliberateness of the breach influences the law or the court to award damages for non-pecuniary losses, explicitly or implicitly. The reason to create a separate section for the relation between deliberateness and this type of damages is that non-pecuniary losses do generally not fit easily in the area of contract law. Contracts are often concluded between parties with an economic objective. Failure to perform may cause economic, financial, pecuniary losses including loss of profits. In general, these losses should be compensated as the previous section and Chapter 1 showed. Non-pecuniary losses in the sense of loss of pleasure, loss of

[277] See for some general contributions on remedies in the CESL e.g. Feltkamp 2011, Kruisinga 2011, Samoy 2011.

amenity or mental distress are generally not recoverable. Circumscribing non-pecuniary losses this way could lead to the conclusion that non-pecuniary losses can generally not be claimed as (a part of) expectation damages. Nevertheless, in some cases the objective of the contract is to provide pleasure or another non-material value. Failure to provide this type of pleasure may result in non-pecuniary losses and in such cases, expectation damages at least may include non-pecuniary losses.

The reluctant attitude of the law of contract towards the award of damages for non-pecuniary losses is tested in some cases where the breach concerned is deliberate. A few examples of cases are mentioned in which non-pecuniary losses can be recovered and where the deliberateness of the breach at least implicitly seems to be one of the causes to award such damages.

4.5.2 English law: Ruxley Electronics and Construction Ltd v Forsyth

In the case *Ruxley Electronics and Construction Ltd v Forsyth* Forsyth orders Ruxley to build a swimming pool in his garden. Parties conclude a contract, which includes the duty of Ruxley to build a swimming pool with a depth of 7 feet 6 inches – approximately 230 centimeters for a price of £ 38,564.77.[278] The finished pool has only a depth of 6 feet 9 inches – 205 centimeters. In other words, Ruxley does not correctly perform his contractual obligation. For safety reasons the difference in depth is not relevant. Furthermore, the value of the shallower pool is held to be equal to the value of the pool with the intended depth. The correct depth cannot be achieved otherwise than by completely rebuilding the pool – approximately £ 21,500. Forsyth refuses to pay and refers to the breach of contract of Ruxley. Ruxley starts legal proceedings and claims performance i.e. payment of Forsyth on the contract. Forsyth claims damages on the level of 'cost of reinstatement' or 'cost of cure'.

The trial judge – the court in first instance –after having established that Ruxley committed breach of contract, decides that he is not convinced that Forsyth will indeed rebuild the pool when the cost of reinstatement is awarded. Furthermore, the relation between the level of damage and the amount of damage is too unbalanced in favor of Forsyth. Finally, he decides to award a small amount of money – £ 2,500 – to Forsyth for 'loss of amenity' due to the shallower pool he received.

The Court of Appeal reverses the decision of the trial judge and awards the claim of Forsyth in full. The Court awards the claim of cost of reinstatement and the award of damages for loss of amenity is set aside. Consequently, Ruxley brings the case to the House of Lords, but he only questions the affirmative decision of the Court of Appeal on the original claim of Forsyth. The decision of the trial judge does not play a role in the case before the House of Lords, especially not the award for the loss of amenity. Therefore, an eventual decision to quash the decision of the Court of Appeal does not force the House of Lords to assess the decision of the trial judge.
Four out of five Lords wrote an opinion on this case. They all come to the same conclusion, but they do not follow the same line of reasoning and they all struggle with the legal foundation of their decision.

The most important argument Forsyth makes to support his claim is that the trial judge recognized the existence of a certain type of loss, because he awarded damages due to loss of amenity. According to Forsyth, at least in the area of building contracts English law does not recognize such a

[278] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

remedy or such a type of damages as an alternative for the 'classic' remedies. The only applicable rule is the general rule of law that after a breach of contract the aggrieved party should be financially brought in the position as if the obligation had been correctly performed. Two options are normally available in this situation. A first possibility is the award of the difference in value. However, this option is not available, because there is no difference in value between the existing and the hypothetically deeper pool, whereas Forsyth has suffered damage at the same time. Therefore, only the second option is available in this case, which is awarding the cost of reinstatement, as the Court of Appeal correctly did.

Lord Bridge of Harwich argues that the starting point of awarding damages in contract should be that the claimant receives what he is entitled to according the contract and the negotiated result. In any case, damages are not supposed to be a punishment for the party committing breach of contract. However, Lord Bridge admits that this principle is only easily applicable in a commercial setting where the loss of the aggrieved party resulting from the breach can be easily calculated. If the object of the transaction is the creation or procurement of pleasure, such as in this particular case, the original assumption is not automatically applicable. Lord Bridge denies the argument of Forsyth by reasoning that in a relative non-commercial setting such as this one, it is not valid to calculate damages based on pure economic reasons. Furthermore, he disagrees with the reasoning that the impossibility of awarding the difference in value automatically leads to an award of the cost of reinstatement. Therefore, he quashes the decision of the Court of Appeal and reinstates the decision of the trial judge.

Lord Jauncey of Tullichettle recognizes the principle in the law of damages of complete expectation damages mentioned by Forsyth with a reference to relevant case law[279], but he argues that a minor failure to achieve the contractual objective should not be equaled to a complete breach of contract. The core question is how to assess the loss of Forsyth. Lord Jauncey argues that the intended depth of the pool does not have an economic added value, but it is a personal preference of Forsyth. Therefore, awarding cost of reinstatement is a bridge too far.

Lord Mustill and Lord Lloyd of Berwick reach comparable conclusions. Lord Lloyd is the only one who discusses the considerations of the Court of Appeal in full. He asks the relevant question whether English contract law offers the possibility to award damages for denied expectations without economic consequences. Because this question is not explicitly part of the questions submitted to the House of Lords, he does not formulate an answer to this question.

In conclusion, although the facts rule out deliberateness of the breach in this specific case, it is clear that all courts struggle with the idea that the builder may walk away from the specifics of the contract, because the award for complete expectation damages or specific performance would be an economic anomaly. The absence of a sanction leads to the possibility of a free ride, a deliberate breach of contract, though within certain margins, because if the breach is too serious, the aggrieved party is able to claim expectation damages. Small deviations which are annoying, but not decisive for the value of the object leave English law in doubt.

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[279] *Robinson v Harman* (1848) 1 Ex 850.

4.5.3 US law: Lutz Farms et.al v. Asgrow Seed Company

In US law, an explicit link between deliberateness and the award for non-pecuniary loss is rare. In the case of *Lutz Farms et al. v. Asgrow Seed Company* an explicit link is nevertheless visible.[280] In this case, the Lutz brothers bought onion seed from Asgrow. The seed produced numerous double onions, which were not commercially salable. Lutz stated and proved that the onion seed they bought was not properly tested in breach of the internal regulations of Asgrow. Had Asgrow done the test, it would have been clear in advance that the seed was of a poor quality. Lutz sued Asgrow on a number of grounds, including breach of express and implied warranties and willful breach of contract, but the claim was also based on tort, more specifically negligence. The case states that Lutz claimed damages for emotional distress in connection with the willful breach of contract claim.[281] In a jury trial in the district court of Colorado the jury honored the claim of willful breach of contract and awarded damages for emotional distress accordingly. The cited case is an appeal case, on which the Court of Appeal of the 10th Circuit decided. For this case, it is only relevant how the court decides on the willful breach claim and the connected claim of damages for emotional distress. The court states three important things in one passage and it should therefore be quoted in full:

“The parties apparently agree that under Colorado law "damages for mental suffering are recoverable for willful or wanton breach [of contract] when they are a natural and proximate consequence of the breach.[282] It is Asgrow's position that there was insufficient evidence that any breach of warranty on its part was willful and wanton or that any emotional distress suffered by the Lutzes was the natural and proximate consequence thereof, and that accordingly, the emotional distress claim should not have been submitted to the jury. The district court was of the view that the evidence was sufficient to warrant submission of this claim to the jury. We agree.”[283]

First, the court states that according to Colorado law damages for emotional distress after willful breach are recoverable. The court puts the words “of contract” between brackets which suggests that the term “willful breach of contract” is not a generally used term, but rather the term “willful breach”. Warranties, next to a contract, can also be breached willfully and warranties need not be always contractual in the sense that parties expressly agreed on its wordings. Nevertheless, in this case the court apparently does not deem the possible difference relevant and it cites case law on which it founds the general link between willfulness and damages for emotional distress.

Second, the court formulates the requirements which should be fulfilled in order to claim damages for emotional distress after willful breach of contract. On the one hand, Lutz should prove the willfulness of the breach and on the other hand, Lutz should prove that the emotional distress is a natural and proximate consequence of the willfulness. This case is also instructive, because the court shows why Lutz succeeded in proving both steps.

The court explains that Lutz showed that the failure to test was a consequence of the calculated and considerate business decision of Asgrow intended to speed up sales and marketing of the onion seed.

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[280] *Lutz Farms et.al v. Asgrow Seed Company* 948 F.2d 638; 1991 U.S. App. LEXIS 25030

[281] *Lutz Farms et.al v. Asgrow Seed Company* 948 F.2d 642.

[282] The court refers to *Trimble v. City and County of Denver*, 697 P.2d 716, 731 (Colo. 1985). See also *Denver Pub. Co. v. Kirk*, 729 P.2d 1004, 1008 (Colo. App. 1986); and *Smith v. Hoyer*, 697 P.2d 761, 764 (Colo. App. 1984).

[283] *Lutz Farms et.al v. Asgrow Seed Company* 948 F.2d 642, 647.

Because Lutz provided evidence to support this claim, the failure to test was willful and wanton and not inadvertent.[284]

Then, the court explicitly mentions the detailed nature of evidence provided by Lutz in order to prove the proximity of their emotional distress as a consequence of the willful breach. The court states that in case of absence of evidence or even in the case of marginal evidence, the district court could not let the jury decide on this matter. The court decided that the district court did not err, because Asgrow was fully aware that they were dealing with commercial growers. Furthermore, Asgrow was also aware that the large value of the deal would lead to bankruptcy on the side of Lutz in the case of harvest failures. This scenario became reality – as Asgrow could have foreseen – and Lutz suffered emotional distress as a consequence thereof.[285]

Consequently, the Federal Court of Appeal supported Lutz's claim and denied the arguments of Asgrow. It is worth mentioning that the district jury awarded $ 425,000 in favour of the two brothers Lutz for damages for emotional distress alone. This substantial amount – the case was decided in 1984 – could not have been awarded had the breach of contract not been willful.

4.5.4 French law: recapturing the swimming pool case

The other case which is comparable to the case study is the French swimming pool case. The Cour de Cassation seems to be more in favor of the creditor, because he seems to be able to enforce his right to performance, even though the disadvantage due to the defective performance need not be established. In this case too, motive as a relevant element has not been part of the arguments. A closer look reveals that the French swimming pool case is somewhat different from the English one, because in the latter one, the cost of reinstatement is deemed to be out of proportion against the loss or damage at the side of the creditor. In such situations, French law is not so creditor-friendly as it seems to be. In a specific French case, where a constructor used a different type of wood than specified in the contract for furniture for a shop, the Cour de Cassation decided that although there was a breach of contract, the creditor could not terminate the contract and claim damages, because there was no loss. The absence of loss was established, because the Cour de Cassation found that the different type of wood used did not affect the usefulness or the outward appearance of the finished work.[286] Careful reading of the decision leads to the conclusion that the debtor offered a price reduction as a reparation measure because of the wrong type of used wood. Such a price reduction can be constituted as a partial termination. The quality of the performance has been decreased, albeit to a minimal extent, and the counterperformance – the payment – has been decreased as well. The creditor is compensated for his losses, but he is not entitled to a higher amount of damages, because he suffered no – additional and tangible – loss. It is interesting that the authors of the Casebook seem to assume that the factor of deliberateness could have been part of the decision in this French case, but the relevance in the end was limited, because the offered price reduction allegedly consisted of the profits the constructor made by using the wrong – and apparently cheaper – type of wood. However, it is not so easy to find a reference to a form of restitutionary measure in the French decision itself.

[284] *Lutz Farms et.al v. Asgrow Seed Company* 948 F.2d 642, 647.
[285] *Lutz Farms et.al v. Asgrow Seed Company* 948 F.2d 642, 647.
[286] Cass.civ, 11 April 1918, S. 1918.1.171.

4.5.5 Dutch law: art. 6:106a BW; an exceptional provision in the Dutch Civil Code

A straightforward example of the relevance of deliberateness on the award for non-pecuniary losses can be found in Dutch law. As previously explained, Dutch law of damages is a general law which encloses contract law as well as tort law, whereas in specific situations the concrete provisions offer sufficient possibilities to distinguish between tort and contract law situations. The starting point of the Dutch law of damages is the award of compensatory damages for material losses – including loss of profits. An aggrieved party confronted with breach of contract or with an unlawful act is automatically entitled to this type of damages according to art. 6:95 BW. According to this provision, the award for non-pecuniary losses is only possible when a specific foundation in law can be identified. Such a foundation is art. 6:106 BW.[287]

Subsection 1 allows for an award of damages for non-pecuniary loss in the case the party inflicting the damage specifically aimed at causing non-pecuniary damage on the aggrieved party.[288] This provision is applicable for contract as well as tort situations, but it is clear that this provision is only relevant in breach of contract situations if the breach also constitutes a tort. A 'simple' deliberate breach aimed at acquiring a financial advantage does not render this provision applicable, because the intention to inflict immaterial harm is absent.

The question arises whether a connection between an award damages for non-pecuniary losses and deliberateness in the area of breach of contract is possible.

4.5.6 Concluding remarks

Section 4.5 describes the potential influence of deliberateness on the award of damages for non-pecuniary losses. Because this type of damages is a rare type of damages to be awarded in contract law, the question is whether deliberateness of the breach may lower the threshold to award damages for non-pecuniary losses. Examples from English law and US law are not conclusive on this issue. At most, both systems give some indications that this question may be answered affirmatively, although both systems provide different examples. Where US law emphasizes the connection between the blameworthiness of the conduct and the award of this type of damages, English law seems to struggle with the question whether the risk of deliberate breach without a sanction would become problematic in cases where expectation damages are not easy to calculate, as the *Ruxley* case shows.

4.6 Deliberateness and punitive damages

4.6.1 Introductory remarks

This section pays attention to the possible link between deliberateness of the breach of contract and the award of punitive damages. In other words, does the element of deliberateness push the court

[287] Art. 6:95 BW: "Damage to the repaired pursuant to a legal obligation to pay damages consits of loss to proprety, rights and interests and any other prejudice, to the extent that the law confers a right therefor." (Translation by Warendorf 2009, p. 660.); Art. 6:106 s.1 sub a BW: "For any prejudice not comprising loss to property, rights and interests, the person suffering the loss has the right to damages to be fairly assessed if the person liable intended to cause such prejudice." (Translation by Warendorf 2009, p. 662).

[288] The Dutch term 'oogmerk' cannot easily be translated, but 'intended objective' approaches its meaning.

towards awarding punitive damages or does it influence the level of punitive damages? The last question is difficult to answer and this section concentrates on the first one.

A first relevant issue is - as Chapter 1 already mentioned – whether punitive damages are a possible remedy in contract law *at all*. In European legal systems, it is fairly safe to argue that in a pure contract law case, punitive damages are not available. In continental systems, punitive damages are neither available in tort law except for a very limited group of defamation cases. In English law, exemplary damages may be awarded in tort cases, but the courts are also reluctant.[289] In other words, in European legal systems, the question whether deliberateness influences the decision of the court to award punitive damages in case of breach of contract is not relevant.

It is interesting to notice that whereas the language seems strong in denying the relevance of motive with regard to the potential award for punitive damages, at the same time some prudence is exercised. This prudence is justified, because there are exceptions. Punitive damages are possible in a situation of breach of contract, if the breach is accompanied by an independent tort. Punitive damages are in certain jurisdictions available in tort, but the question remains whether punitive damages are also available in the case of a deliberate breach which is not automatically an independent tort.

The notion of punitive damages is certainly well developed in US law. However, the specific question asked in this chapter cannot be answered in an easy way. In the next subsections the step towards a possible award of punitive damages after a willful breach of contract proves to be a two stage rocket. Even then, it is questionable, whether a proper link between the two notions is possible to establish.

4.6.2 French law: a new development on punitive damages in contract?

This section starts does not start with a description of current French law, in which prunitive damages are not available, neither in contract nor in tort. However, the last reform project as a proposal introduced the availability of punitive damages in case of a 'faute manifeste deliberée' (art. 1371 Proposal). According to the structure of the Proposal which is not too clear on this point, art. 1371 means also to cover contract cases in which a so-called 'faute lucrative' gives access to punitive damages. The exact wordings of the provision are:

"L'auteure d'une faute manifestement délibérée, et notamment d'une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, a des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part de Trésor public. La decision du juge d'octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêts accordés á la victime. Les dommages-intérêts ne sont pas assurables."[290]

It is worth mentioning this tentative provision in French law, because it reflects a tendency in legal thinking which completely opposes the more popular law and economics theory of efficient breach. The award of punitive damages does not only aim to redress the type of cases which will be elaborated on in the subsequent subsections on bad faith breaches in insurance cases, but also

[289] The leading case is still *Rookes v Barnard* [1964] A.C. 1129,1221 in which Lord Devlin describes the award of punitive damages in general as an 'anomaly'.
[290] Rowan 2009, p. 358.

explicitly the classic type of deliberate breach, the double sale.[291] Rowan acknowledges that the proposed provision would mean the introduction of unknown territory to French law. It is therefore regrettable that the provision and the official additional comments on the provision do not make clear how the court should exactly make use of this new possibility. Does it really apply to contract case or only – for example – to the more traditional defamation cases – as in English law? Nevertheless, the development shows that the first attempts to acknowledge the phenomenon of the deliberate breach of contract in connection with remedies on the continent are present.

4.6.3 US law I: deliberateness, punitive damages and the issue of contract and tort

In case of any breach of contract, the primary available remedy for the aggrieved party is expectation damages. Expectation damages are only available to the extent of compensation of the losses. Deliberateness is in general not relevant for the award of expectation damages. Furthermore, in a pure breach of contract case, the breach being deliberate or not, the aggrieved party does not have access to punitive damages.

In the case *Christopher Keith Salvino and Suzanne Mary Salvino and Wish Acquisition LLC v. Christopher Salvino* the court again states the current position of US law towards punitive damages and contract law, especially in a case of willful breach:[292]

"It is well settled in this state that punitive damages are not recoverable in an action for breach of contract, even though it is alleged that the breach was unlawful, willful, wanton and malicious."[293]

Nevertheless, although US law considers a conscious breach of contract no different than any other breach in terms of remedies, the question may be asked whether a deliberate – willful – breach at least sometimes may also qualify as a tort. In the area of tort damages, punitive damages are available in the appropriate cases. Labeling 'willful breach of contract' as a specific tort in order to gain access to punitive damages without any further legal requirement could be a trick to avoid the doctrinal limits of contract damages. Courts also acknowledge this potential manoeuver. The Second Restatement of Contract is an academic document with no legal force, but nevertheless attempts to provide a structured picture of the general rules of contract based on case decisions. A commentary on § 355 of this Restatement says that punitive damages may be awarded for breach of contract only

"if the conduct constituting the breach is also a tort for which punitive damages are recoverable"[294]

The route from contract damages to tort damages – in other words the equation of breach of contract with a tort – has generally, historically and traditionally been cut off firmly. In the words of Gilmore, classical contract theory on this issue is

"dedicated to the proposition, that ideally, no one should be liable to anyone for anything."[295]

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[291] Rowan 2009, p. 358, 359.

[292] *Christopher Keith Salvino and Suzanne Mary Salvino and Wish Acquisition LLC v. Christopher Salvino* 373 B.R. 578; 48 Bankr. Ct. Illinois Dec. 2007.

[293] The court quotes another case *R&H Trucking v. Occidental Fire & Cas.Co.* of N.C. 2 Ohio App. 3d. 269, 441 N.E.2d 816,819 (Ohio App.Ct. 1981)

[294] Restatement (Second) of Contracts § 355 (1981).

[295] Gilmore 1974, p. 3.

Gilmore used this exaggeration to emphasize that damages in contract have a history of constant limitation and restriction, as explained before. The whole idea of contract and its narrow conception of damages would be in danger if damages in tort could be easily obtained by qualifying every breach of contract as a tort.

However, parties to an insurance contract are not only bound by the wording of the contract, they are also bound by an implied covenant of good faith and fair dealing. In earlier decisions, it was already decided that the covenant of good faith sounded in contract and in tort. The gateway to the tort qualification is essential, because remedies in tort also include punitive damages, whereas remedies in contract generally do not. The question is whether breach of the insurance contract in this case could also be classified as a tort. If that result is achieved, remedies in tort are also available, under which punitive damages.

Taking into account the requirement of a breach needing to be a tort in order to have access to punitive damages, the question arises whether deliberateness of the breach as such is sufficient to 'upgrade' the breach to a tort, on the sole aspect of deliberateness. Such clear-cut examples are not easily available, but within a specific type of contract, the insurance contract, willful breach may lead to qualification as a tort, the tort of bad faith breach, which in turn gives access to punitive damages.

4.6.4 US law II: Fletcher v Western National Life Insurance Co.

The development of the bad faith breach doctrine has been a hesitant one. California may be labeled as the birthplace of this idea and several states have incorporated elements of the doctrine. The facts of the mentioned case provide a good idea of the factual background against which this doctrine developed and why punitive damages became a viable option.

In the Californian case *Fletcher v Western National Life Insurance Co* Fletcher has a full-time job on a construction site as a construction worker.[296] He works long days and the work he does is physically very demanding. He owns a modest house and some small real estate. He has disability insurance, which is supposed to pay him on the level of minimum for a period of 30 years if he becomes totally disabled. After an unfortunate accident on his work, Fletcher suffers back injury. According to several medical experts he is totally and permanently disabled. However, the insurer refuses to acknowledge his claim and denies the cause of the injury is connected to his working activities. The insurer even states that Fletcher was negligent in disclosing a back injury from the past and therefore reclaims the small amount the insurer already paid him. Fletcher is forced to enter legal proceedings, but suffers direct losses. He loses his house and his other real estate and his financial space (and his family's) rapidly decreased. In this case the court eventually not only awarded compensation damages for breach of contract**,** but also awarded punitive damages on two grounds. First, the insurer committed breach of the covenant of good faith and fair dealing. This covenant sounds in contract and in tort. Secondly, the insurer committed an included, but separate tort, namely the tort of intentional infliction of mental distress.

This decision of the court to award punitive damages based on tort of bad faith breach should be examined in more detail in order to assess the influence of the deliberateness of the breach. The key

[296] Facts derived from *Fletcher v Western National Life Insurance Co.* 10 Cal. App. 3d 376, 89 Cal. Rptr. 78. See also e.g. *Wetherbee v United Insurance Co. of America*, 265 Cal.App.2d 921, 71 Cal.Rptr. 764.

element of the concept of bad faith breach is that it is a specific tort. US law primarily recognizes the *contractual* character of a first party insurance. The refusal to perform any obligation according to the contract should primarily be considered as breach of contract. The available tools for the aggrieved party are the remedies for breach of contract, primarily expectation damages. However, parties to an insurance contract are not only bound by the wording of the contract, they are also bound by an implied covenant of good faith and fair dealing. In earlier decisions, it was already decided that the covenant of good faith sounded in contract and in tort. The breach of this covenant is under circumstances labeled as a bad faith breach and leads to the establishment of the bad faith breach. A breach of the covenant of good faith and fair dealing may sound in contract and in tort[297], but the question is why specifically in insurance contracts the idea of this specific covenant is needed in order to provide the insured with an extra weapon next to the ordinary remedy of expectation damages. The court decided that a special relationship between contractual parties is needed in order to imply the mentioned covenant. Macintosh analyzes the relationship between the insurer and the insured and comes to the conclusion that the insurance contract is not a balanced contractual relationship.[298] Naturally, in the *Fletcher* case the insured is an individual with a very modest financial and intellectual background and the insurer is a large company and a repeat-player in the area of dealing with claims inside or outside the courtroom. However, Macintosh advances another, behavioral or economic argument why the insurance contract is not balanced. The insurer does not have an intrinsic incentive to pay after the event for which the insurance is bought has occurred. The insured paid his premium to remain insured, but after the insured event took place, the insurer does not have an incentive to pay the entitlement on the policy, even if the insured has every right to the entitlement based on the policy. The lack of counterweight to incentivize the insurer to pay or at least to act timely is on the one hand intrinsically connected with the specific insurance contract, because the insurer has nothing to gain from keeping the relationship with the insured sound, because the insured has already performed his part of the contract. On the other hand, the lack of counterweight has to be found in the absence of sufficient armory for the insured to use against the insurer once he refuses to perform his part of the contract –i.e. the traditional contract law remedies are not strong enough. The biggest weapon of the insured is the remedy of expectation damages, which is often actually the maximum limit of the policy and nothing more, because expectation damages should be compensatory and the aggrieved party should not achieve a better position than in the case the insurer paid him according to the contract. Naturally, the insured may suffer additional and consequential losses due to the absence of payment. In the *Fletcher* case, the insured lost his house and his other small real estate due to his lack of income. Not all of these losses are always recoverable, but generally only within the limits of foreseeability and remoteness. In addition, according to the court in the *Fletcher* case, in disability insurance cases the only measure of liability and damage is the sum or sums payable in the manner and at the times as provided in the policy. In summary, on the basis of probabilities the insurer may well decide to refuse to pay, because the insured has to be quite determined to receive what is owed to him and even then, the insurer knows well in advance that he does not have to cover all costs and damages of the insured. In other words, the vulnerability of the position of the insured is important in order to qualify the actions of the insurer as tortious. In the *Fletcher* case, the court decided that the insurer commits bad faith breach of contract, if the insurer consciously abuses the vulnerable position of the insured

[297] *Comunale v. Traders & General Ins. Co*. 50 Cal.2d 654.
[298] Macintosh 1993.

by denying liability, even though he knows he does not have a viable defense against a claim speculating on the ignorance of the insured or his inability to fight for his rights. In this situation, it is acceptable that tort remedies are also available, because this type of behavior of the insurer should be subject to retribution on the one hand and be deterred on the other hand.

A disadvantage of the award of punitive damages in insurance law which should be taken into account is the potential rise of premiums because insurers should take into account the potential risk of facing an unpredictable amount of damages. However, this disadvantage did not withhold the California Supreme Court and subsequently the courts of various other states to introduce the bad faith breach as a specific tort or to classify bad faith breach as a tort with a specific content, such as the tort of inflicting serious mental distress, as the court did in the *Fletcher* case.[299]

So far, a 'normal' bad faith breach case occurs after conclusion of the contract, but it is also possible to discover the so-called *institutional* bad faith breach of contract. This type of bad faith breach occurs when insurance companies are built on policies elaborated in schemes, computer programs and job trainings, which deliberately deny claims in order to maximize profits.[300] In such a case, insurance contracts may be sold when it is clear in advance that the insurance company is not likely to indemnify the insured party if the insured event becomes reality and the insured has a sound case.

Several States did adopt bad faith breach as a specific tort in insurance cases. In the heat of the court developments in the 1970's the question arose whether bad faith breach with its potential access to punitive damages could also be applicable in *other* cases than insurance cases, because the requirement of the special relationship between the contracting parties seems to be relatively general.

4.6.5 US law III Seaman's Direct Buying Service inc. v Standard Oil Co

Again in California, the limits of the bad faith breach tort were tested. Whereas the bad faith breach tort in cases of employment contracts was tested[301], the California Supreme Court attempted to cover the ground for a general application for bad faith breach of contract.

The California Supreme Court decided the controversial Seaman's case in 1974.[302] Seaman's was a retailer of supplies for ships and boats. The city of Eureka, California, planned to build a new marina in which there would be space for a fuel station for boats. Seaman's and Eureka negotiated a contract under which Eureka would lease space in the new marina to Seaman's for selling boat fuel, but the contract was conditional on Seaman's providing proof that it had obtained a fuel dealership from a reputable wholesale fuel supplier. Seaman's signed a dealership contract with Standard and presented a copy to Eureka as proof, on the basis of which Eureka gave Seaman's the lease. However, before Eureka completed the construction of the marina, the worldwide oil shortage of 1973-1974 started. New federal regulations prevented Standard from delivering oil to Seaman's

[299] See for more in-depth analysis of this type of cases e.g. Tennyson & Warfel 2009; Kornblum & Olson 1986; Diamond 1981.
[300] See inter alia Richmond 2010, p. 443-446.
[301] See e.g. *Tameny v. Atlantic Richfield Co*., 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1337 n.12
164 Cal. Rptr. 839, 846 n.12 (1980).
[302] *Seaman's Direct Buying Service inc. v. Standard Oil Co* 36 Cal. 3d 752, 686 P. 2d 1158, 206 Cal. Rptr. 354.

unless Seaman's filled in specific forms to request delivery. Standard offered Seaman's help to fill out these forms. In the end, the supply order was granted.

Subsequently, Standard responded by changing its position. The company contended now that no binding agreement with Seaman's had ever been reached. Therefore, Standard decided to appeal the order "because [it] did not want to take on any new business." When Seaman's learned of the appeal, it twice wrote to Standard requesting an explanation. None was forthcoming. Standard's federal appeal was successful. Seaman's then appealed and this decision was, in turn, reversed. The new decision provided that an order "direct[ing] [Standard] to fulfill supply obligations to Seaman's" would be issued upon the filing of a copy of a court decree that a valid contract existed between the parties under state law. Seaman's asked Standard to stipulate to the existence of a contract, explaining that it could not continue in operation throughout the time that a trial would take. In reply, Standard's representative laughed and said, "See you in court." Seaman's testified that if Standard had cooperated, Seaman's would have borrowed funds to remain in business until 1976 when the new marina opened. Seaman's discontinued operations in early 1975.

Seaman's sued Standard, claiming breach of contract, violation of the covenant of good faith and fair dealing sounding in tort, and tortious interference.[303] The tortious interference claim will not be discussed in the subsequent parts.[304]

The facts of the case evidently show that Seaman's was rightly awarded expectation damages in every instance. The question is whether does the facts in this case give Seaman's a claim beyond expectation damages. Seaman's also claims compensatory damages for the tortious interference and – more importantly – punitive damages for breach of the covenant of good faith and fair dealing which sounds in contract and in tort. The new aspect of the Seaman's case is that this case is not about insurance contracts.

The difficult part is how the court justified an eventual larger award of damages. The court awarded all claims of Seaman's, including the claim for punitive damages, but had some difficulty to give reasons for its decision. The court established that the contractual relationship was a normal commercial contract and did not have the specific characteristics of an insurance contract. In principle, the bad faith breach approach which seemed to be reserved for area of insurance contracts, did not seem to be acceptable. However, the court ruled that bad faith breach could also be established in non-insurance cases if the party in breach:

"(…) adopted a stonewall position without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics."[305]

The struggle with bad faith breach did not end with the *Seaman's* case. The quick rise of bad faith breach as a specific tort which could trigger several types of damages which were normally not

[303] Slawson 1996, p. 106.
[304] The tort of tortious interference indicates an unlawful interference with business relationships of other parties. In this case Standard wrongfully interfered with the relationship of Seaman's with Eureka by not abiding by the contract, because Seaman's was deprived of an advantageous contract with Eureka. *Seaman's Direct Buying Service inc. v. Standard Oil Co* 36 Cal. 3d 752, 686 P. 2d 1158, 206 Cal. Rptr. 354.
[305] *Seaman's Direct Buying Service inc. v. Standard Oil Co* 36 Cal. 3d 752, 686 P. 2d 1158, 206 Cal. Rptr. 354.

available in contract cases did not stabilize. The decision of the Californian Supreme Court was generally not followed by other States, although subsequently, in 1988 and later in 1995, the California Supreme Court overruled the Seaman's decision, because the pressure to refrain from qualifying breach of contract as a tort was very high.[306] Most courts throughout the country adhered to the freedom of parties to keep or breach a contract, at least to the common law fundaments of this principle.[307]

4.6.6 Dutch law: a step aside; another solution for cases of bad faith insurance; Van Rossum/Fortis

Where the debate in US law on the connection between deliberate breach and punitive damages in insurance law is blurred by the tort law aspect, Dutch law has also difficulties with insurers who do not comply with their obligations arising from the contract with the insured party – for example by intentionally delaying payment. However, these problems are completely different from the type of problems in US law.

In Dutch law, the obligation of the insurer is separated from its legal background. It does generally not matter whether the obligation arises from a contract or from another source of obligations, such as the law or an unlawful act. What is important is that the obligation of the insurer is one to pay an amount of money based on a legal source of authority. The Civil Code contains a specific provision on late payment. The aggrieved party may claim interest at a statutory rate according to art. 6:119 BW. There is a specific provision for obligations to pay arising from a commercial contract. Art. 6:119a BW is specifically written for this situation. What in this context a 'commercial contract' is, is defined in the provision. The result is more or less comparable with the result arising from the general provision.

In an insurance case, the solution to solve the problem of overdue payment by the insurer seems to be remarkably simple: the insured has a right to claim the statutory interest and nothing more. Damages are generally fixed, specifically in order to avoid disputes about the extent of damages during the delay. While this solution seems to be an attempt to make legal proceedings economically efficient, one may think that this approach is quite harsh for the insured. It could well be that due to the late payment the aggrieved party suffers a much higher loss than the loss covered by the policy plus the statutory interest.

The level of the actual damages can be lower *or* higher than the fixed amount of statutory interest. Both situations as such are not sufficient to award more damages or less damages than the monetary 'fine' imposed by art. 6:119 BW.[308]One of them will be explored in more detail, because although the Hoge Raad is not opening the gates for claims above statutory interest, close reading reveals some

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[306] *Freeman & Mills, Inc. v. Belcher Oil Co.* 11 Cal.4th 85, 900 P.2d 669 Cal.,1995. See e.g. the Canadian case *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 (Supreme Court of Canada) for a substantially insured-friendly view.

[307] Farnsworth 2004, p. 763. It is interesting that Farnsworth note that the rejection of the tort of bad faith breach does not imply rejection of the implied duty of good faith imposed by the Code and by case law. However, the implications of this statement for the assessment of intentional breach of contract is not clear.

[308] HR 14 januari 2005, NJ 2007, 481 m. n. Hijma (Ahold/Staat) and HR 14 januari, NJ 2007, 482 (Van Rossum/ Fortis). These decisions are not surprising taking into account the parliamentary history of art. 6:119. (Book 6, p. 467, 473-474).

possibilities for a change in approach in the future. The Van Rossum/Fortis case deals with the upper limit – which is the most relevant limit in the perspective of this thesis, because deliberate delay may cause more losses – imposed by the statutory interest. This section is interested in the question whether the limit of statutory interest can be taken away where the breach of the insurer was deliberate.

The facts are as follows. Van Rossum owned premises which burnt down due to a fire. Van Rossum had an insurance contract with Fortis which covered losses due to a fire. The level of damage had been established by experts according to the contract. Fortis refused to pay, because according to Fortis, the fire could only have been caused by a conscious act of a human being. The only reasonable person to set fire was Van Rossum and therefore the insurer refused to pay.

The court in first instance denies the claim of Fortis and orders Fortis to pay the insured amount. Subsequently, Van Rossum claims additional damages due to the refusal of Fortis to pay the insured amount. Van Rossum supports his claim by referring – inter alia – to the actions of Fortis in order to avoid payment. Van Rossum does not attach the label 'deliberate' to these actions, but the arguments Van Rossum uses indicate something in that direction, especially because he also claims damages due to loss of reputation, because he is falsely accused of setting fire to his own premises.

The Court of Appeals also denies the claim of Van Rossum and the Hoge Raad confirms the decision of the Court of Appeal. The Hoge Raad repeats that the claims for payment of a due amount can only be accompanied by a claim of loss of interest at a statutory rate, based on art. 6:119 BW. Applied to the insurance context, the Hoge Raad confirms the strict attitude of Dutch law towards additional claims next to the claim based on the policy. Nevertheless, the Hoge Raad does not the close the door to an additional claim, but special circumstances – which the Court of Appeal justifiably did not establish – may block the restrictive application of art. 6:119 BW based on the principle of good faith. It remains questionable.

The question is whether this case is especially highlighted, because the deliberate behavior is not unambiguously established or acknowledged by the court and there is also not a serious trace of a specific sanction as a consequence of the behavior of the insurer. The answer to this question is that this case illustrates that in insurance law, the insurer must also have opportunities to defend himself. The obligation to pay directly on the policy after the insured event occurred conflicts with the possibility the insurer should have to defend himself against frivolous claims. In this case, the court *ex post* establishes that the accusation of self-inflicted fire is not sound, but awarding additional damages – especially if they can be labeled as punitive damages – may imply a factual limitation on the freedom of the insurer to defend himself in litigation.[309]

4.6.7 Concluding remarks

Section 4.6 describes the relation between deliberate breach and the award of punitive damages. In continental systems, the award of punitive damages in private law is in general hardly allowed, let alone in breach of contract situations. In the US a direct link between punitive damages and willful

[309] See Van Boom 2011 for a comparative European analysis of the problem of bad behavior of insurers and potential sanctions versus the protection of the procedural interests of the insurer. He argues that some European legal systems recognize the possibility to claim additional damages next to statutory interest.

breach of contract is generally also denied. However, under circumstances and in a limited group of cases in the area of insurance contracts, a willful breach of contract may be labeled as a specific tort, i.e. bad faith breach, which in its turn gives access to punitive damages. After the 1970's especially California attempted to extrapolate the application of the bad faith breach tort to other than insurance cases, but this attempt failed. The influence of deliberateness on the award of punitive damages is therefore not absent, but limited.

4.7 Deliberateness and account of profits

4.7.1 Introductory remarks

The question in this section is whether account of profits is awarded in case of deliberate breach of contract. A terminological issue is a first step to overcome, because especially in common law jurisdictions several terms are used to describe the phenomenon of account of profits. In terms of doctrine, the remedy of account of profits is classified as a restitutionary remedy. Restitution and contract law is not a logical combination in advance. After termination – see section 4.8 – restitution in some form may be awarded, but account of profits is a specific category. As a synonym of account of profits, the term disgorgement is also a common term. It is important to realize that in every legal system the award of account of profits as an alternative remedy compared with expectation damages is a serious step, because the classic objective of compensation of the aggrieved party is not 'overserved' by the remedy of account of profits. On the other hand, it is in a way a logical step to deprive the party committing deliberate breach of contract from the profits he gained from that deliberate breach. This section shows that this tense contradiction yields interesting case law and a serious development in doctrinal thinking on disgorgement of profits as an independent remedy.

4.7.2 English law I: Surrey County Council and another v Bredero Homes Ltd

In first instance, English law is reluctant towards awarding other than compensatory damages in the case of breach of contract, such as account of profits.[310] The remedy of expectation damages is not only leading, starting point is that the expectation interest cannot be extended or replaced by other damages regimes which are more friendly to the aggrieved party.[311]

A vital case to explore the possible influence of deliberate breach of contract on the availability of account of profits is *Surrey County Council and another v Bredero Homes Ltd*.[312] Two councils owned parcels of land, which were originally destined for road purposes. However, the land was no longer required for road purposes and the councils decided to sell the land to be used for housing estates. In order to obtain a reasonable amount with an eye to eventual profits, they agreed with the estate developing company, the defendants, upon a specific building scheme. The site was sold in January 1981 subject to the express condition that the defendant would obtain permission to develop the site according to the agreed scheme. The defendant agreed to a specific contract clause that he would develop the site according to the agreed scheme. However, after the sale he obtained fresh

[310] *Robinson v Harman* (1848) 1 Ex 850; *Hadley v Baxendale* (1854) 9 Ex 341.

[311] In exceptional situations, reliance losses may be covered incase expectation damages do not cover the losses of the aggrieved party, but the award of reliance losses is also a manifestation of compensatory damages: bringing the aggrieved party into a situation as if he never entered into the contract. See Peel 2011, p. 1005 and *Anglia Television Ltd v Reed* [1972] 1 Q.B. 60.

[312] *Surrey County Council and another v Bredero Homes Ltd* [1993] 1 WLR 1361.

permission to develop the site in such a way that he could build more houses. The site turned out to be more profitable than it would have been under the agreed scheme. The defendant committed deliberate breach of contract. However, the plaintiffs decided not seek an order for specific performance of the contract. Instead, after the defendant had sold the site, they sought damages equal to the payment that might have been extracted from the defendant in return for agreed modifications to the covenants so as to authorize the more profitable development which had in fact been carried out. The defendant recognized he committed breach of contract, but argued that damages were meant to compensate any loss of the plaintiffs, which were only nominal. He refused to pay damages only because he made more profit by breaching the contract without causing any damage to the plaintiff. The High Court of Justice only awarded nominal damages.

The victim of the breach argues that the aspect of the deliberateness of the breach should be taken into account in the assessment of damages, because the party in breach should not profit from his deliberate wrongdoing. The victim argues that if he only received 'conventional' damages, he might lose his bargaining power. At this point, the victim connects the claim for a higher amount of damages than 'conventional' damages to the availability of the remedy of specific performance:

"Damages for loss of bargaining power can be awarded if – but only if – the party in breach could have been restrained by injunction from committing the breach of contract or compelled by specific performance to perform the contract. Where no such possibility existed, there was no bargaining power in reality and no right to damages for loss of it. Hence, damages for loss of bargaining power cannot be awarded where there is (for example) a contract for the sale of goods or (generally) a contract of employment."[313]

This element is essential, because it becomes clear in a real case that eventual deliberateness of the breach can be connected to a claim for specific performance, which in its turn may influence the level of damages, because the bargaining power is seriously affected by the eventual availability of specific performance as a remedy. The loss of bargaining power is materialized in a claim for account of profits of the party supposedly committing deliberate breach. The victim of the breach attempts to obtain access to restitutionary damages, because of the deliberateness of the breach.

However, the loss of bargaining power as a legal relevant element of loss is not recognized by Dillon LJ who denies this argument:

"I find difficulty with that because in theory every time there is a breach of contract the injured party is deprived of his 'bargaining power' to negotiate for a financial consideration a variation of the contract which would enable the party who wants to depart from its terms to do what he wants to do. In addition it has been held in *Walford v Miles* [1992] 1 All ER 453, [1992] 2 AC 128 that an agreement to negotiate is not an animal known to the law and a duty to negotiate in good faith is unworkable in practice--and so I find it difficult to see why loss of bargaining or negotiating power should become an established factor in the assessment of damages for breach of contract."[314]

Even more elaborate and negatively towards the concept of introducing motive as a relevant element in the law of (contract) damages is Lord Steyn:

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[313] *Surrey County Council and another v Bredero Homes Ltd* [1993] 1 WLR 1361, 1368 (Dillon LJ).
[314] *Surrey County Council and another v Bredero Homes Ltd* [[1993] 1 WLR 1361, 1368 (Dillon LJ).

"Despite Sir William's disclaimer it seems to me that the acceptance of the propositions formulated by him will inevitably mean that the focus will be on the motive of the party who committed the breach of contract. That is contrary to the general approach of our law of contract and, in particular, to rules governing the assessment of damages.(…) The introduction of restitutionary remedies to deprive cynical contract breakers of the fruits of their breaches of contract will lead to greater uncertainty in the assessment of damages in commercial and consumer disputes. It is of paramount importance that the way in which disputes are likely to be resolved by the courts must be readily predictable. Given the premise that the aggrieved party has suffered no loss, is such a dramatic extension of restitutionary remedies justified in order to confer a windfall in each case on the aggrieved party? I think not."[315]

In other words, the Surrey case seems to deny the possibility to claim account of profits under English law even in the case of deliberate breach.[316]

4.7.3 English law II: Attorney General v Blake (Jonathan Cape Ltd, third party)

Although the *Surrey* case does not create an opening for deliberate breach influencing the court to apply a restitutionary remedy in the form of account of profits, English law since then seems to have slightly changed its position, not only with regard to account of profits as an available remedy in contract, but also with regard to the factor of deliberateness influencing the availability of account of profits. A first indication can be found in a case which is already mentioned in section 4.2.2b, the *Argyll* case. In the Court of Appeal case Millett LJ says in the last paragraph of his opinion:

"Withholding equitable relief does not, of course, mean that a covenant to keep a shop open could safely be ignored. The covenant would sound in damages; such damages could be substantial; and it is an open question whether in an appropriate case they might not include an element of what are sometimes – I believe erroneously – called restitutionary damages."[317]

Millett LJ seems to suggest that in an 'appropriate case' the victim of deliberate breach has access to account of profits as form of – apparently – compensatory damages. However, although he mentions the deliberateness of the breach as a signal ("safely ignoring a covenant"), he does not elaborate on the exact role of this element in the decision to award the victim more damages. Moreover, he does not explain what he means with restitutionary damages, which may not be called as such and why these damages seem to be compensatory to his opinion.

In the landmark *Blake* case, which appeared a few years later, the House of Lords did not shut the doors for taking into account motives as a factor of relevance in the decision to award account of

[315] *Surrey County Council and another v Bredero Homes Ltd* [1993] 1 WLR 1361, 1370 (Steyn LJ).

[316] The firm denial of the role of motive in assessment of damages is certainly somewhat nuanced by another case, namely *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 812. The deliberateness of the breach in this case does not contribute to this decision, because there was none. That is why this case is not dealt with in this section. From a perspective of legal development however, the *Wrotham* case seems to be a step towards a wider recognition of loss of (hypothetical) bargain as a sound basis for a monetary remedy, more than the recognition of account of profits. Developments since then recognized the relevance of the hypothetical bargain-damages in full. See e.g. the recent case *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 W.L.R. 2370, 2385-2388.

[317] *Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.* [1996] Ch. 286, 304.

profits. The reason for its landmark status is as mentioned earlier nevertheless the fact that the House of Lords for the first time recognized account of profits as a legitimate source of damages for the victim of breach of contract. The facts of the case were quite special, so the applicability of the decision of the House of Lords on the treatment of deliberate wrongdoing in contractual situations in general should not be exaggerated. Blake had been an employee of the British Secret Intelligent Service between 1944 and 1961. However, from 1951 on, Blake worked for the Soviet Union as a spy. In 1961 he was convicted for spying, but in 1966 he escaped from prison and fled to the Soviet Union. Before he became an agent for the British Intelligence Service he signed a contract and promised not to divulge any official information gained as a result of the employment, either in the press or in book form. In 1989 Blake wrote his biography, by which date the information disclosed was not considered confidential, damaging to the public interest. The publisher agreed to pay Blake £ 150,000. However, after publication in 1990, the Attorney-General started legal proceedings against Blake. At this moment, Blake had received £ 60.000. The Attorney-General was determined to prevent payment of the rest of the amount by reclaiming the whole amount as account of profits.[318]

These facts do not a priori disclose an intention to breach the contract of several decades ago. Blake breached the duty of confidentiality in those days. The question remains if confidentiality still operates, if the presumed confidential information is not really relevant any longer. As Blake did not ask permission, which would have been slightly surprising after having lived in the Soviet Union for more than 20 years, the breach may still be considered deliberate. However, one could not avoid the thought that the spying activities from several decades ago influenced the idea of self-evidence of the deliberateness of the breach in 1990. The claim was dismissed in first instance and by the Court of Appeal.

It is interesting, that Lord Nicholls does not qualify account of profits as a claim of damages, but as a specific monetary remedy.[319]Although account of profits has an official remedial status since this case has been decided, the precise consequences for a deliberate breach of contract situation are not clear. The restrictions formulated by Lord Nicholls, combined with the exceptional facts of the case suggest a careful approach to any generalization of the judgment, especially because Lord Nicholls explicitly limits the sole influence of the nature of the breach on any change in remedial relief:

"Lord Woolf MR (*one of the Lord Justices in this case before the Court of Appeal, MvK*) also suggested three facts which should not be a sufficient ground for departing from the normal basis on which damages are awarded: the fact that the beach was cynical and deliberate; the fact that the breach enabled the defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract the defendant put it out of his power to perform his contract with the plaintiff. I agree that none of these facts would be, by itself, a good reason for ordering an account of profits."[320]

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[318] *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] A.C. 268, 277.
[319] *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] A.C. 268, 285.
[320] *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] A.C. 268, 286 with references to the CA case [1998] 1 All ER 845.

Lord Hobhouse of Woodborough dissents, partly because he thinks that the account of profits route is chosen to punish Blake and that is not what remedies in contract should be about according to him:

"The answer given by my noble and learned friend does not reflect the essentially punitive nature of the claim and seeks to apply principles of law which are only appropriate where commercial or proprietary interests are involved. Blake has made a financial gain but he has not done so at the expense of the Crown or making use of any property of or commercial interest of the Crown either in law or equity."[321]

Furthermore, Lord Hobhouse argues that the claim should not be allowed on restitutionary grounds, because the equitable jurisdiction which governs restitutionary interests already offers a range of remedies, which the Crown for some reason chose not to seek. If the Crown had sought to prevent publication by way of injunction, he would probably have succeeded, but they should not have the possibility to repair their own conduct by relying on this 'new' remedy. Furthermore, the classical notion of damages does not apply either, because damages are a substitute for performance. This traditional view does not allow account of profits as a basis for damages.[322]

4.7.4 English law III: Experience Hendrix LLC v PPX Enterprises Inc. and another

The Blake case is a landmark case for the award of account of profits in breach of contract cases in general. For the specific position of deliberate breach, the Blake case is relevant, because the House of Lords acknowledges the phenomenon of deliberate breach, but not as a basis for the award of account of profits. The more recent case of *Experience Hendrix LLC v PPX Enterprises Inc. and another* shows a new attempt to connect deliberateness to account of profits.[323]

PPX as a producer concluded an agreement with Hendrix which bound him to PPX and ordered him to play and record a certain amount of tracks per year for PPX. Hendrix and, after his death in 1970, his estate, claimed that this was a too harsh agreement. PPX and the estate concluded a settlement in 1973 about the rights of PPX to the mastertapes and the royalties paid to the estate. According to the settlement PPX had only licensing rights to a limited amount of mastertapes. On all other tapes, PPX should ask the estate for permission if it wanted to grant licenses and agree upon a new royalty fee. From 1973 PPX sold licenses for tapes of doubtful quality and licenses without having obtained permission of the estate, all against the agreement made in 1973. The estate's lawyer was aware of the breaches, but no claim was filed until halfway the nineties. The manager of PPX claimed to be the one who had discovered Hendrix and alleged that he had therefore justified reasons to exploit the musical legacy of Hendrix the way he chose to do. The estate filed a claim against the granting of

[321] *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] A.C. 295.

[322] In some contributions it is suggested that the Blake case could be a danger for the development of efficient breach in English law. See Campbell 2002, p. 260 or Campbell and Harris 2002, p. 237. The idea of efficient breach in English law seems to be acknowledged in *Teacher v Calder* [1899] AC 451, but it is an old case and in later cases the idea of efficient breach has not been analyzed in court decisions. According to Zhou, efficient breach may be possible under English law, but it is not desirable, because no sufficient safeguard to guarantee full compensation are available. See Zhou 2008, p. 283. At the same time, objections against efficient breach as a concept for legal practice in English law are also visible. See e.g. *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] A.C. 295 and *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

[323] *Experience Hendrix LLC v PPX Enterprises Inc. and another* [2003] EWCA Civ 323.

licenses to two companies in 1995 and 1999. In first instance, the court ordered PPX to perform the agreement correctly, but dismissed any claim of damages and/or account of profits. The Court of Appeal had to decide on this matter.

The Court of Appeal refers to the Blake case and repeats that only under extraordinary circumstances a claim for account of profits can be awarded. All opinions recognize that PPX commits deliberate breach, but they do not deem the deliberateness of the breach as sufficiently 'extraordinary' to award the claim for account of profits. Peter Gibson LJ formulates the reluctant attitude as follows:

"No doubt deliberate breaches of contract occur frequently in the commercial world; yet something more is needed to make the circumstances exceptional enough to justify ordering an account of profits, particularly when another remedy is available."[324]

This assessment of the legal reality is not without relevance. Peter Gibson LJ not only recognizes the breach by PPX as deliberate, but he also states that deliberate breaches occur frequently in the commercial world. It is not clear whether he justifies the 'normality' of deliberate breach – and the subsequent refusal of the award of account of profits – by referring to the fact that deliberate breach frequently occurs.

Mance LJ also stated that the Hendrix case was a commercial one, where no state or other confidentiality interests played a role. Furthermore, awarding a full account of profits would be quite a large step beyond any compensatory function of damages, because in the case any agreement on licensing all mastertapes had been concluded, the estate would have negotiated for a reasonable royalty fee. This fee would only have been a percentage of the profits PPX had made. According to Mance LJ, such a remedy would not fit in a commercial setting. Nevertheless, the party committing deliberate breach which gained profit for him, should not get away without any account towards the original creditor. Consequently, Mance LJ chose to follow the decision in the *Wrotham* case. The applicable remedy can be considered as compensatory, namely as a loss of bargain. The applicable test is, whether both parties had concluded a settlement about granting a license in the particular two cases concerned, what the royalty fee would have been.[325] This test is a hypothetical exercise, and in more than one way. It is hypothetical, because it has never happened, but it is also hypothetical, because it is very unlikely that the estate would have ever considered concluding a settlement about all tapes available. Mance LJ has not overlooked this problem and he gives due consideration to the consequences of this double hypotheticality. Although he does not want to elaborate on the outcome of the hypothetical negotiations, he assumes that the percentage would have been considerably larger than the percentage agreed upon in the settlement. By increasing the potential loss of bargain, the factual unwillingness to conclude a bargain is taken into account.

In conclusion, the attitude of English law towards account of profits as a remedy in case of breach of contract is a difficult one, whereas the clear recognition of the remedy of account of profits as a result of deliberate breach is even more difficult. In addition, it should be emphasized that in English legal doctrine the position of disgorgement of profits as a contractual remedy has been thoroughly

[324] *Experience Hendrix LLC v PPX Enterprises Inc. and another* [2003] EWCA Civ 323, no. 55.
[325] *Experience Hendrix LLC v PPX Enterprises Inc. and another* [2003] EWCA Civ 323, No 45.

debated as well, but a clear link with deliberate breach of contract has only been mentioned, though not clearly accepted.[326]

4.7.5 US law I: Earthinfo, Inc v. Hydrosphere Resource Consultants, Inc.327

Disgorging profits from the party committing breach of contract is possible in US law, but it is not an easily accessible remedy for the aggrieved party. The question in this subsection is whether deliberateness – in common US language, willfulness – of the breach may help the aggrieved party to claim disgorgement of profits. First, a case law example shows that current law may connect disgorgement and willfulness of the breach. Second, developments in legal scholarship show a tendency to acknowledge the link between willfulness and disgorgement more firmly. The development of this debate seems to be confirmed by a quite sharply formulated provision in a Draft Restatement on unjust enrichment which will also be briefly explored.

The Earthinfo case concerned a contract between Earthinfo and Hydrosphere. Hydrosphere developed certain products for a predecessor of Earthinfo. Earthinfo used the technology in its own products and paid Hydrosphere royalties for the use of a range of specifically mentioned products developed by Hydrosphere. In the course of time, Hydrosphere claimed royalties for a derivative product, not mentioned on the original list. Earthinfo refused to pay royalties for a new product and also refused to pay all royalties for the products mentioned on the list, apparently because Earthinfo did not trust the way Hydrosphere calculated the royalties. This dispute led to litigation and parties wanted to rescind the contract. As a result of the rescission, Earthinfo had to return all the technology, but the trial court also awards a claim for full payment of realized profits after the breach of contract by Earthinfo. For this section, the only relevant issue is that the Supreme Court of Colorado had to decide whether Hydrosphere could claim at least a part of the profits made by Earthinfo, because they used products developed by Hydrosphere. One could say that in this case, the account of profits is a result of the remedy rescission. In this case, disgorgement of profits does seems to be a form of damages after rescission, although the Supreme Court does not seem to pay attention to this particular issue.

The court starts by comparing principles of expectation damages and restitution:

“If, on breach, the injured party's lost expectation equals or exceeds the gain by the party in breach, then damages based on expectation strip the party in breach of all gain, and make the injured party whole. But if the injured party's lost expectation is less than the gain realized by the party in breach, then damages based on expectation do not strip the party in breach of all gain. This situation brings the two principles into conflict.”[328]

The question for this subsection is whether willfulness of the breach may force the party in breach to pay the realized profits above the level of expectation damages. The first question is whether the Supreme Court assesses the particular breach as willful. It does:

[326] See e.g. Campbell & Harris 2002.

[327] *Earthinfo, Inc v. Hydrosphere Resource Consultants, Inc.* 900 P.2d 113, 64 USLW 2037.

[328] *Earthinfo, Inc v. Hydrosphere Resource Consultants, Inc.* 900 P.2d 113, 64 USLW 2037, 116.

"We agree that EarthInfo must be required to disgorge the profits it accrued as a result of its breach since its breach was conscious and substantial."[329]

The court in this case uses the terms 'conscious' and 'substantial'. The first one may be equalized with willful in this case in the light of the whole decision, whereas the term 'substantial' refers to the doctrine of material breach and substantial performance. The quotation of the court also reveals the outcome of the decision, because it says that disgorgement of profits is awarded. The second step to be made is how the court comes to this conclusion. The court repeats a principle of US law that disgorgement of profits is not available in case of a mere breach of contract. A breach should be more 'upgraded' in a certain way to open the door for disgorgement. The court explains how:

"If, however, the defendant's wrongdoing is intentional or substantial, or there are no other means of measuring the wrongdoer's enrichment, recovery of profits may be granted."[330]

Again, another synonym is used, but the court refers to the breach being intentional in order to make account of profits available for the aggrieved party. The connection between the remedy of account of profits and deliberateness of the breach is openly acknowledged and applied in practice.

4.7.6 US law II: appraisal and criticism on the Draft Third Restatement: deliberate breach directly and firmly connected to disgorgement

The exploration in this chapter on signs in current and existing law on the acknowledgement of deliberate breach as an independent legal phenomenon with its own, specific legal consequences has not been very fruitful so far. Sometimes, deliberate breach has been recognized as a manifestation of breach, but a clear and direct connection to a special remedial regime has not been found, let alone encouraged.

This section shows that US law plans to introduce a straightforward connection between deliberate breach – in US terms in this case 'opportunistic' breach – and disgorgement of profits.[331] The most direct source of this section is the Tentative Draft Third Restatement of Restitution and Unjust Enrichment, in which a § 39 is incorporated. The Restatement should be a guideline and a basis for the state of the law in a specific area. Although not embodied with a formal status, a Restatement is an authoritative source. The Third Restatement has still a Draft status, but nevertheless it represents the line of thinking of US law on restitutionary measures. The explicit recognition of the relevance of the breach received appraisal and criticism in various academic contributions. Without elaborating too much on the individual contributions, it is relevant to notice that a difference in approach between English and US law seems to be traced, because English attitude towards disgorgement in breach of contract seems to more reluctant.

Although it is a long provision, it is relevant to quote § 39 in full:

"§ 39. Profit Derived from Opportunistic Breach

[329] *Earthinfo, Inc v. Hydrosphere Resource Consultants, Inc.* 900 P.2d 113, 64 USLW 2037, 120.

[330] *Earthinfo, Inc v. Hydrosphere Resource Consultants, Inc.* 900 P.2d 113, 64 USLW 2037, 119.

[331] It is worth mentioning that in the last proposal for reform of French contract law a comparable and new provision (art. 120) has been included which connects a deliberate breach with the possibility of claiming account of profits. See Terré 2009, p. 286.

1. If a breach of contract is both material and opportunistic, the injured promisee has a claim in restitution to the profit realized by the defaulting promisor as a result of the breach. Liability in restitution with disgorgement of profit is an alternative to liability for contract damages measured by injury to the promisee.

2. A breach is "opportunistic" if

a) the breach is deliberate;

b) the breach is profitable by the test of subsection (3);

and

c) the promisee's right to recover damages for the breach affords inadequate protection to the promisee's contractual entitlement. In determining the adequacy of damages for this purpose,

(i) damages are ordinarily an adequate remedy if they can be used to acquire a full equivalent to the promised performance in a substitute transaction;

and

(ii) damages are ordinarily an inadequate remedy if they cannot be used to acquire a full equivalent to the promised performance in a substitute transaction.

3. A breach is "profitable" when it results in gains to the defaulting promisor (net of potential liability in damages) greater than the promisor would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defaulting promisor would not have realized but for the breach. The amount of such profits must be proved with reasonable certainty.

4. Disgorgement by the rule of this Section will be denied

(a) if the parties' agreement authorizes the promisor to choose between performance of the contract and a remedial alternative such as payment of liquidated damages; or

(b)to the extent that disgorgement would result in an inappropriate windfall to the promise, or would otherwise be inequitable in a particular case."[332]

Before analyzing several comments on this provision, it is necessary to put this provision into the perspective of this chapter and the research so far. This provision contains the first – albeit in a draft Restatement – semi-official definition of opportunistic breach. The term 'willful' is avoided, but a first step towards unanimity on the term has been made. Opportunistic breach should be deliberate and 'profitable'. The definition is comparable to the working definition of deliberate breach of contract provided in Chapter 3 of this thesis.[333] Nevertheless, the added requirement in subsection 3 also includes a difference. The remedy of disgorgement is limited to the cases where expectation

[332] Restatement (Third) of Restitution & Unjust Enrichment § 39 (Tentative Draft No. 4, 2005).

[333] "Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or incurred in the case of performance of the contract."

damages as a remedy are not adequate. The wording of this additional requirement is an important one, because the limitation is the one which is the clearest deviation from classic thinking in the law of contractual damages. This requirement allows the remedy of disgorgement replacing the remedy of expectation damages, but nothing is said on an eventual upper limit based on the maximum of expectation damages. This way of introducing disgorgement as a monetary remedy means that the remedy is not a subsection of expectation damages – in other words as another way of calculating expectation damages. This section means a total breach with the Holmesian approach towards the law of contract. Not only is the absolute limit of expectation damages abandoned, but the idea behind distinguishing opportunistic breach from other breach of contract in fact emphasizes that the contract itself is valued differently than the financial value of the obligation concerned. The real impact of this section depends on the definition of opportunistic breach. The attentive reader also sees that the problem of evidence, which has been signaled in Chapter 3, is partly tackled. Instead of proving deliberateness or opportunism as an internal state of mind – which has been defined in objective terms: material breach, profitable breach and the limitation in subsection 3 – it is now relevant for the aggrieved party to prove the breach to be 'profitable'. Although the term 'profitable' is not dependent on a state of mind and therefore in theory easier to prove, in practice, this requirement may cause sufficient difficulty for the aggrieved party, because the aggrieved party does not always know the exact reasons behind non-performance.

A supporter of this new approach is Roberts, who extensively wrote on the application of disgorgement of profits in the law of contract. In several contributions she defended the new approach towards the law of remedies and she connected the new approach to an ethical revaluation of the contract. The consequences for the role of the law of contract are large. According to Roberts,

"this section is breathtaking in its potential transformation of the traditional contractual landscape from a choice model of contract law to a perspective that values keeping promises and condemns certain breaches. Condemnation may support the aims deterrence and punishment, conventional goals for criminal and tort law but foreign to contract law. The choice model emphasizes individual freedom to choose behavior including contract breach, without fear of punishment."[334]

Roberts defends the new approach by emphasizing the need for certainty for parties. If parties agree to conclude a contract, they must be able to count on the intrinsic will of the parties to perform. A system which allows parties to – financially – escape from performance if they choose to do so does not pay sufficient tribute to the instrument of contract. Roberts chooses for a moral approach to defend the new § 39.

Not everyone, however, hails the introduction of restitutionary remedies in the law of contract as a desirable development. Campbell strongly disagrees with the new attitude which proposes a new stability for the contract and a re-establishment of the moral importance of performance of the contract connected to the introduction of restitutionary remedies.[335] It should be emphasized that

[334] Roberts 2009a, p. 993. Roberts consistently argued her position in at least three contributions. See Roberts 2008, Roberts 2009 and Roberts 2009a. See also e.g. Rogers 2007.

[335] Campbell 2011, p. 1067, 1068. An interesting element in the contribution of Campbell is his attempt to redefine or to circumscribe the term 'opportunistic' mentioned in § 39. He argues that the term 'deliberate' would not be good synonym, because it is too general. He prefers the term 'deliberate and cynical'. It is visible

Campbell predominantly criticizes the development from the perspective of English law. His most important criticism is the view of breach as a wrong. According to this opinion, the Blake case caused many problems, because no unanimous line could be found which dealt coherently with the type of breach which should be remedied by disgorgement. A further criticism is that the new § 39 seems to consider expectation damages as an amoral remedy. Campbell argues that expectation damages should be considered as the highest standard of a moral remedy, because they institutionalize the cooperative response to breach that it is at the heart of the success of the law of contract. He supports his view by referring to the fundamentally cooperative nature of the law of contract. This conception of the law of contract has paradoxically been blurred by the strongest supporters of the remedy of expectation damages, namely the supporters of efficient breach of contract, because they present the law of contract as a primarily egocentric system.[336] It is clear that Campbell writes his contribution with the Blake case in the back of his mind. This case indeed hardly provides concrete information on the availability of disgorgement of profits as a remedy for breach of contract and the case is explicit on the sole factor of deliberateness on the potential availability: there is none. This state of English law leads to the systematical conclusion of Campbell that disgorgement of profits as a contractual remedy is not a logical part of the law of restitution.

The last word has not been spoken on this development. This chapter and this thesis are not the place to criticize individual authors on their opinion on the relevance of deliberateness and § 39 of the Draft Third Restatement. In order to do so, like Campbell does, each author deserves lots of attention and it would not fit into the structure of this chapter. The developments in the common law on the remedy of disgorgement of profits at least show that deliberate breach of contracts is a phenomenon which receives structural attention.

4.7.7 Dutch law: Huurder/Stichting Ymere

Art. 6:104 BW mentions account of profits in the section of the Civil Code on damages, though in a limited way:

"If a person who is liable towards another on the ground of a tort or of a failure in performance of an obligation has derived proftis from that tort or failure, the court may assess the damage, upon the demand of such other person, at the amount of such profit or at a part thereof."[337]

The provision does not recognize the relevance of deliberateness as an element to award a particular type of damages. Nevertheless, the comments of the lawmaker on the provision explicitly mention that the degree of 'culpability' can be relevant for the court to use its discretionary powers.[338] Nevertheless, it should be remarked that the lawmaker explicitly aimed at covering specific cases,

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that he struggles with the description of the concept, p. 1075. See also for a recent and critical contribution of the development of account of profits as a remedy in connection with deliberate breach of contract Rotherham 2012.

[336] Campbell 2011, p. 1130.

[337] Translation by Warendorf 2009, p. 662; art. 6:104 BW: " Indien iemand die op grond van onrechtmatige daad of een tekortkoming in de nakoming van een verbintenis jegens een ander aansprakelijk is, door die daad of tekortkoming winst heeft genoten, kan de rechter op vordering van die ander de schade begroten op het bedrag van die winst of op een gedeelte daarvan.

[338] Parlementaire Geschiedenis (Parliamentary History), Boek 3,5,6, p. 1267. See for a thorough exploration of 'account of profits' as a remedy in Dutch and German law including thoughts on the use of this remedy in contract law – with a summary in English – Linssen 2001.

such as for example an employee gaining profits due to violation of a non-competition clause. The Dutch law of damages formulated in the Civil Code, including art. 6:104 BW, is applicable to the law of contract as well as to the law of torts. This provision is therefore certainly not specifically written to cover contract law cases. The influence of this provision should not be exaggerated. This provision is not meant to be an alternative or an addition to compensatory damages. Damages can be estimated on the basis of account of profits *as a form* of compensatory damages if the court allows the aggrieved party to this claim. In other words, the victim of the breach cannot claim account of profits when he did not suffer any damages.[339]

Whereas the lawmakers and the doctrine are clear on the position of account of profits as a concrete application of compensation, but nothing more[340], case law may shed some more light on the relevance of the behavior of the breaching party as far as the remedy of account of profits is concerned. This may be done by considering this remedy, but also in deciding the extent of the damages. Recent examples are the cases of *Huurder Stichting Ymere* and *Setel NV/AVR Holding*.[341] In the first case, the housing corporation Ymere owns many buildings in the city of Amsterdam for potential tenants. In the contracts between tenants and Ymere subletting by the tenants is prohibited. Because there is an enormous shortage in living space in Amsterdam, many tenants nevertheless sublet their homes for amounts of money which are double or triple the rent they owe to Ymere. In other words, the tenants accrue large profits, although they deliberately commit breach of contract. Ymere starts proceedings and claims damages for breach of contract. Ymere claims the account of profits the tenant obtained during the period of subletting.

The first question is whether Ymere may claim account of profits as a form of expectation damages. Expectation damages, as explained earlier, should bring Ymere financially in the state as if the breach would not have taken place. Ymere claims all the profits made by the defendant. However, as the court in first instance says, that is not a right way of applying the hypothetical 'what if' test. In that case, as the courts reasons, the defendant would have cancelled the contract once he left the house. The corporation would have let the house to another tenant. Due to the general increase of rent, Ymere could have concluded a new contract with a new tenant against a higher price. According to the court of first instance, damages should be calculated on the basis of the difference between the estimated new rent and the rent actually received. According to this line of reasoning, Ymere should have claimed expectation damages. The calculation of missed profits is only a method which may be helpful to calculate the compensatory damages of the aggrieved party. The court of first instance awards a part of the claim of Ymere.

Nevertheless, Ymere claimed the whole account of profits again in appeal. The Court of Appeal does not follow the argument of the court of first in instance. The Court of Appeal argues that the damage suffered by Ymere cannot be established as easily as the court of first instance considers, because Ymere also incurs costs in order to track down the practice of illegal subletting. Because it is difficult

[339] HR 16 juni 2006, *NJ* 2006, 585 (Kecofa/Lancôme)
[340] Asser/Hartkamp & Sieburg 6-II 2009/105.
[341] HR 28 juni 2010, LJN:BM 0893 (*Huurder/Stichting Ymere*); this section focuses on this particular case; HR 18 juni 2010 LJN: BL9662 (*Setel NV/AVR Holding*). See for an analysis of these cases against the background of art. 6:104 BW Van Boom 2011.

to calculate the exact size of the damage, damages may be estimated at the size of the accrued profits of the illegal subletting.

The Hoge Raad follows the Court of Appeal, but adds a few statements of his own. The Hoge Raad confirms that account of profits should be considered as a form of *calculation* of damages. The Hoge Raad seems to deny the possibility that account of profits can also be as an alternative for expectation damages, in the sense that it may *replace* expectation damages. This starting point on the one hand means that account of profits as a way of calculating damages may be available, even though the concrete level of damage cannot exactly be established. On the other hand, the creditor must show an indication that he suffered at least some damage.[342]

The Hoge Raad emphasizes that account of profits is not a measure with a punitive character, not even partly.[343] If the level of profits largely oversteps the loss of the creditor, the court may establish the level of damages on a part of the profits gained by the debtor. Because account of profits is not a separate remedy, the same requirements for 'normal' expectation damages apply which are all discussed in section 6.1.10 of the Civil Code. The Hoge Raad explicitly mentions art. 6:98 Civil Code, which implicitly includes the degree of fault as a relevant factor to establish whether a specific type of loss should be recovered as damages.[344] In this case, the Hoge Raad considers that for application of the remedy of account of profits a specific level of fault is not required. Nevertheless, the court may take into account the level of fault as a relevant factor when he decides to apply art. 6:104 BW at all and when he decides whether to award he whole account of profits or only a part.

Finally, the court argues that a reasonable relation between the concrete damage and the level of profits is not a necessary requirement, just because this remedy should be used when the damage can only be estimated. Again, the Hoge Raad repeats the sentence on the possibility of the court to limit the awarded amount in the case of an obvious disbalance between damage and profits.

4.7.8 Concluding remarks

Section 4.7 describes the connection between deliberateness and the award of account of profits in case law, but also in academic developments. In current case law, a connection is still hard to establish, though hints of development in several jurisdictions are visible. However, in exploring the developments in legal scholarship. In US law, this section struck a 'goldmine'. The draft of the Third Restatement on unjust enrichment reveals a very explicit link between deliberate breach and the award of disgorgement of profits. In English law the Blake case offers an implicit connection between deliberateness and the remedy of account of profits, though the case has its own peculiarities and it is questionable whether a general rule can be derived from the case in this sense. Dutch law only recognizes a limited applicability of account of profits in the first place, holding via art. 6:104 that account of profits can be nothing more than calculation of damages and not a replacement of compensatory damages. If the aggrieved party suffered no losses, account of profits cannot be

[342] HR 16 juni 2006, *NJ* 2006, 585 (Kecofa/Lancôme).
[343] The HR refers to art. 2.21 Benelux Verdrag regarding Intellectual Property (Benelux Verdrag inzake Intellectueel Eigendom) The remedy of account of profits in this treaty recognizes a punitive element. See also BenGH 24 oktober 2005, nr. A2004/5, LJN: AW2552, *NJ* 2006, 442.
[344] Art. 6:98 BW: "Reparation of damage can only be claimed for damage which is related to the event giving rise to the liability of the obligor, which, also having regard to the nature of the liability and of the damage, can be attributed to him as a result of such event." (Warendorf 2009, p. 661).

awarded according to Dutch law. Although the link between deliberateness and account of profits is not mentioned in the Ymere case, the facts of the case lead to a careful conclusion that deliberateness may trigger the court relatively easy to award account of profits.

4.8 Deliberateness and (partial) termination

4.8.1 Introductory remarks

The question is whether the law c.q. the courts pay attention to the deliberateness of the breach when parties invoke the remedy of termination. In many legal systems, a creditor who wants to terminate the contract, should prove that the breach is somewhat more serious than a common breach. This threshold is frequently mentioned as the fundamental breach or a similar qualification. This section especially focuses on the question whether deliberate breach is a fundamental breach or, slightly more modest, whether deliberateness of the breach is a factor to label a breach as fundamental. Several examples show that such an explicit link may indeed be established.[345]

4.8.2 US law: deliberateness and material breach; a few case law examples

In US law a connection can be established between termination of the contract and potential deliberateness of the breach. It is slightly tricky to mention this particular legal manifestation under the header of termination, because the common law approaches this issue somewhat differently, namely as a problem of restitution. As section 4.2 has shown, US law recognizes the doctrine of substantial performance. If performance is deemed to be substantial, but not complete, a party is nevertheless able to claim payment or recovery on the basis of the contract. If a party does not substantially perform a contract and commits breach of contract, he is generally not allowed to claim restitution of eventual benefits conferred on the other party due to the partial performance. For example, a buyer partially pays the sum provided in the contract, but defaults on the whole payment without receiving the good. He sues the seller for recovery of the part payment. In the old days, such a request was denied. A comparable situation arises when a defaulting employee sues the employer for the benefits conferred on him due to the work the employee had performed. The Supreme Court of Massachusetts states in 1824:

“It will not admit of the monstrous absurdity that a man may voluntarily and without cause violate his agreement, and make the very breach of that agreement the foundation of an action which he could not maintain under it.”[346]

However, the Superior Court of Judicature of New Hampshire took a very different view on this matter in the case of *Britton v. Turner*. In this case in the area of labor law, employee Britton had agreed to work for Turner for a year for 120 dollars, but defaulted without cause after 10 months. According to the court, the traditional view would entail that part performance may be worse for the breaching debtor than total non-performance, because in the first case the debtor attempted to perform, but did not succeed, whereas he receives nothing from the benefit conferred on the other party. In the second case, the breaching party does not act and he does not receive. The court concludes:

[345] See e.g. *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 834.
[346] *Stark v. Parker*, 19 Mass. (2 Pick.) 267, 275 (1824).

"If a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, (…) the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess."[347]

This decision has been followed, but the question was raised whether it is not only applicable in personal service contracts. Nevertheless, in, building contracts as well as contracts where sale of goods or sale of land is at stake, courts have also reluctantly recognized the possibility that the breaching party may recover a sum as restitution.[348]

This figure could be compared with the continental notion of the consequences of termination. These consequences are generally that the obligations arising from the terminated contract should be made undone by the parties.[349]

This background is necessary to introduce the relevance of deliberateness. The question arises whether the breaching party retains a right to a form of restitution once he *deliberately* commits breach of contract. In this type of situation, the deliberate breach occurs by deliberately performing the obligation in an incorrect way.

In US law, this question raised problems. Some courts denied restitution to the party in breach, because the breach was willful instead of accidental or negligent.[350] Other courts declined to include the quality of the breach as a relevant factor to decide whether restitution should be allowed.[351] As Farnsworth states, the argument for taking into account of the quality of the breach is stronger when the claim is for payment of the value of some benefit conferred by the party in breach than when it is for the return of money paid. The reason is that allowing restitution in the former case imposes on the injured party both an obligation different from the one for which that party bargained and the burden of proving damages resulting from the breach.[352]

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[347] *Britton v. Turner* 6 N.H. 481, 487, 492 (1834).

[348] For building contracts see e.g. *PDM Mechanical Contractors v. Suffolk Constr. Co.*, 618 N.E.2d 72 (Mass. App. 1993); for sale of goods see e.g. UCC 2-718; for sale of land see *Maxey v. Glindmeyer*, 379 So. 2d 297 (Miss. 1980). It should be noted that a liquidated damages clause is part of the contract or if the purchaser deliberately pays a sum in advance which may be equalized with a liquidated damages, the vendor may retain the sum. See Farnsworth 2004, 559.

[349] See e.g. 6:271 BW: "The setting aside releases the parties from the obligations effected by it. To the extent that these obligations have already been performed, the legal ground for this performance remain intact, but for the parties an obligation arises to reverse the performance of the obligations which they already have received". (Translation by Warendorf 2009, p. 717). Art. III:3.510 DCFR may be compared more directly with the doctrine of restitution after termination in US law.

[350] *Harris v. The Cecil N. Bean* 197 F.2d 919 (2d. Cir. 1952)

[351] *Begovich v Murphy*, 101 N.W.2d 278 (Mich. 1960). In this case, it is again quite relevant how willful breach is defined. In this case, the client of an attorney committed willful breach according to the court, because he committed suicide. Therefore, he could not pay his attorney fees.

[352] Farnsworth 2004, 559. The Second Restatement does not argue that deliberateness of the breach should always and completely bar the claim for restitution. Nevertheless, the comments on §374 (which replaced § 357 which said that the breach had to be not willful and deliberate in order to make the debtor able to claim restitution) clarify that in building contracts an intentional strong if the deviation from contractual specifications which amounts to a material breach should be sufficient for a debtor to deny him a claim for restitution, even if the wrongfully constructed building conferred a benefit on the creditor. According to the Restatement this argument is particularly strong if the party has broken the contract for its own convenience or financial advantage.

The already mentioned notion of material breach sounds familiar, because it reminds the European lawyer of the notion of fundamental breach in for example the DCFR, the PECL, the PICC and the CISG. The question immediately arises what exactly amounts to 'materiality'. To a large extent, as was also the case in order to determine the notion of substantial performance, parties can decide for themselves which breach is material and which is not. However, the question remains when parties fail to determine which potential breach is material and which is not. According to Calamari and Perillo, materiality of the breach depends on a potential range of factors. One of the factors, they mention is the following:

"A willful breach is more likely to be regarded as material than as a breach caused by negligence or by extraneous circumstances". [353]

A good example is a Wisconsin case, in which Greyhound, a major public transport company willfully terminated a deal with a building company about restructuring a bus terminal. The Court found that

"Greyhound acted in bad faith materially breached an repudiated the Exchange Agreement when it decided to "undo the deal" in March 1982".[354]

It seems that the factor of willfulness plays a role in the decision of the court to label the breach as material, especially because the Court also refers to the contract itself and considers that Greyhound may rely on various reasons not to agree with the plan of the building company according to the contract. However, the contract does not provide that Greyhound may terminate the contract merely because it determines that this would be financially beneficial.[355]

Another example of the connection between deliberateness of the breach and termination is the case of *Wasserburger v. American Scientific Chemical, INC. et al.*[356]Wasserburger was a salesman working for American Scientific, selling products to United Medical Laboratories. The oral contract between Wasserburger and American Scientific foresaw in payment of a commission of a certain amount of money for every order United would place at American Scientific. Two problems arose in the course of time. The first was that American Scientific contended that part of the contract was the duty of Wasserburger to find more clients. Wasserburger more or less admitted he did not put in much effort to find new clients contrary to the contractual obligation. The second point was that several problems arose with payments. Wasserburger thought he received his payments too late. As a consequence, Wasserburger started to work for another employer and persuaded United to buy the same products from his new employer. United notified American Scientific about the new contracts and the role of Wasserburger. Thereupon, American Scientific terminated the contract with Wasserburger. The issue of the case was that United for a certain period of time still bought products from American Scientific *after* the termination of the contract between Wasserburger and American Scientific and *before* United entered into a contract with the new supplier. American Scientific did not pay commission to Wasserburger for the deliveries in this period of time.

[353] *Coxe v. Mid-America Ranch & Recreation Corp.,* 40 Wis. 2d 591, 162 N.W. 2d 581.
[354] *Greyhound Lines Inc. v. Morton A. Bender and Michael Murray Associates* 595 F. Supp 1209; 170 Wis. 19 (1984), 63.
[355] *Greyhound Lines Inc. v. Morton A. Bender and Michael Murray Associates* 595 F. Supp 1209; 170 Wis. 19 (1984), 63.
[356] *Wasserburger v. American Scientific Chemical, Inc. et al* 267 Ore. 77; 514 P.2d 1097.

Wasserburger filed a case and argued that the he had a right to payment of commission after termination, because the deliveries would not have been possible without the previous effort of Wasserburger, in other words that he substantially performed his obligations.

The Supreme Court of Oregon decides that the breach of Wasserburger is deliberate or willful *and* material on both points. Wasserburger did not seek other clients as he was supposed to do and the attempt to persuade United into a contract with his new employer is even a clearer sign of willful breach. The consequence of willful breach for the contractual claim of Wasserburger is not entirely clear, because a claim for recovery is only possible if Wasserburger substantially performed his obligations. According to the court, he did not, because he committed a material breach. As we have seen, willfulness may be a factor to conclude that a breach is material, but it is not the only factor. Nevertheless, the court seems to derive the materiality of the breach especially from the willfulness of the conduct of Wasserburger.

The influence of willfulness of the breach seems to be present in a more visible way. The claim of Wasserburger to receive the commission for the deliveries after termination can also be based on a quasi-contractual claim for payment of commission, because American Scientific should pay some of its profits to Wasserburger, because he would not have earned the profits without Wasserburgers effort. Wasserburger would have a right to recovery of the value of the work performed, but only if the breach is not willful. Unfortunately, the court only alleges that there is substantial evidence that the breach was willful, but it does not conclude anything on the denial of the claim, because the trial court in first instance did not pursue this matter, because the plaintiff then did not sue on a quasi-contractual basis.

In conclusion, it is clear that US law recognizes willfulness of the breach as a relevant element in establishing material breach. The question whether breach is material is important to assess the access of the aggrieved party to the remedy of termination and there are serious traces in US case law which acknowledge the relevance of willfulness in connection to the requirement of 'materiality'.

4.8.3 Deliberate breach and termination in a convergent soft law vehicle: the Draft Common Frame of Reference

If the DCFR is to be considered as a result of comparative research it is not remarkable that the notion 'deliberate breach' turns up in several places in the provisions of the DCFR, because in several influential civil codes, the element of deliberateness returns in their provisions.[357] In the DCFR, the synonym used for 'deliberate' is 'intentional'. With respect to remedies in contract there are two key provisions where the intent of the party committing breach is relevant. The first one is on termination of the contract. Art. III.3:502 DCFR states the following:

"(1) A creditor may terminate if the debtor's non-performance of a contractual obligation is fundamental.

(2) A non-performance of a contractual obligation is fundamental if:

(a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance , unless at the time of

[357] Apart from German law, see e.g. the French and Belgian Civil Codes, art. 1150.

conclusion of the contract the debtor did not foresee and could not reasonably expected to have foreseen that result; or

(b) it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on."

In first instance, the 'fundamental' requirement of the remedy of termination only seems connected with the lack of performance itself and not with the intention of the debtor committing breach. It is possible to deliberately breach a non-fundamental part of the contract and it is also possible to unintentionally breach the most important obligation of the contract. However, section 2b states that non-performance is also fundamental, if it is intentional or reckless, but only if the intentional non-performance gives the creditor reason to believe that the debtor's future performance cannot be relied on. The comments on this article reveal the meaning of term 'intentional' by providing several examples.[358] The situation whereby A agrees to sell B's products as a sole distributor and where A subsequently also sells C's product, thereby violating the contract with B, is enough for B to terminate the contract on the basis of fundamental non-performance. In this situation, it is not relevant that A does not make any additional profits when selling C's products. His intentional breach triggers B to reasonably believe A's future performance cannot be relied on and that is sufficient.

However, the additional connection of intention to expected future performance limits the possibility of the debtor to rely on termination of the contract. The comments specifically mention an example in the area of building and construction contracts, where A intentionally uses another type of brick than the one specified in the contract. If B points out the discrepancy and A removes the cheaper type of brick and promises to use the proper one in the future, A has no right to terminate, because he can rely on proper performance in the future. On the basis of this provision, it is fair to conclude that intention of the contract breaker is legally relevant for applying the remedy of termination. The consequence of establishing intentional breach is an easier access to the remedy of termination of the contract.

In conclusion, the DCFR pays attention to the motive of the party committing breach, especially intentional breach. However, a closer look into these provisions and their background reveals some doubts about the value of these provisions for the future. For example, the illustrations clarify the purpose of the provisions, but they do not represent real case law. The background notes on the different European legal systems do not provide much support for the argument that intent is considered to be an important factor playing a role in applying the remedy of termination for breach of contract. Secondly, termination of the contract is in many European jurisdictions not considered as a remedy which is easily accessible for the creditor. It is generally considered as a last resort remedy.[359]

Not in every legal system should the non-performance be fundamental, but it is accepted that the breach should have an increased level of seriousness in most legal systems. In other words, the creditor must overcome a certain threshold to invoke this remedy.

[358] DCFR 2009, p. 855.
[359] See Chapter 2 for details.

4.8.4 Concluding remarks

This section analyzed the relation between deliberateness and the remedy of termination. The analyzed case law provides sufficient ground to consider that deliberateness at least sometimes – e.g. in US law and in the DCFR – is a factor to constitute a fundamental or material breach. Establishing a fundamental breach is often necessary for a party to invoke the remedy of termination. The explicit mentioning of deliberateness by the courts or in legal provisions in this respect does not necessarily reveal anything of the overall importance of the factor of deliberateness in cases where termination as a contract plays a role. The cited cases and provisions, again, serve as illustrations of situations where deliberateness plays a role in current law.

4.9 Deliberateness and recovering costs for legal representation

4.9.1 Introductory remarks

The question to be answered in this section is whether the deliberateness of the breach influences the law c.q. the court to award a claim for costs for legal representation. This specific question is difficult to answer, because it is tempting to get lost in other debates, which may be interesting, but not directly relevant for the answer to this question, such as the question whether costs for legal representation should be recoverable at all and if so, under which "heading". For the purposes of this chapter, the relevant issue is whether the deliberateness of the breach may trigger the law c.q. the court to incorporate costs for legal representation into the award for damages. Explicit references to this type of connection are not easy to find. At least US law offers an example which illustrates the practical relevance of this connection.

4.9.2 US law: James T. Wellman et.al. v. Energy Resources Inc.

In the case *James T. Wellman et.al. v. Energy Resources Inc.*[360] a lease contract for an oil field is concluded. Energy Resources promised to drill new wells in a specified period of time and to pay royalties to Wellman. However, Energy Resources failed to drill the wells in the specified period of time, but instead reopened an old well and extracted some gas out of this well. It also failed to pay the required amount of royalties according to the lease contract. After Wellman repeatedly requested Energy Resources to fulfill its obligations according to the contract and Energy Resources failed to comply with these requests accordingly, the lease contract provided that the contract was terminated. Subsequently, Wellman had to regain possession of his own property in order to dispose of the oilfield as he wished. The court acknowledged that Energy Resources committed breach of contract by not drilling the wells according to the contract and not paying enough royalties. Among other claims, Wellman claimed attorney fees as a result of willful breach of contract. The court decided in favor of Wellman:

"This Court has indicated that an award of attorney fees is appropriate where there has been a willful breach of contract and where a lessor is forced to take legal action against its lessee to recover possession when the lessee improperly holds the lease over after termination."[361]

[360] *James T. Wellman et.al. v. Energy Resources Inc*. 210 W. Va. 200; 557 S.E.2d 254.

[361] Ibid, p. 267. The court refers to another case *TXO Production Corporation v. Alliance Resources Corporation*, 187 W. Va. 457, 419 S.E.2d 870 (1992).

Although the award of attorney fees depends on several case specific elements, some sort of general rule is also formulated. The termination and the enforced legal action to recover possession are relatively simply to prove in this case. However, the court also indicates that the presented facts contain sufficient evidence to qualify this type of breach by Energy Resources as willful. The court does not bother itself with the question whether Energy Resources had the intrinsic idea to commit breach of contract and simply stated that the refusal to drill new wells and the reopening of an old well constituted intentional breach of contract.

It is also interesting to note that the court links the necessity of the aggrieved party to go to court in order to establish his property right and the willfulness of the breach. In other words, the idea that the party committing willful breach forces the other party to enter legal proceedings under circumstances justifies the decision that the aggrieved party need not to pay for this forced legal proceedings. In the area of the bad faith breach of insurance companies the court may use a comparable line of reasoning. If the insured has a valid claim and the insurer refuses to pay, the insured is also forced to enter into legal proceedings in order to claim what he is entitled to.

4.9.3 Concluding remarks

This section analyzed a more specific potential connection between deliberateness and the possibility to recover costs for legal representation. The issue of claiming costs for legal representation is an issue with its own dynamics. Usually, these costs do not automatically qualify as expectation damages. Under each jurisdiction specific system, the possibility to claim this kind of legal costs is different. The assumption of this section is that the cause of being drawn into legal proceedings influences the possibility of claiming the extra costs to be able to participate in legal proceedings. At least in the US case law can be found where a claim for recovery of attorney fees least partly depends on the willful breach of contract of the "losing" party.

4.10 An outsider: exclusion clauses limiting liability in a contractual context

4.10.1 Introductory remarks

Especially in a commercial context, it is common for parties to attempt to control the consequences of breach of contract in advance. An example has been shown in section 4.3, where penalty clauses were discussed. Another, perhaps even more common, manifestation of 'breach' control is the use of exclusion and limitation clauses. As explained in Chapter 2, many variants of this type of clause exist. This section briefly explores the potential influence of deliberateness of the breach on the use of the exclusion clause. If a party cannot rely on an exclusion clause, because deliberate breach of contract caused the damage, the availability or the extent of the standard remedy of expectation damages is at least partly decided by the element of deliberateness. Because exclusion and limitation clauses frequently return in contracts, it is relevant to pay attention to the connection between deliberateness and exclusion clauses in this chapter. However, it should be emphasized in advance, that the possible prohibition of reliance on an exclusion clause due to deliberateness of the breach – the most explicit connection which may be found – only leads to a 'normal' access to expectation damages. An eventual influence of deliberateness on the applicability of exclusion clauses does not in itself have consequences for the application of the standard remedies, although it is not impossible. This systematic statement is relevant in order to understand the exceptional status of the section at the end of this chapter.

4.10.2 English law: *Astrazeneca UK Ltd v Albemarle International Corporation*

English law, as has been shown in previous sections, recognizes the phenomenon of deliberate breach, but is quite reluctant in accepting legal consequences of deliberateness of the breach. Lord Wilberforce in the case *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolencentrale* has formulated this in clear wordings, which are especially relevant for the connection between deliberateness and exclusion clauses:

"The 'deliberate' character of a breach cannot, in my opinion, of itself give a breach of contract a 'fundamental' character, in either sense of that word. Some deliberate breaches there may be of a minor character which can appropriately be sanctioned by damages: some may be, on construction, within an exceptions clause (for example, a deliberate delay for one day in loading). This is not to say that 'deliberateness' may not be a relevant factor: depending on what the party in breach 'deliberately' intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited: and a deliberate breach may give rise to a right for the innocent party to refuse further performance because it indicates the other party's attitude towards future performance. All these arguments fit without difficulty into the general principle: to create a special rule for deliberate acts is unnecessary and may lead astray."[362]

According to Lord Wilberforce, there may be a certain influence of deliberateness on contractual sanctions. A recent example may indicate that such a statement may be clear in theory, but not so easy to execute in practice.

In English law the question whether exclusion clauses may be relied upon in case a breach is considered to be deliberate is not easy to answer. Case law in which reliance on exclusion clauses is the core question often comes down to interpretation of the wordings of the exclusion clause and the contracts as a whole. In this respect too, English law explicitly recognizes the problems of a difficulty of defining the term 'deliberateness', whereas English law also seems to acknowledge that parties cannot rely on an exclusion clause after having committed deliberate breach.[363]

In the case *Astrazeneca UK Ltd v Albemarle International Corporation* an example is provided of a situation in which a party cannot rely on an exclusion clause. [364] The facts are as follows. Astrazeneca – AZ – is a pharmaceutical company which produced an anaesthetic called Diprivan. Diprivan contains propofol, which has to be distilled from the substance DIP. AZ bought DIP from Albemarle. In 2005 a new contract was signed between AZ and Albemarle, which was a continuation of a long-term relationship between the two companies. At the time of the contract, AZ contemplated the possibility of buying propofol directly and stripping the distillation process. A clause in the contract with Albemarle foresaw in the possibility that AZ switched from requesting DIP to propofol and the clause offered Albemarle the first opportunity to negotiate on a new contract and the first right to

[362] *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolencentrale* [1967] 1 AC 361, 435. See for further developments e.g. *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 AC 827.

[363] See Peel 2011, p. 252. Discussions on the terminology bring about that deliberateness is in general a ground to refuse reliance on the exclusion clause, but not a decisive ground. The problem of definition seems to overtake an appropriate application of motive for the justified appeal on the exclusion clause. See e.g. *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC), 206.

[364] *Astrazeneca UK Ltd v Albemarle International Corporation* [2011] EWHC 1574 (Comm), 288-301.

refusal. In 2008, AZ concluded an agreement with Sochinaz for the supply of propofol without having offered Albemarle the opportunity to negotiate on propofol, i.e. without having offered Albemarle the opportunity to match the offer of Sochinaz.

Albemarle sued AZ for breach of contract and claimed loss of profits due to the missed opportunity of a new contract with AZ. AZ denied the breach and relied on an exclusion clause in the contract which would allegedly render the claim of Albemarle without success. The core question is whether according to the court AZ could rely on the exclusion clause. This question is only relevant for the argument in this thesis, when the preceding breach is considered to be a *deliberate* breach. Only then can the influence of the deliberateness on the validity of the exclusion clause be tested.

The question is whether AZ deliberately committed breach of contract by not giving Albemarle the opportunity to conclude a contract with AZ. This case is if all specific circumstances are not taken into account, a fair example of a "double sale" situation. AZ was contractually bound to offer a new contract on propofol to Albemarle. However, AZ negotiated with Sochinaz. The negotiation itself is not prohibited by the contract, but Albemarle was entitled to match the offer of Sochinaz. This case is a rare illustration of a situation where the whole process of negotiation and contracting has been reconstructed by the court and where the court clearly showed that AZ had not been honest in this negotiations towards Albemarle. In brief, they acted as if Albemarle had an opportunity to match the offer of Sochinaz, whereas the courts showed that internal policy of AZ never included the possibility that AZ would conclude a contract with another party than Sochinaz. This conclusion is based on deep research by the court who heard many witnesses. One quote is included in this thesis in order to illustrate the opinion of the court in this respect:

"Given that Albemarle had matched the offer, the obvious question is why AZ did not proceed with negotiations either at the meeting on 15 February 2008 or immediately thereafter. It seems clear that the answer is that Mr Hadfield - *an employee at AZ, MvK* - attended the meeting with the intention (probably on instructions from his superiors in AZ), that even if Albemarle did match the Sochinaz offer, he would not negotiate any sort of deal or agreement in principle with Albemarle."[365]

The court realizes that English law – by the wordings of Lord Wilberforce – is not too eager to deny reliance on an exclusion clause as a result of deliberateness of the breach. Therefore, the court has to carefully approach this issue. In order to understand what the court does, it is necessary to quote the exclusion clause itself:

"No claims by BUYER of any kind, whether as to the products delivered or for non-delivery of the products, or otherwise, shall be greater in amount than the purchase price of the product in respect of which such damages are claimed; and failure to give written notice of claim within sixty (60) days from the date of delivery, or in the case of non-delivery, from the date fixed for delivery, shall constitute a waiver by BUYER of all claims with respect thereto. In no case shall BUYER or SELLER be liable for loss of profits or incidental or consequential damages."[366]

It should be emphasized that Albemarle is the seller and AZ is the buyer. The exclusion clause itself logically seemed to only exclude liability for breach of Albemarle, because Albemarle was the party

[365] *Astrazeneca UK Ltd v Albemarle International Corporation* [2011] EWHC 1574 (Comm), 209.
[366] *Astrazeneca UK Ltd v Albemarle International Corporation* [2011] EWHC 1574 (Comm), 274.

to deliver the DIP to AZ. The exclusion clause was included in order to protect Albemarle if Albemarle failed to comply with his contractual obligations. It is now AZ who relies on the exclusion clause and especially on the second sentence. However, the court disagrees with AZ and argues that the second sentence can only be connected to the delivery of DIP, because another interpretation would leave Albemarle virtually without any remedy as far as the breach of the specific obligation to be able to contract with AZ on delivery of propofol, because the essential consequence of that specific breach of contract is loss of profits. The court formulates this element as follows:

"Viewed cynically, if any right of Albemarle to claim for its loss of profits suffered as a consequence of AZ's breach of that obligation is excluded, there is little incentive for AZ to comply with that obligation."[367]

Therefore, the court does not allow AZ to rely on this exclusion clause. The point is that no explicit reference towards the deliberateness of the breach of AZ is made, because such a reference would not lead to the desired conclusion. Instead, the court emphasizes the necessity of the construction of an exclusion clause. Nevertheless, against the background of the elaborate analysis of the court of the way AZ committed breach of contract – i.e. *deliberately* – this case seems to be an excellent example of an implicit reference to the relevance of deliberateness for the validity of an appeal on an exclusion clause. The case is also relevant, because the deliberate behavior which in this case obstructs the validity of an appeal on the exclusion clause is a 'pure' deliberate breach of a primary obligation of the contract as on economic and policy grounds. The strict approach of Lord Wilberforce remains perhaps a starting point in English law for application of exclusion clauses cases like these, but the result in this case shows that it is questionable whether the reluctant approach may hold in every situation of deliberate breach.

4.10.3 US law: William D. Huggins and Dona. G. Huggins v. Marriott Ownership Resorts, Inc.

This section does not describe the law of exclusion clauses in US law. US law is in general common-law based and does not differ from English law in a way that should be elaborated on extensively given the objective of this section.

The case law example from a Florida court highlights two aspects. First, in US law one cannot escape the thought that deliberateness of the breach and applicability of exclusion clauses do not fit in easily together. This aspect has also become clear while exploring the English case. The particular feature of the following case is that parties themselves acknowledge the difference between 'termination by written notice' and 'willful breach of contract' in the exclusion clause incorporated in the contract.

In the Florida case *William D. Huggins and Dona. G. Huggins v. Marriott Ownership Resorts, Inc*., the contract contained a long clause describing the rights of the Purchaser:

"(…) if Seller fails to perform under this contract (…) Purchaser may seek specific performance or elect to terminate this contract by written notice to Seller, in which event (…) Seller and Purchaser shall be relieved of any and all further obligations to each other under this Contract, and Purchaser may commence an action to recover only actual and direct damages (…). Under no circumstances may Purchaser seek or be entitled to recover any special, consequential, punitive, speculative or

[367] *Astrazeneca UK Ltd v Albemarle International Corporation* [2011] EWHC 1574 (Comm), 312.

indirect damages (…). Notwithstanding the foregoing, in the event of the willful non-performance by Seller under this Contract, Purchaser's remedy shall not be limited to a return of Purchaser's Deposit or a return of Purchaser's Deposit plus interest accrued thereon."[368]

The facts of this case are not relevant for the case, it is only an example of acknowledging deliberate breach in an exclusion clause. This clause is not only an exclusion clause, it is a clause which attempts to arrange the access to remedies in case the contractual obligations are not performed as expected. The clause illustrates a variety of limitations and extensions to potential liability of the seller in the case of breach of contract depending on the circumstances of the specific situation. The clause contains a severe limitation on the potential recoverable damages in case of 'termination by written notice'. Not only punitive damages are excluded, but also so-called "special" damages and consequential damages, which may perhaps be normally labeled as compensatory damages. Punitive damages are never recoverable independent of the type of breach or motive of the breaching party. The possibility of the buyer to claim damages in the case of 'termination by written notice' – which my also be possible in case of 'normal' breach of contract – is more or less limited to recovery of some payments already made added with some interest. In the case of willful breach however, this clause explicitly waives this strict limitation. This clause seems to reveal a specific position for willful breach, which is – at least according to the parties – a more serious manifestation of breach which justifies application of a more creditor-friendly exclusion clause. This exclusion clause effectively allows for every claim for damages, except for a claim for punitive damages.

4.10.4 Dutch law: Telfort/Scaramea

In Dutch law, a party who acts deliberately or in gross negligence, in general cannot invoke an exclusion clause, as briefly explained in Chapter 2. This section more explicitly attempts to illustrate the connection between deliberate breach of contract and the applicability of the exclusion clause.

In the case of *Telfort /Scaramea* Scaramea claims damages based on breach of contract of the telephone company Telfort.[369] Scaramea concluded a contract with Telfort on the delivery of so-called 'interconnection capacity'. In brief, Telfort promised Scaramea wide access to a specific position of the Internet on a specific date. The extent of the access could only be provided when Scaramea had sufficient 'interconnection capacity'. This contract was concluded in July 1999 for delivery of the interconnection capacity in September 1999. At the moment of the conclusion of the contract, Telfort had serious doubts whether they would be able to comply with the obligations they were about to undertake, because they had serious indications that KPN, the telephone company where they themselves had to buy the capacity, could not deliver the capacity. Telfort did not notify Scaramea on these doubts and instead continued concluding the contract. In September, Telfort was indeed not able to perform the obligations according to the contract. For Scaramea, the non-performance was a disaster, because they had counted on having access to the Internet, because they sent CD-ROM's around the country which the receivers could use to access a specific website. This plan completely fell apart due to the breach of contract. Subsequently, Scaramea claimed damages from Telfort as a result of this breach of contract. However, Telfort referred to an exclusion clause in the contract which limited their potential liability to a maximum. For this section, the

[368] *William D. Huggins and Dona. G. Huggins v. Marriott Ownership Resorts, Inc*. 2008 U.S. Dist. Lexis 14805.
[369] HR 5 september 2008, *NJ* 2008, 480 (Telfort/Scaramea).

opinion of the Hoge Raad is relevant. The first question is how the Hoge Raad qualifies the breach of contract – is it qualified as a deliberate breach? – and the second question is whether this type of breach influences the applicability of the exclusion clause.

With regard to the first question, the Hoge Raad confirms the view of the Court of Appeal that Telfort should have reconsidered the conclusion of the contract in July, because there were serious indications that KPN would not be able to enable Telfort to unconditionally perform the obligations, whereas Telfort also knew that a correct performance was extremely important for Scaramea. In the words of the Hoge Raad, this type of behavior which ultimately led to breach of contract, qualified as 'grossly negligent' behavior. The use of the term 'gross negligence' in Dutch law is not uniform.[370] This is not the place to go into detail on this analysis, but the term 'deliberateness' is not used by the Hoge Raad in this case and with a reason. Telfort attempted to create a different image of its actions before the conclusion of the contract and Scaramea – and the Court of Appeal – were not able to establish that Telfort deliberately took the risk of non-performance. Telfort attempted to prove that they had good reasons to conclude the contract with Scaramea, because they sincerely expected that KPN would be able to provide the capacity. According to the Hoge Raad, this discussion is not relevant, because the Court of Appeal could have come to the decision to deny the applicability of the exclusion clause without establishing that Telfort had serious doubts about the possibility to perform. Gross negligence in this respect is a term with a lower burden of proof, because problems of evidence seem to stand in the way of labeling the actions of Telfort as deliberate. Nevertheless, 'gross negligence' also seems a label to a certain extent. For example, the Hoge Raad especially circumscribes the behavior of Telfort as 'consciously careless'. Terminology again decides what type of conduct is labeled as deliberate or not. In this case, no explicit reference to deliberateness has been made, but it is also clear that the Hoge Raad qualifies the conduct of Telfort as a serious manifestation of gross negligence.

A difficult aspect of this case is that the qualification of the behavior of Telfort primarily regards the actions of Telfort around the moment of the conclusion of the contract and not of the breach itself. In this case, the breach of contract naturally resulted from the conclusion of the contract. The doubts on KPN being able to provide the interconnection capacity at the moment of the conclusion of the contract directly resulted in the risk that the obligations could not be performed. It is at least questionable, whether Telfort at one moment sincerely wanted to perform the contractual obligation.

The second question is whether the Hoge Raad allows the applicability of the exclusion clause in this specific situation. The lower courts – the court of first instance and the Court of Appeal – both denied the appeal on the exclusion clause. The Hoge Raad confirms the view of the Court of Appeal and connects the grossly negligent behavior to the application of the exclusion clause. Telfort cannot rely on the exclusion clause, because the principle of good faith blocks application of the exclusion clause

[370] See for example J. Duyvensz, 'Exoneratie en bewuste roekeloosheid', *WPNR* 2011 (6878), p. 225-231. For example, gross negligence in terms of employment law – within the framework of the question whether an employer is liable for an accident causing damage to the employee in the case the employee acted 'grossly negligent' – is interpreted differently than gross negligence in a context of commercial contract.

due to the grossly negligent behavior of Telfort. Telfort could have verified whether KPN was able to provide the capacity in September 1999, but it did not and therefore acted 'consciously carelessly'.[371]

A strong connection between deliberateness and applicability of the exclusion clauses can be found in theory – deliberate behavior blocks applicability –[372], but is more difficult to find examples of specific deliberate breach of contract connected to exclusion clauses. The *Telfort/Scaramea* case is a good example of a situation which approaches the idea of deliberate breach of contract.

4.10.5 Concluding remarks

It is not a surprise that exclusion clauses cannot be upheld in case of deliberate behavior of the party attempting to rely on the exclusion clause. Although it is generally acknowledged that especially in a commercial context, parties should have the freedom to shape the contractual relationship – including the use of exclusion clauses in order to limit damages – it is also true that deliberate actions to frustrate performance combined with a successful reliance on exclusion clauses make a contractual agreement practically without value. This section especially focuses on the deliberate foregoing of the core contractual obligations – which is a very specific category of deliberate behavior – and the existence of exclusion clauses. A direct and explicit connection is still difficult to establish, but in various legal systems implicit hints to such a connection can be found. English law attempts to hide the connection by emphasizing the construction of an exclusion clause. In case of a deliberate breach, a small gap can often be found and as a result the party relying on the clause cannot succeed. Dutch law on the other hand seems to acknowledge the relevance of the notion of deliberateness in connection with exclusion clauses, but deliberateness in general may be something else than deliberate breach of contract. Terminology seems to confuse the real issue on a clear connection between deliberate breach of contract and the application of exclusion clauses. In the end, the highest goal for an aggrieved party to achieve is that the court renders the exclusion clause inapplicable. If a court does so on the basis of deliberate breach of contract, it is still not clear that deliberate breach of contract results in stricter sanctions, because the standard remedy of expectation damages still remains without any addition. In that sense, the meaning of this section for the existing recognition of the relevance of deliberateness is limited.

4.11 Conclusion

This chapter attempted to answer the following research question:

Does deliberateness of the breach of contract play a role in existing contract law, more specifically in contract law related legal provisions or in case law, in the sense that deliberateness as a relevant factor influences the choice or application of remedies in contract and if so, how?

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[371] HR 5 september 2008, *NJ* 2008, 480 (Telfort/Scaramea), section 3.5. The relevant quote in Dutch is as follows: "Daarmee heeft het hof tot uitdrukking gebracht dat Telfort zich welbewust op zodanig onzorgvuldige wijze jegens Scaramea heeft gedragen dat het naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn indien zij zich op de exoneratieclausule zou mogen beroepen. Het hof heeft tot zijn oordeel kunnen komen ook zonder dat is komen vast te staan dat Telfort daadwerkelijk wist dat KPN de benodigde capaciteit niet tijdig zou leveren of dat Telfort daaraan daadwerkelijk twijfelde."

[372] The Hoge Raad attaches relevance to the degree of the blameworthiness of the conduct of the party relying on the exclusion clause in order to decide whether it should be applied,. This point of view should logically imply that deliberate misconduct even stronger influences the possibility of relying on exclusion clauses. See e.g. HR 20 February 1976, *NJ* 1976, 486 (Van der Laan/Top).

It is relevant to repeat the statement in the introduction that the answer to this question, which comes between the question what deliberate breach of contract is and how deliberateness of the breach *should* influence remedies in contract, should provide material in order to build an analytical framework on which the answer to the normative research questions of this thesis may be developed.

Although this chapter has not provided a representative picture of the influence of deliberateness on remedies in contract in any analyzed jurisdiction in a statistical sense, it has aimed to choose examples which provide a coherent idea of how the law and the courts deal with the notion of deliberateness as far as the use of remedies in contract is concerned. The conclusion of this exercise is that sufficient concrete examples in law exist to argue that deliberateness as part of breach of contract at least in some jurisdictions is already taken seriously as far as some key remedies in contract law are concerned. Nevertheless, in none of the jurisdictions mentioned in this chapter can a coherent and consistent recognition of the relevance of deliberateness of the breach be found for all or at least the standard remedies in contract.

First, the strongest examples of explicit recognition of deliberateness combined with a serious and noticeable adaption of the standard remedies are can be found in French law, English law and in US law. In French law, deliberateness of the breach directly influences the standard remedy of expectation damages. Art. 1150 Cc shows that unforeseeable losses become available inter alia in case of deliberate breach of contract, whereas in a case of a breach which is not accompanied by deliberateness or gross negligence only foreseeable losses can be recovered. In English law, deliberateness of the breach is relevant in deciding the question whether the debtor committing the breach may successfully request specific performance. Deliberateness of the breach may help the aggrieved party to successfully argue that the debtor is not relieved from forfeiture. In US law, deliberateness of the breach explicitly triggers the availability of punitive damages. Punitive damages are generally not available in contract. The link between deliberate breach and punitive damages is not direct, because the tort of bad faith breach has to be established in between. Labeling the deliberate breach as a tort opens the gate to punitive damages, though in a very limited amount of cases, i.e. specific cases of insurance law. The Fletcher case is a good example. Furthermore, § 39 of the Draft Third Restatement on Unjust Enrichment in US law offers a direct link between deliberateness of the breach and the availability of account of profits as a standard alternative for expectation damages. This provision does not have any binding force at the moment, but it is the strongest example of the relevance of motive for remedies in contract. Opportunism in deciding to perform cannot be left without a serious sanction. The choice for this unorthodox approach rendered critical comments from others. The existence of the strong academic debate on this specific issue reveals the current tension in the law of contract regarding the potential relevance of deliberateness.

Second, deliberateness may be mentioned explicitly, whereas a potential influence on the application of remedies is explicitly denied. The strongest examples are visible in Dutch law and US law. In Dutch law, the Hoge Raad in the *Ymere* case explicitly mentioned the existence of a breach being deliberate, but confirmed the traditional view that motive cannot justify the award of account of profits. Account of profits in Dutch law remains a way of calculation of damages – shaped as a discretionary competence of the court at the request of one of the parties – according to art. 6:104 Cc, and it is not a separate remedy next to expectation damages. In US law, the influence of motive on the remedy of expectation damages is explicitly denied by courts.

Third, deliberateness of the breach may be explicitly recognized by courts as an existing fact, but the influence on remedial relief remains unclear. Examples can be found in Dutch law, English law and US law. In Dutch law, deliberateness of the breach in insurance cases is mentioned as a fact, but the remedy – award of statutory interest – is not influenced by deliberateness and only a theoretical escape in specific circumstances remains. In English law, deliberateness of the breach is mentioned in several cases which dealt with the remedy of account of profits, but the courts do not seem to accept to use the argument of deliberateness of the breach as an element in deciding on the award of account of profits. In US law, deliberateness of the breach is acknowledged as a potential factor in order to establish material breach. The fulfillment of the requirement of material breach may trigger the remedy of termination. Whether deliberateness of the breach renders a breach material is not so clear, but it is likely that a certain connection between deliberateness and termination in US law exists.

Fourth, in some situations deliberateness of the breach is left undiscussed by the court, whereas it seems to play an implicit role in the decision of the court. Dutch law and English law provide strong examples. In Dutch law, the Hoge Raad in the *Vos/TSN* case seems to deny the party committing breach of contract access to a debtor-friendly way of calculating expectation damages. An explicit reference to the deliberateness of the breach is absent, whereas the arguments to support the strict application of the full expectation damages are technical. In English law, a similar reluctance towards acknowledging a breach as deliberate can be found in the *Golden Victory* case, although the minority of the House of Lords is less reluctant.

A specific position in this debate is reserved for contractual remedies arranged by parties such as the penalty clauses and the exclusion clause and the influence of deliberateness thereon. In the area of exclusion clauses deliberateness of the breach negatively influences the possibility of the party to rely on an exclusion clause. In English law, the *Astrazeneca* case is an example. In the area of penalty clauses, there are examples in Dutch law where the courts specifically deny mitigation of the penalty due to the deliberateness of the breach, such as the *Buck* case. Although in several jurisdictions an explicit link between deliberateness and the application of the contractual remedy can be established, the aggrieved party can generally only achieve full application of the contractual remedy - i.e. enforced performance – in the case of the penalty clause or full application of the standard remedy – in case of denying the validity of an exclusion clause – but nothing more.

Finally, taking in account the modest ambition of this chapter in being descriptive and eclectic, this chapter delivers sufficient material to answer the research question asked in this chapter. The answer is affirmative with restrictions. Deliberateness plays a role in current law in different jurisdictions as a relevant factor in deciding which remedy should be awarded in a breach of contract case and to what extent it should be awarded. On the other hand, the influence of deliberateness is limited. Its influence is sometimes explicitly denied. In other cases, a specific breach of contract situation is not labeled as a deliberate breach by the court itself. The label of deliberate breach is attached by the author of this chapter, which makes the specific case perhaps less convincing. Furthermore, even if deliberateness is explicitly mentioned in relation to a specific remedy, it is not always clear how it influences the concerned remedy, for example because there is no concrete case law example available.

5 A framework for solving cases of deliberate breach: Four arguments and six recommendations for adaptations in remedies in contract

5.1 Introduction

This chapter deals with the two following normative questions:

Why should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?

How should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?

The law of contract in its current state in general wrongfully denies or neglects that deliberateness of the breach should be a relevant factor which influences the availability and/or the extent of remedies for breach of contract. The reluctance towards the relevance of deliberateness of the breach for the availability and extent of remedies in contract is explained and directly invalidated by presenting four arguments: a moral, a systematic, a practical and an economic argument. According to this chapter, the reluctant attitude towards deliberateness as a relevant element for deciding on the availability or extent of remedies in contract reveals a structural fallacy of the law of contract. This chapter shows that all four arguments lack sufficient power to deny the relevance of motive for the availability or extent of remedies in contract. This chapter advocates the opinion that deliberateness of the breach should be a relevant element in deciding on the availability or extent of a concrete contractual remedy in a concrete case.

When the relevance of deliberateness for application of remedies in contract is established, it is also necessary to explain *how* deliberateness as a relevant element returns in the application of remedies in contract. Therefore, the second normative research question, which is a solution-seeking question, needs to be answered in this chapter as well. If deliberate breach is labeled or qualified as a particular type of breach of contract being something else than breach of contract in general, to which results in the area of remedies in contract should it lead? The box with moral, systematic, practical and economic arguments offers tools in order to improve the law of remedies in contract. In other words, this chapter also explains how remedies in contract should be adapted in order to deal with a deliberate breach of contract in terms of remedies in another and improved way. The four reasons why deliberateness of a breach is relevant are a necessary preparation for several concrete recommendations on the application of remedies in the case of deliberate breach of contract depending on the circumstances of the specific case. This chapter presents the recommendations in a more general way, whereas the next chapter tests the recommendations on concrete cases. Six main recommendations in order to solve cases of deliberate breach are analyzed and discussed.

By assessing the current attitude of the law in the books and the courts towards deliberate breach as fundamentally wrong and presenting recommendations to improve the law of contract on this point, this chapter builds an analytical framework upon which concrete deliberate breach cases can be satisfactorily solved from a remedial point of view in chapter 6.

5.2 The moral argument

The moral argument counters the thesis that deliberate breach of contract is not an act which should have consequences for the award of a remedy in contract on moral grounds.[373]In other words, in terms of remedies in contract deliberate breach should not be treated differently from any other type of breach of contract as far as motive of the breaching party is concerned.

The moral argument considers that deliberate breach is morally wrong and that the immorality of deliberate breach is legally relevant, i.e. that the immorality should have consequences for the availability and the extent of remedies in contract. The law of contract is generally based on the idea of trust at least in the area of breach of contract and performance of contractual obligations.[374] Parties rely on each other when they conclude a contract and they naturally expect performance. They expect that promises formalized in the contract are kept. Parties also rely on the system of contract law which fills any gaps left by the parties in their contracts and which provides sufficient remedial relief in case of breach of contract.[375] A system of contract law which allows calculated deliberate breach of contract yielding sufficient gain in order to be advantageous compared with performance undermines the level of trust of parties involved in a contract.[376]

This thesis does not have any philosophical aspirations. It does not have any pretention to conclude anything on the connection between morality and the law in theory. A moral assessment of certain behavior – in case of deliberate breach of contract – means an assessment on whether certain behavior is ethically acceptable in society. Such norms and values are never static, but dynamic. What people accept as morally acceptable conduct differs from time to time and from place to place. Nevertheless, this thesis argues that the law of contract in every legal system has moral implications, which should have consequences for remedies in contract. This thesis argues that deliberate breach is morally wrong and that this moral wrongfulness should be made visible in remedies in contract. This fundamental argument is based on the following line of reasoning.

Contracts are instruments in order to create a secure environment in which parties are able to enhance their economic position. Contracts themselves do not ameliorate the economic position of parties; the performance of the obligations arising from the contract realizes the financial advantage or, more precisely, the certainty that parties will perform their obligations. Contracts are instruments in order to achieve this advantage. From this perspective, the core element of a contract is trust on a double level. Trust in the other party that he will perform according to the contract (1) and trust in the contract and the system of contract law that it provides a reliable mechanism in order to stimulate performance and in order to minimize the negative consequences of non-performance (2).

[373] Consider Posner 2009, p. 1363. Posner does not qualify deliberateness of the breach per definition as amoral, but he considers a possible immoral status of deliberate breach not relevant for action in remedies. Whether deliberate breach of contract is considered to be amoral or immoral is less relevant in this perspective, because a moral assessment is not relevant for remedial consequences anyway.

[374] See for example Wilkinson-Ryan & Baron 2010, p. 1041.

[375] Asser/Hartkamp & Sieburgh 6-III, 2010/40. According to Smith a rights-based approach to the law of contract – and the systems subject to research in this thesis can be viewed as 'rights-based'in the sense that a contract in all systems primarily confers (enforceable) obligations on parties involved in a contract – an intentional breach should be approached more forcefully in the sphere of remedies, but contract law apparently does not. This is "puzzling" according to Smith. See Smith 2004, p. 127, 154, 155.

[376] Wilkinson-Ryan & Baron 2010, p. 1041. Barnett 1992, p. 891.

The element of trust can be translated into legal provisions and contractual arrangements[377], but it also holds a moral component. A contract creates a relationship of mutual dependence. Parties only want to be dependent on each other if they can trust each other. A party who deliberately lets his own interests prevail over the obligations in the contract proves he does not respect the contractual bond of dependence.

The law of contract contains a structural wrong if the contract itself is a construction which aims at securing performance of the obligations in the contract, whereas the law of contract does not sufficiently prevent the possibility for a party to deliberately avoid performance of the obligations in a situation where the party committing deliberate breach can achieve financial advantage. The freedom of contract as a principle underlying the law of contract is matched by the principle of the binding force of the contract. If freedom of contract also implies the freedom of parties to forego performance and make a deliberate and cynical decision to commit breach – only under the condition of payment of expectation damages – the added value of the legal instrument of contract other than a financial security is absent. A choice is not possible either, because an unambiguous choice for a system where parties can easily commit breach of contract completely disrupts the primary function of the law of contract, which is – as mentioned before – upholding the confidence of parties in their own contractual relationship.

Whereas mutual commitment and voluntariness may generally be elements of a contract which can be found in any jurisdiction, the focus on the content of commitment and the specific aspects of voluntariness may differ and so may the two key principles. These differences are of interest for the topic of this thesis. Essentially, this thesis assumes that the law should recognize somewhere that parties may act consciously inconsistently. One moment they commit themselves to a contract, the next moment the obligation arising from the contract is violated on purpose. The breach of trust following from such inconsistent behavior is assumed to undermine trust in the system of contracts as such, because contracts are made to be enforceable.

However, these assumptions can only make sense if a deliberate breach of contract is legally perceived as consciously inconsistent behavior which causes lack of trust in contracts.

The instrument of contract in every legal system is available for parties in order to create certainty about their economic position. Parties agree on the creation of obligations which they promise to perform. A agrees with B to sell him a house for E 400,000. At least at the moment of conclusion of the contract, they both expect to obtain a better financial position after performance of the obligations, because they both attach a higher value to the performance of the obligation of the other party than to the performance of their own obligation. In this sense, every commercial contract is a bargain, as a representative of a common law system would say.[378] The advantage will only be materialized for both parties if all obligations are correctly performed. Consequently, both parties do not only expect a profit from the contract, they also implicitly expect the obligations to be performed. A expects that B pays the agreed price. B expects that A delivers the house. A contract works as a protection mechanism against the risk that one of the parties does not fulfill his

[377] See e.g. Rooks 2002, p. 5.

[378] This is not to say that a representative of the common law would imply that a contract is nothing more than a bargain, see Cartwright 2009, p. 158, 159.

obligations. If, for example, A does not deliver the house, the law of contract and, more specifically, the law of remedies offers possibilities to deal with the negative consequences of the failure to perform. In essence, these remedies are designed in order to facilitate the disappointed creditor to achieve the same situation as if the contractual obligation had been correctly performed, either by enforcing performance of the original obligation or/and awarding expectation damages.

Describing the law of contract this way, a contract is a value-neutral instrument designed to deal with risks in the future. The failure to perform always triggers the same consequences, because the objective of remedies is aimed to repair the negative consequences of the breach without paying attention to the cause of the failure to perform. The motive of the breaching party does not seem to be relevant. However, this description is an oversimplification of the legal construction of the contract and its remedial consequences.

A contract is a legal manifestation of a relationship of trust between parties. Parties would not conclude a contract with each other if they did not trust each other. The basic assumption in order to conclude a contract at all is that the other party performs. Exceptions such as coercive contracts and contracts concluded in bad faith exist, but they do not play a role in building the trust argument. A contract contains provisions which seem to address a lack of trust, because they provide for solutions in the case one of the parties or both do not perform their obligations correctly such as penalty clauses, exclusion clauses et cetera. Depending on the type of jurisdiction, the law of contract fills the gaps left by the parties, which means in this perspective that the law of remedies as a silent risk insurance is part of practically every contractual relationship. One may even argue that parties wish to conclude a contract, *because* they do not trust sufficiently on a good performance result. Parties take into account that “things” may go wrong, as a result of which one of the parties or both cannot perform. Even if parties themselves do not take into account that things go wrong, the implied law of remedies silently offers solutions if things go wrong. According to this way of reasoning contracts are manifestations of trust and of distrust at the same time.

A closer look at the trust-distrust relationship which the contractual bond between parties represents is necessary to make the step to assessing the relevance of deliberateness in connection with remedies in contract. The element of trust is present on two levels. The first level is the one just explained. Parties must have a basic level of faith in each other to enter into a contractual relationship. A second level of trust is the trust in the contract itself, the law of contract and its enforcement mechanisms. The primary reason to convert the first level of trust in a legal, contractual relationship is the idea that the formalization in itself attributes valuable instruments to parties to enforce the rights resulting from the contract.[379] These rights or remedies must have an added value for the parties subject to the law of contract in order to be trustworthy as an instrument of authority. In fact, this statement forces us to formulate objectives of the law of contract, because the law of contract can only support the contractual bond optimally if it is clear what a contract wishes to achieve.

Breach of contract may or may or not in itself destroy the trust of the aggrieved party in the specific contractual bond. It depends on the circumstances of the case whether trust is diminished or even

[379] The function of trust in contractual relationships may also be approached from a sociological point of view; See e.g. Buskens 1999; Buskens & Raub 2006.

destroyed. For example, in case of an excusable breach of contract or an imputable breach of contract due to risk attribution instead of personal fault, the trust in the reliability of the party in breach need not be fundamentally damaged. A breach committed in order to achieve a better financial position certainly destroys the trust of the aggrieved party, because the party in breach exercises contradictory behavior. Conclusion of a contract means commitment to the obligations involved. Consequently, a deliberate move in order to avoid performance is not an expected move.

Against this line of reasoning, the famous quote of Holmes can be cited, because the connection between contracts, remedies and trust depends on the expectation parties may have from being contractually bound.[380] Do parties expect the other party to perform what he has promised or does he only expect to have created a right to be financially compensated if the other party does not perform? As a US common law legal scholar, Holmes states the last.[381] Civil law jurisdictions intrinsically refuse to adopt this approach. Dutch, French and German law all in one way or another attach a principled value to the right to performance of the contract. This right does not follow from the breach, but from the contract itself and is therefore not a simple remedy, but a right. These systems attempt to emphasize that contracts primarily are to be performed. The primary position of the right to performance, at least in theory proves the relevance of morality in contract law. Trust in performance is essential and trust in performance is inevitably linked with the ethical norm that you should do what you have promised.

The claim in this thesis that deliberate breach violates a moral norm and should therefore be dealt with explicitly by the law of contract differently from any other breach of contract also includes the common law legal systems. The trust argument via the right to performance cannot be made in these systems. The quote of Holmes may be true and its potential consequence, formulated by Posner may also be true: Let us not blame the contract breaker.[382] The fundamental question beyond the systematic and traditional differences between civil law and continental legal systems is whether parties making use of the common law jurisdiction indeed experience a contractual relationship as a relationship which offers nothing more than a right to the monetary value of the obligations agreed to. Modest empirical research tends to show that this is not the case.[383] A victim of deliberate breach in common law jurisdiction expects that a contract he concluded would have been performed correctly. He is willing to accept that in case of non-performance a claim for damages remains, but if he is forced into the situation for the financial benefit of the party committing deliberate breach, he feels abused as in a malicious tort situation. In other words, the common law structure of remedies in contract is a good reflection of commercial reality – because it is often commercially sound to claim damages instead of performance –, but it does not prove that parties who conclude contracts expect anything else than performance of the contract. The trust argument in common law jurisdictions is therefore not only upheld by empirical research, but also by the argument that the

[380] For a detailed analysis on the notion of trust as a functionality see the aforementioned publication Buskens & Raub 2006.

[381] Holmes 1897, p. 5.

[382] Posner 2009, p. 1350.

[383] Wilkinson-Ryan 2010; Wilkinson-Ryan 2011; Wilkinson-Ryan & Baron 2009; Wilkinson-Ryan & Hoffman 2010. For slightly older references see Baumer & Marschall 1992; Marschall 1982; Macaulay 1963 ; Beale 1978.

remedial structure does not necessarily reflect the way parties interpret the commitment to the contract.[384]

From the perspective of the moral argument, deliberate breach of contract should ideally be prevented. A strong right to performance combined with a more 'victim of breach'-friendly approach of damages in contract and a more aggressive application of account of profits as a reasonable alternative for performance or expectation damages serves this purpose.

5.3 The systematic argument

The systematic argument deals with the thesis that motive for breach of contract should not be relevant for determining the appropriate contractual remedy, because the aggrieved party has a right to enforced performance of the contract or a right to expectation damages in case of *any* breach of contract, which should completely compensate him for his losses. Motive is irrelevant, because the aggrieved party receives what he expects based on the contract.

The systematic argument reasons that the general absence of attention to motive for breach of contract is not compatible with the function of remedies in contract in the law of contract in various legal systems. Leaving the common law jurisdictions aside for a moment, the main problem is that within the law of contract civil jurisdictions generally position the right to performance as a strong right, but it is a theoretical right, because parties face many procedural or practical problems which discourage them from using this right. Although a strong right in theory is not without value and although there are good justifications to limit the right to performance in certain situations, parties often claim damages instead of performance after breach of contract.[385] The second limb of the argument against the relevance of deliberateness is that perfect compensation does not trigger the aggrieved party to emphasize the relevance of deliberateness. The objective of perfect compensation is practically never achieved, partly due to generally justified limitations on damages, such as rules on foreseeability and limitation of damages for immaterial losses or recovery for costs of legal representation. The imperfections of the law of remedies are understandable from a systematic point of view in a general sense, but not if the law of remedies does not deal with motive as a relevant and separate element in assessing claims for performance or damages. The ideal of the law of contract that the aggrieved party receives performance or equal financial compensation is often not achieved. Therefore, it makes sense that an aggrieved party who is confronted with deliberate breach of contract has more remedial possibilities to approach the ideal situation as close as possible. If he could claim more than the usual expectation damages within the usual limits taking into account motive, i.e. the deliberateness of the breach, the system of contract law would make more sense. Widening the scope of expectation damages may include a more lenient application of the foreseeability limit, a more lenient approach to the award of damages for immaterial losses and a more lenient award of costs for legal representation.

In common law jurisdictions, the right to performance does not even in theory prevail. The claimant has long had only a right to expectation damages. In the common law jurisdictions, the problem of undercompensation is even more urgent, because the absence of the right to performance puts the

[384] See for example also Shiffrin 2009.

[385] See Lando & Rose 2004, although the empirical evidence on which this contribution relies does not seem to be very reliable.

aggrieved party in a potentially worse position to negotiate about the consequences of breach. The urgency to improve the position of the aggrieved party by emphasizing the interest of performance is in theory less clear, because the contracting parties would not expect the other party to perform in the common law, because they know in advance they only acquire a right to damages. However, modest empirical evidence from common law countries contradicts this Holmesian assumption.[386] Expectation damages as a remedy are not sufficient to counter the problem of the substantial risk of undercompensation, because the law of damages in any legal system, including common law jurisdictions, recognizes limits on foreseeability, remoteness and so on. Therefore, the objective which should exclude deliberateness as a relevant element for awarding damages, i.e. perfect compensation, is not achieved in common law jurisdictions either. Because these limits are generally justified in common law jurisdictions, a serious argument should be presented in order to overstep these limits. Deliberateness of the breach as an aggravating factor in terms of remedies in contract is a good reason which may systematically overturn the limits on the remedy of damages.[387]

5.4 The practical argument

The practical argument deals with one of the potentially strongest arguments against relevance of deliberateness for deciding on availability or extent of remedies in contract. This argument is that the aggrieved party can practically never prove that a specific concrete breach of contract is deliberate, because subjective intent is an internal state of mind of the party committing breach and therefore impossible to prove for the aggrieved party. According to this line of reasoning deliberateness can only be proved if the party allegedly committing deliberate breach himself admits that he committed the breach on purpose. This situation practically never occurs; therefore the relevance of deliberateness is a theoretical issue apart from any other substantive argument against the relevance of deliberate breach. In order to prove the subjective intention aimed at committing breach of contract, the burden of proof would be too heavy. The argument is that even if the law of contract would take into account deliberateness as a relevant element in deciding how to respond on breach of contract, it would be generally useless, because the aggrieved party could not prove deliberate breach anyway.

The practical argument reasons that deliberate breach of contract is not a single-definition term and that the most relevant types of deliberate breach for this thesis and its remedy- based approach may be made plausible by the aggrieved party without proving actual subjective intent. The type of deliberate breach which yields financial gain for the party committing breach may be established by pointing out the relevant circumstances: canceling of the contract without a good intrinsic reason in the first place and second, if possible, the existence of an external financial reason – a more advantageous contract other relevant circumstances, such as excessive delay in case of payment on an insurance policy. The core of this argument is that every case of potential deliberate breach of

[386] Holmes 1897, p. 5. See the aforementioned contributions, most of which at least co-authored by Wilkinson-Ryan.

[387] Thel & Siegelman also favor a stronger remedy of disgorgement, but they approach such a remedy from an empirical and systematic perspective. They argue that the standard remedy of expectation damages too often leads to undercompensation because of problems of calculation. Instead, they argue that the disgorgement of profits can be justified, because it is a promisor-based remedy: the promisor is brought into the position as if the obligation had been correctly performed. "(…), promisor expectation is a kind of antiremedy: the best remedy for breach is to prevent breach in the first place, and promisor expectation does just that when performance is appropriate." Thel & Siegelman 2010, p. 1239.

contract should be judged on its merits. Courts may use insights from other disciplines, such as criminal law, in order to deal with the notion of intent, but existing court practice shows that deliberateness is sometimes difficult to prove and sometimes easy to establish. Nevertheless, in order to open a larger box of remedies, the aggrieved party has to build a serious argument on why the involved breach should be considered to be deliberate.

5.5 The economic argument

The economic argument deals with two counterarguments. The first is that the law of contract should allow efficient breach of contract. This argument is somewhat different than the previous three arguments against the relevance of deliberateness of the breach for determining the appropriate contractual remedy. The economic argument is not used to argue in favor of an equal treatment of all breaches in the sense that deliberate breach should not be dealt with more severely, but that a specific type of deliberate breach, i.e. efficient breach, should be encouraged or at least allowed by the law of contract. This argument distinguishes between efficient breach and any other breach for which the party committing breach is liable. The argument is generally that breach should be allowed if the party in breach compensates the victim of breach for the non-performance, i.e. pays the added value of the obligation above the contract price. The second counterargument is that the availability of a box of extended remedies – from an easier accessible right to performance to larger amounts of expectation damages, account of profits, let alone the availability of punitive damages – entails a risk of overcompensation. A substantial risk of overcompensation creates an economic inefficient law of remedies in contract, because parties will be cautious to enter into transactions of which they cannot predict in advance the amount of damages in case of breach of contract. Furthermore, a too generous box of remedies leads to undesirable conduct of the victim preceding breach of contract, because he has incentives to trigger a situation of breach of contract which may render a financial advantage for him.

The economic argument firstly argues that efficient breach is not a concept which should be implemented in the law of contract, because it based on assumptions which are all disputable. The first economic assumption is that parties are indifferent towards receiving compensatory damages instead of performance of their obligations. Although there may be some isolated transactions in which this assumption may be correct, it is wrong to found the law of contract upon this assumption because in general contracts are concluded because parties *expect* performance. Civil law jurisdictions acknowledge this principle, because they have generally incorporated the right to performance into their law of contract. In these systems, efficient breach is simply not possible – at least not without cooperation of the aggrieved party –, because breach can be blocked by a claim for performance. Only in common law jurisdictions has efficient breach in theory a chance to survive. The second economic assumption is that the act of performance of a contractual obligation can be completely ‘translated’ into a financial value. This assumption again may be correct in some simple cases, but in slightly more complicated transactions breach of contract triggers a range of consequences which are hard to quantify, if possible at all. Many of these consequences are connected to trust problems. If due to a so-called efficient breach, a party does not receive the object he was entitled to, he will not be able to resell it, to use the object to produce and sell the goods he wants to produce and sell in time. These isolated situations may be valued and the party committing breach may compensate the victim for them, but the trust relationship between the victim and his contractual partners which he disappoints is not easy to attach a value to. The third

economic assumption is that the aggrieved party receives perfect compensation paid voluntarily by the party committing breach. This assumption may be correct in certain situations, but again, in more complicated contractual relationships perfect compensation is rarely achieved. The fourth economic assumption is that the way the financial advantage is distributed among the parties involved is legally not relevant, because the law of contract only exists to secure their economic rights resulting from the contract. This assumption essentially argues that the fact that the party committing efficient breach gains from the breach and makes a profit is legally not relevant for the remedial possibilities of the victim of the breach. Modest empirical evidence supports the idea that victims of breach of contract feel especially betrayed if the breach of contract yields a gain for the party committing breach.[388] Efficient breach is therefore a situation which can practically never be achieved. Efficient breach without efficiency is a plain deliberate breach or willful breach in US legal terminology and should be dealt with accordingly.

The economic argument also rejects the argument of the risk of overcompensation. Too be precise, it is correct that a more generous approach in terms of remedies of deliberate breach creates a risk of overcompensation. However, the risk is not endangering the economic and systematic stability of the law of contract. The proposals for adapting the law of remedies are primarily aimed at bridging a gap of effective enforcement of the remedial possibilities of the victim of the breach. The existing reality is one of *undercompensation* in case of breach of contract. Some of the reasons which have led to a practice of undercompensation are understandable, sometimes even justifiable, but the general conclusion is that a party who is confronted with breach of contract is practically always worse off than if the contract had been correctly performed.

A first point to discuss in this light is a possible reinforcement of a claim for performance, which is most relevant in common law jurisdictions. In principle, a claim for enforced performance cannot directly lead to a situation of overcompensation of the claimant, because the ultimate consequence of exercising the claim is that the claimant exactly receives what he contracted for. However, changed circumstances after conclusion of the contract can make actual performance of the contractual obligation extremely burdensome for the party committing breach of contract. For these cases, the law should have possibilities to limit the right to performance.[389] In common law jurisdictions, this problem is less urgent, because specific performance is a secondary remedy anyway. In the case of *deliberate* breach of contract, the situation just described is not relevant. In a situation of deliberate breach of contract because of the reason to obtain a financial gain, a difficult situation can occur. Although the deliberateness of the breach should entail that an eventual burden to perform cannot be a justified excuse to limit the power to exercise the right to performance, reality also asks a reasonable solution. In case of a double sale or a breach of a long-term contract, the party having committed the deliberate breach is often practically not able to perform any longer. He has to rebuy the object sold to a third party if that is possible at all and in case of breach of a long-term contract such as the English *Argyll* case performance of the original obligation is also practically impossible. A possible solution for this situation can be found by acknowledging the secondary

[388] One of the most recent sources to support this statement is the contribution of Wilkinson-Ryan and Hoffman on the perception of breach; Wilkinson-Ryan & Hoffman 2010, p. 1045: "Breaches for gain are perceived as worse than breaches to avoid loss."

[389] For example, Haas in his dissertation formulates some recommendations how to limit the right to performance in Dutch law in this situation, partly based on German law. See Haas 2009, p. 348, 349.

purpose of a strong right to performance. A strong right to performance increases the possibility for the victim of the breach to claim full instead of undercompensatory damages, because he can always threaten to use this right in order to negotiate a an amount of damages which approaches the subjective value of the obligation. This consequence of the right to performance is especially relevant when the obligation does not have a market value which can be objectively assessed. Two things are important in order to avoid excessive overcompensation as well as the still existing risk of undercompensation. First, in order to effectively be able to use the right to performance in order to receive an appropriate amount of damages it is undesirable to limit the right to performance in the situation of deliberate breach *in advance*, because it would undermine the negotiation position of the victim of the breach. An additional argument is that it may be *practically* impossible for the party committing breach to perform, it is often not *absolutely* impossible. Second, a risk of overcompensation may also exist when the victim of the breach does not have a reason to limit the subjective value of the breached obligation. The court should offer some assistance to limit the extent of the subjective value attached the obligation if a market value cannot be established.[390] A second risk of overcompensation may occur once a claim for expectation damages or any other monetary remedy, such as a claim for account of profits or even punitive damages, is extended beyond limits which are applicable in case of any other breach of contract. The argument of potential overcompensation in case of a claim for expectation damages may be justified, because these limits attempt to prevent the victim of the breach from claiming damages for losses which cannot be connected to the breach. However, this argument is somewhat inaccurate, because the term expectation damages in itself contains a limit. This limit is that the victim can only claim damages for losses or missed profits he would not have had if the party committing breach had performed correctly. In case of *deliberate* breach, it is not unimaginable that costs of legal representation in order to deal with the breach of contract are recoverable to a larger extent than in a case of 'ordinary' breach of contract. Any limits with regard to foreseeable damages or – if accurate – immaterial losses should be considered with the utmost reluctance. A second argument is a policy argument which results from this analysis. The risk of undercompensation remains far more likely than the risk of overcompensation.

5.6 Intermezzo: three remarks

Before the five recommendations for adapting the law of remedies in contract in case of deliberate breach of contract are presented, three preliminary remarks need to be made, because the recommendations are not *all* suitable in *every* case of deliberate breach of contract in *every l*egal system. The appropriate solution depends on the concrete circumstances of the case. The arguments as presented in the previous sections help to categorize and structure the level of deliberateness.

First, as Chapter 2 already indicated, deliberate breach is not a term with a single definition and the appropriate remedial solution may be adapted accordingly. The majority of authors and courts use this term or a synonym of this term to indicate a breach of contract which yields a financial advantage for the party in breach. The party in breach commits breach deliberately if the advantage

[390] Ogus proposed the hypothetical value assessment, which is based upon the idea of a hypothetical incorporation of a penalty clause assessing the value of the concerned obligation before the occurrence of the breach. See Ogus 2006, p. 208 ff.

is larger than the advantage he would have had if he had performed correctly. According to this description, deliberate breach of contract includes the law and economic concept of efficient breach. The type of remedial solution which is appropriate to deal with this type of deliberate breach may be different from other manifestations of deliberate breach such as the malicious breach according to which the party intentionally aims to inflict harm on the aggrieved party without the aim to gain financial advantage. The majority of the solutions presented attempts to deal with the financial variant of deliberate breach, because this variant seems to be the most frequent one occurring. If another variant of deliberate breach is meant to be addressed, an explicit reference will be made.

Second, in order to assess a specific solution as "appropriate", it should be clear in advance what the objective of a specific remedial solution is. Because deliberate breach of contract is in essence an undesirable way of behavior as has been shown by moral, systematic, practical and economic arguments, it should ultimately be prevented. Therefore, an appropriate remedial solution should have a deterrent effect in order to prevent parties to consider deliberate breach of contract as a possible option with advantages and disadvantages. Prevention and deterrence suggest an ex ante approach. Remedies are primarily designed to be invoked ex post, i.e. after a breach of contract occurred. The threat of a severe remedy may however prevent a party from committing deliberate breach so that the actual remedy does not have to be invoked at all. The paradox of this line of reasoning is that the ideal situation would be that the law of remedies would be adapted in line with this objective of prevention and deterrence, whereas the success of this adaptation would be maximal, when the presented solutions are practically *never* used. Apart from the deterrent effect of the remedy in order to be appropriate, it should also have another effect if deliberate breach of contract despite the deterrent effect takes place. An appropriate remedial solution should guarantee a smooth and easy way for the victim of the breach to receive full compensation. The generally legitimate thresholds limiting the possibility to receive full compensation should be lowered as the concrete solutions provide in order to guarantee that the victim of the deliberate breach does not have to bear any negative financial consequences of the deliberate breach of contract. Prevention, deterrence and maximal compensation are the key notions in terms of objectives of the recommendations and adaptations in the remedies in contract. At the same time, the remedies should not be out of line with the underlying systematic coherency and economic feasibility of the law of remedies in contract. In other words, the remedial solutions should fit into the concrete applicable legal system, whereas parties should not be deterred from relying on the law of contract.

Third, the following recommendations are not applicable on an equal basis in every legal system. An eclectic approach followed by this thesis can be well defended, but it remains necessary to take into account that breach of contract in every legal system and in every legal family – e.g. civil law or common law – requires different answers. The arguments reveal part of the variety of the possible perspectives, but the explanation of the various recommendations also reveals the differences in application of the specific recommendation.

5.7 Recommendation I: Deliberate breach and actual performance

In case of deliberate breach of contract a claim for performance of the contractual obligation should be accessible and strong.

Taking into account the third preliminary remark, this recommendation renders different results in civil law jurisdictions compared with common law jurisdictions. The right to performance in civil law

jurisdictions is stronger than the remedy for specific performance in common law jurisdictions. In the latter, a right to performance does not exist, it is a remedy granted by the courts on a discretionary basis. The basis for a strong and easily enforceable claim for performance in case of deliberate breach of contract in general is based on the idea that contracts are concluded in light of the expectation that they are going to be performed. Deliberate breach of contract in every manifestation – either the financial or the malicious version – is a direct violation of the relationship of trust between contractual partners and in a law of contract which does not appropriately react to this type of breach. A strong and enforceable claim for performance directly resulting from the contract, not from the breach of contract, prevents deliberate breach of contract in the first place. The existence of a right to performance in civil law jurisdiction means that this recommendation is especially relevant for common law jurisdictions.

In civil law jurisdictions the discussion about the possibility of efficient breach as a special manifestation of deliberate breach largely remains an academic discussion. Efficient breach is a manifestation of deliberate breach of contract and should be prevented and deterred and a strong and enforceable right to performance guarantees the incentive for parties to refrain from committing deliberate breach including efficient breach. In civil law jurisdictions, this recommendation in essence already exists. The right to performance as it stands need not be changed in a serious way in cases of deliberate breach of contract.

In common law jurisdictions, the situation is different. The debate about the way the law of contract should deal with deliberate breach of contract seems to be more urgent, because of the lack of a strong right to performance. Although Chitty starts with this Holmesian premise, it immediately scales down its importance with four counterarguments, which are meant to illustrate that English law cares for legal assurance that primary promises are kept. First, courts may enforce primary obligations, namely in actions for the agreed sum. Second, damages are generally awarded to bring the injured party in the position as if the contract had been correctly performed. Third, in certain cases where breach is deliberate, but conventional damages cannot heal the injustice, account of profits in the sphere of unjust enrichment may be available. Fourth, an order of specific performance cannot easily be denied, because denial leads to contempt of court according to procedural law.[391] However, these four arguments do not sufficiently tackle the idea that the principle of binding force has to be approached carefully in a common law context. The second and fourth argument are no real arguments to counter Holmes, because Holmes does not deny the possibility of monetary sanctions – i.e. damages – in the case of breach or even deliberate breach of contract. He even emphasizes that damages should be available. The severe punishment of the party breaching an order for specific performance does not take away that parties do not have a right to specific performance of the contractual obligations or promises. They should request an order from the court. The first and third argument are more convincing, but the first is of limited weight, because the action for the agreed sum is a very specific action and does not counter the principle that damages are the primary remedy. The third argument is very interesting for this thesis, because the possibility of the award of account of profits in certain cases of breach of contract may even suggest that English law pays attention to the motive of the party in breach. Moreover, it may push parties to perform the primary obligations, because it may provide a disincentive to commit breach. If the party

[391] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 12.

in breach should hand over his gain received from the breach itself, why not just perform the contractual obligation?[392]

As established in Chapter 1, a claim for specific performance is judged by the court, which has a discretionary power to award or to deny the claim. The doctrinal rule is that damages as a remedy in the specific case are not adequate in order to honor the claim for specific performance. In practice, in many situations, the claim for specific performance is assessed on the basis of concrete circumstances. In cases of sale of land or in cases where the object of the contractual obligation is unique, specific performance is generally available. The practical differences between common law and civil law jurisdictions are not very large.[393]However, when a stronger right to performance in reaction on *deliberate* breach of contract is proposed, it is the principled difference between civil law and common law which needs to be emphasized. Especially under US law, a principled discussion has recently been developed. The US debate on deliberate breach of contract and its influence on remedies in contract can be summarized by contrasting two contradictory views on the law of contract. At this point, it is necessary to repeat that US law developed a nuanced approach towards deliberate breach. The exact meaning of deliberate breach is not easy to detect, if it can be done at all. In US case law, deliberate breach may be allowed in court decisions, as long as it is *efficient*, whereas *willful* breach is considered as a term with a more negative connotation. From a remedy point of view, in both cases it is questionable whether courts treat both manifestations of deliberate breach differently from any other non-excusable breach with regard to the remedy of specific performance.

On the one hand, one may argue that contract law does not incorporate assessment of moral behavior.[394] Consequently, willful breach of contract does not require any other treatment under the law of contract than any other breach of contract, for which the debtor can be held liable. Willful breach of contract may be morally dubious and the creditor may feel worse after willful breach than after any other breach, but that is not what contract law should respond to. In case of breach of contract, as a main rule, full expectation damages should be awarded, no more and no less. Therefore, no good reason can be given for an extension of the right to actual performance of the contract. According to this line of reasoning, efficient breach is a normal result of the view on the law of contract. Even stronger, whereas efficient breach is in line with the law of contract structure and should therefore be stimulated, inefficient breach should be deterred, even if it is accidental.

On the other hand, a more ‘ethical’ perspective can be chosen.[395]Contract law cannot be considered as amoral. In short, motive counts, not only morally, but also legally. The supporters of this view are convinced that damages should be more readily available in the case of deliberate breach of contract. Moreover, actual performance of the contract is the goal of every contract, so the strength of the remedy of specific performance should be revalued. Furthermore, perfect expectation damages do not exist in reality. Even if perfect expectation damages can be awarded, a form of ‘punitive’ damages should be considered to prevent debtors from coldheartedly breaching.

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[392] Chitty 2008, 1-019 (p. 16, 17).
[393] See for example Lord Hoffmann in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 11, who acknowledges the theoretical differences between common law and civil law on this point, but also points out that in practice the differences are less pregnant.
[394] See e.g. Posner 2009, Shavell 2009.
[395] See e.g. Shiffrin 2009, Roberts 2009a.

Other recommendations explore the area of damages, but it is clear that this recommendation aims at the heart of the contractual relationship. The certainty of receiving what the creditor is entitled to should be visible in the law of remedies in contract, especially in case of deliberate breach of contract. According to this recommendation, the law of contract should not be considered as a pure economy driven structure, but as a structure with an own identity. According to the recommendation, revaluing the remedy of specific performance should be taken seriously.

5.8 Recommendation II: Deliberate breach and expectation damages

Expectation damages should be assessed in favor of the aggrieved party in case of deliberate breach of contract. Limits on recovery of unforeseeable damages, costs for legal representation, consequential losses, damages for immaterial losses should be applied with reluctance in case of deliberate breach of contract.

A more open acknowledgement of a breach of contract as deliberate offers the law of damages a stronger foundation to lift some of the justified limits on expectation damages. It has been argued previously that expectation damages do not compensate the victim of the breach completely in practically any case which is slightly more complicated than the sale of a loaf of bread on the market. Maintaining those limits in general is justified. The law of contract should not be a resort for victims of breach of contract attempting to dwell on their losses and above all attempting to get better after the breach than before the breach. In general, this situation should be avoided. The law of contract is not a goal, it is designed to help parties conclude contracts in order to be able to enhance their economic welfare. Limits to damages with regard to foreseeability, with regard to recovery of costs of legal representation or with regard to recovery of immaterial losses are generally logical. Contracting with parties is a risk and this risk may materialize when something goes wrong. When a party is not able to perform correctly, he has to pay, but the victim of the breach will always bear some of the burden as well. This picture changes when a party commits breach of contract deliberately. The focus is again on a breach which renders a financial advantage for the party committing breach. Be it a case of double sale or a deliberate breach of a long-term contract without a good reason except the opportunistic financial one, the victim of the breach could not have taken into account such a step when the contract was concluded, because it is not logical. The contract is concluded with the idea to make a gain for both parties. Circumstances can change afterwards which will possibly make one of the parties regret the decision to conclude a contract, but that by itself cannot be sufficient for simply committing breach of contract. The problem with deliberate breach of contract is that the party considering breach of contract will only do so because performing is less advantageous than committing breach. This decision includes the consideration on the amount of damages due after the breach. If the damages are foreseeable and only incorporate the difference between the market value of the performance and the contract price, the decision to commit breach because of a financial motive is not a difficult one. The trust argument is again important to emphasize the gravity of the violation in case of deliberate breach. It is very easy for a victim of deliberate breach to lose trust in the institution of contract, if he is not compensated adequately. However, it is also important that the threshold for the party considering breach is high.

5.9 Recommendation III: Deliberate breach and account of profits

Account of profits as a remedy after breach of contract should be more readily available in case of deliberate breach of contract.

Account of profits or “disgorgement” of profits is potentially an effective remedy in order to react to deliberate breach of contract. It is effective, because it potentially deprives the party committing deliberate breach of contract from the profits he made from the breach. As explained, the motive to commit breach is often a financial one in case of a deliberate breach. If a credible remedy exists in order to take away the profits of the party committing deliberate breach, this remedy would have the preventive, deterrent effect which should make parties think twice before committing deliberate breach.

This recommendation as formulated above suggests that it is already possible at least in some legal systems to claim account of profits. The question arises if the current law is already capable of dealing with deliberate breach of contract. The remedy of account of profits reveals a deep struggle of the law of contractual damages, be it in civil law or common law jurisdictions. The problem with account of profits is that it is a remedy naturally aimed at the position of the party in breach. However, the law of remedies in contract, and the law of damages especially, in civil law and common law jurisdictions are primarily aimed at the position of the victim of the breach. The victim should receive what he contracted for – materialized by a right to or at least a possibility to claim performance of the obligation – or the victim should be compensated for his losses by a claim for damages. Account of profits is often presented as a manifestation of a type of damages. This way of approaching the remedy of account of profits leads to systematic problems. The primary objective of the law of damages is compensation of the victim of the breach. Other objectives, such as prevention, deterrence, let alone punishment are not primary objectives of the law of damages, at least in contractual situations. This statement formulated in this wide sense is applicable in civil law as well as common law jurisdictions. The primary objective of compensation does not rule out the possibility that a remedy may also have preventive or deterrent effects. Although these effects are taken into account, it is questionable whether prevention, deterrence or punishment may be understood as secondary *objectives* of the law of remedies. The reluctance towards such an approach will be discussed below.

The primary objective of the law of remedies aimed at compensation of the victim of the breach allows the possibility of account of profits as a possible alternative for classic expectation damages in the sense of covering losses and missed profits of the victim of the breach. Dutch law, for example, allows for the possibility to award account of profits. Nevertheless, this possibility is limited by the primary objective of the law of damages, because the remedy may only be used as an alternative to compensate for damage, i.e. losses incurred and profits foregone. In other words, in this situation account of profits is a compensatory remedy. The position of account of profits as a remedy in common law jurisdictions is more complicated. English law does not seem fond of awarding account of profits in any breach of contract situation. There are some examples in a relatively recent past, but since the *Blake* case, the attitude of the House of Lords c.q. the Supreme Court towards account of profits in breach of contract situations has been reluctant, certainly as far as the connection between deliberate breach and account of profits is concerned.[396] In US law, the situation is somewhat different, because a new view seems to arise from the Draft Third Restatement on Unjust Enrichment and from legal scholarship. The link between account of profits and deliberate breach is made

[396] See for a recent and critical review of the connection between disgorgement of profits and deliberate breach of contract for the purpose of deterrence Rotherham 2012.

explicitly in both academic publications, although the Third Restatement uses the term 'opportunistic', ruling out as it seems situations of efficient breach of contract. As Thel and Siegelman argue, a fundamental shift in approach is necessary in order to apply this remedy as adequate as possible. They argue that not the expectation of the victim of the breach should be leading in assessing damages, but the expectation of the party committing breach of contract. In other words, the party committing breach of contract should be placed in the position as if he had correctly performed. Therefore, he may be deprived of his profits. This approach means that in the near future US law may allow the victim of the breach to claim account of profits as a complete alternative to classic expectation damages.

The struggle of the law of remedies in contract now becomes apparent. The reluctance towards other objectives than compensation in the area of remedies in contract is based on the idea that the victim of the breach should not receive more than he expected to receive if the obligation concerned had been performed correctly. The risk of overcompensation and the possible anticipation of the victim of the breach to receiving an overcompensatory remedy by causing a breach of contract himself are a first reason to emphasize the objective of compensation for the law of remedies in contract in all legal systems. A second reason to be reluctant in this respect is a matter of principle. The law of contract is considered to provide a framework structuring – mostly commercial – relationships between private parties. As a branch of private law, the law of contract law should in contrast with public law, not incorporate any sanctions which contain elements of maintaining public order, when the sanctions would lead the party in breach to pay of an amount exceeding the level of damage suffered by the victim. Objectives such as deterrence and punishment are therefore not suitable to be incorporated as objectives of the law of contract. As the classic theory according to this line of reasoning would argue, account of profits cannot be used as a separate remedy as a reaction on the *deliberateness* of the breach and not connected to the *disadvantage* caused by the breach to the victim.[397] The benefits of the sanction would be attributed to the victim of the breach, in this case the disgorgement of the profits, without the necessity of substantial damage to be compensated. Giving the victim a monetary remedy without giving him the duty to prove why he needs the money – i.e. the losses incurred and/or profits foregone due to the breach – means that the victim of the breach is provided with other powers than those needed to restore his own *financial* position.

This issue is a very essential one, because it reveals another dichotomy which is different from the classic common law versus civil law dichotomy. This dichotomy exists between the US legal system and the European legal systems. As Hodges argues, the US legal system historically attributes more power to private parties in order to fortify his own position, but also as a serious instrument to correct their fellow citizens.[398] Historically, the reason for the emphasis on private vindication of the law can be explained by the traditionally small role of the state in practically every part of society compared to European states. The other closely related reason is that the confidence in public defense and vindication of the law is far less developed in the US than in Europe. Accordingly, European states are built on a strong public confidence which reduces the necessity of private parties to enter into the domain of taking preventive, deterrent or even punitive action towards their fellow citizens in private law disputes. Although for example the English jurisdiction is very different from

[397] Hodges 2011, p. 104, 105.
[398] Hodges 2011, p. 104, 105.

the Dutch or French jurisdiction, the idea that the law of damages primarily serves a compensatory purpose and not a vindictive or punitive purpose is present in all these systems. As explained, the idea of giving the victim of deliberate breach the possibility of claiming account of profits because of the deliberateness without taking into account the level of damage at the side of the victim is therefore in US law a more logical option than in European systems.

Approaching the relationship towards the remedy of account of profits from a private versus public enforcement perspective seems to emphasize the differences between the legal systems mentioned above. The opportunities for using account of profits in European jurisdictions in order to deal with situations of deliberate breach also seem to be very limited accordingly. From this perspective, it also seems logical in the US legal system to widen the scope of applicability of account of profits as proposed by the Third Restatement in case of deliberate breach of contract. However, reality is always more complicated. It is far too simple proposing to introduce a claim for account of profits in case of deliberate breach in European legal systems without any substantial further condition.

The existing differences between the application of account of profits as a remedy in the US legal system and the European legal systems are smaller than it seems. As Chapter 4 showed in some cases account of profits is already available under European legal systems. The Dutch Ymere case is a good example. The Dutch remedy of account of profits is limited by art. 6:104 BW. This provision, as discussed, only allows account of profits as a way of assessment of damages, whereas it is also at the discretion of the court to award this remedy. In other words, the victim has to show any damage and there should also be a good reason to claim account of profits instead of 'normal' expectation damages. The Ymere case is special, because Ymere suffered damage in the form of missed rent due to illegal subletting.[399] The claim for account of profits was substantially higher than the amount of missed rent. The victim of the breach – Ymere – had to develop a system in order to detect the practice of subletting. This argument justified a higher claim and the claim was honored by the courts whereas the argument was upheld by the Hoge Raad. It is clear that although there should be a minimum level of damage, the claim for account of profits need not per se match the actual level of damage. In this case, it seems that the party committing the breach at least partly pays for vindication of policy set out in all contracts with tenants other than himself. However, the Hoge Raad emphasized that Dutch law of damages does not contain a punitive element. Unfortunately, the breach as such was not labeled specifically as deliberate, whereas on the other hand the Hoge Raad ruled that the level of fault may be a relevant element in deciding on the applicability of art. 6:104 and also on the level of the awarded amount. In my opinion, this decision shows that labeling the breach as deliberate can solve the complicated issue of positioning deliberateness of the breach of contract as a core element for the availability of account of profits.

The plea for a more accessible remedy of account of profits in case of deliberate breach of contract is a nuanced proposal. A more direct acknowledgement of deliberateness of the breach will give the court a more credible argument in order to award a claim of account of profits. The justification for the award of account of profits must be found in the violated trust of the victim in the contract and a minimum level of actual damage suffered as a consequence of the deliberate breach. It is essential

[399] HR 28 juni 2010, *LJN* BM0893, RvdW 2010, 771 (*Doerga/Stichting Ymere*); HR 18 juni 2010 *LJN* BL9662, RvdW 2010, 772(*Setel NV/ AVR Holding)*

that the court labels the breach concerned as deliberate if the party committing the breach acquires a financial advantage resulting from the breach. The aggravated level of fault justifies a remedy which in a limited way oversteps the compensatory objective of the law of remedies in contract. The system of remedies in contract needs to be able to respond to the direct violation of the mutual trust in order to be able to deal adequately with deliberate breach of contract.

5.10 Recommendation IV: Deliberate breach and punitive damages

Punitive damages in exceptional cases may serve as a last resort for excessive deliberate breach situations.

The area of punitive damages in contract law is a dangerous one. Systematically, the law of contract refuses to incorporate punitive damages as a remedy after breach of contract. Of all potential purposes next to compensation, the objective of punishment is resented the most of all. It is evident that in European legal systems punitive damages in the law of contract are rejected. Next to the argument that punitive action is a public enforcement issue and not a private enforcement issue, European legal systems generally do not need punitive damages. The existence of a right to performance in most continental systems which at least gives the victim of breach a good position to negotiate on the level of damages takes away an immediate reason to provide the victim of the breach with such a powerful monetary weapon. The option to include a penalty clause into the contract in order to enforce performance at the cost of a substantial penalty is also an option which would make the availability of punitive damages slightly over the top. Furthermore, taking into account the primary objective of compensation of the law of damages in contract situations, which has already been discussed, it is not a surprise that punitive damages do not fit into the box of remedies in contract. The question is whether punitive damages should be allowed for deliberate breach of contract in European legal systems, including English law. The answer would be in general negative for several reasons. The most important reason is that although deliberate breach of contract is an underestimated legal phenomenon, a change of remedies in contract which would address this problem involving the introduction of punitive damages, would simply be a step too far. In European legal systems, the concept of punitive damages in general is only accepted in a limited way in tort situations. Liability in tort is generally considered as more serious than liability in contract, because of the involuntary relationship between the victim and the tortfeasor. Systematically, the law of contract would be out of balance, if a victim of breach of contract had access to a remedy which is generally not even available in situations of tort liability. Furthermore, the risk of deterrence to the commercial market, not to commit deliberate breach , but to incorporate the law of contract of a European legal system as the law governing the contract, would be large. Another argument is that punitive damages do not assist sufficiently in achieving the objectives which would make a remedy appropriate in order to deal sufficiently with deliberate breach of contract.

In general, this recommendation in the area of damages is of relatively minor importance for the reasons just mentioned. However, the recommendation is made with a reason. In US law, punitive damages in contract is more openly discussed than on the European continent. An important reason is again as explained before the difference between private and public enforcement. In tort law, punitive damages are a structural part of the remedial possibility of the claimant. Nevertheless, the general attitude is that punitive damages in contract law are even in the US not a logical option, because of commercial and economic stability reasons. Parties should be able to calculate which risks they run and the possibility of facing punitive damages would not encourage commercial parties to

conclude contracts. There is one exception and that is the insurance contract as explained in Chapter 3, although the possibility of punitive damages is only accessible via the *tort* of bad faith breach. The core idea is that insurance companies should not have the possibility and the economic freedom to procrastinate payments on legal claims based on the policy, only because the insurance companies know that they only need to pay the insured amount. This problem, especially when it is an institutionalized policy instead of a random mistake is not limited to the US territory. In the US under strict circumstances, the claimant has the option to claim punitive damages if he can prove that the breach of contract also qualifies as the tort of bad faith breach. The tort is the deliberate non-payment on a valid claim in the hope that the claimant does not have sufficient financial assets to start and continue with legal proceedings. The insurance company hopes to get away with his behavior, because it can be financially attractive. This is a good example of the type of deliberate breach the law of contract should respond to adequately. US law does so by introducing punitive damages under strict conditions. This recommendation does not primarily plead for an extension of punitive damages in the US legal system to other cases of deliberate breach of contract, because other recommendation should largely be able to fill the gaps. In European jurisdictions, there is a serious lack of adequate response to this conduct. Payment on a policy constitutes an obligation to pay money. Not every legal system is able to deal with this specific problem adequately, because the only serious sanction on late payment is the additional payment of interest. Such a provision is too predictable and not deterring the insurance company from committing deliberate breach. A lack of adequate response in European jurisdictions may allow for introduction of punitive damages in this specific area of contract.

5.11 Recommendation V: Deliberate breach and termination

Termination should be more easily accessible for the aggrieved party in case of deliberate breach of contract.

The remedy of termination is generally not considered to be available as of right after breach of contract. A simple breach of contract is often not sufficient to trigger the remedy of termination. Terminating the contract in essence means that one of the parties does not have sufficient confidence in correct and complete performance of the agreed contractual obligation. Terminating the contract causes problems once one or both parties have already started to perform. If termination is meant to be remedy for breach of contract, the loss of confidence which triggers a party to terminate the contract only starts at the moment of the *breach* of contract and not at the moment of the *conclusion* of the contract. Suppose that A agreed to build a house for B. A starts building, but he fails to complete his tasks. B wants to terminate. B does not question that he wanted to conclude a contract. However, after the termination, the part performances should – at least in principle – be undone. This simple example shows that undoing the part performances can be a problematic and complex issue. Because termination is considered to be a severe remedy, many jurisdictions, but also for example the DCFR and the CESL, recognize a certain threshold in order to have access to termination. In the DCFR as well as in many common law jurisdictions, a breach should be fundamental in order to trigger the availability of termination.[400]In civil law jurisdictions, the party committing breach should in general be granted a second chance to perform before the aggrieved party has access to the remedy of termination.

[400] See also Chapter 2.

The motive of the party committing breach should influence the assessment of the importance of the breach or the importance of the breached term. In other words, the existing thresholds in various legal systems may in general be justified, but not in case of a deliberate breach of contract. For civil law jurisdictions, this point of view lead to the suggestion that a debtor who commits deliberate breach of contract wastes his second chance to perform, because he deliberately avoids to attempt to perform correctly the first time. In other words, the debtor should not have a second chance in case of deliberate breach of contract. In jurisdictions working with the requirement of fundamental breach, deliberateness of the breach should generally make a breach fundamental in order to grant the aggrieved party access to termination. In common law jurisdictions, a deliberate breach of any term – be it a condition, an innominate term or a warranty – should be sufficient to grant the aggrieved party access to termination. Termination seems to be the most logical remedy for the aggrieved party, because he will lose any confidence in performance. If the aggrieved party lost confidence in the debtor it does not seem realistic or logical in economic terms to grant him another chance to perform. Moreover, from an economic perspective it is not logical to deny access to termination because access to termination will grant the aggrieved party a better negotiation position in order to cover the losses incurred after the first, deliberate breach.

5.12 Recommendation VI: Deliberate breach and penalty clauses

Penalty clauses should not be mitigated in case of deliberate breach of contract. Penalty clauses should not be declared invalid if the breach concerned is deliberate.

This recommendation is slightly different from the first five, because it is on the party-arranged remedy – the penalty clause – and not on the standard remedies after breach of contract. Enforcement of penalty clauses is systematically hard to label, because there are elements of actual performance involved –enforcement of the clause itself –, but also elements of damages – how to assess the validity of the clause and the mitigation powers of the court – as well as purely contractual elements which do not refer to the law of remedies – parties agreed to this clause, why would the court interfere?

As the previous chapters show, the most relevant distinction in approaching the penalty clause is the common law-civil law one. Common law does not allow penalty clauses unless they contain a genuine pre-estimate of potential damages, whereas civil law allows penalty clauses, but also allows courts to mitigate the penalty. The recommendation attempts to address both variations and adds a third one with regard to deliberate breach of contract. A party who commits deliberate breach of contract defies the confidence of the other party in the contract, but also defies the economic value of the contract as a document to rely on and to make further economic decisions. In order to diminish the risk of non-performance parties incorporate penalty clauses into their contracts. It would be an anomaly, when a party deliberately avoids performance, whereas he maintains a chance in court that the penalty will be mitigated. In such a case, the penalty clause would miss its goal. In common law jurisdictions, the potential strength of penalty clauses is been undone by the possibility of parties to litigate in court over the clause being a penalty clause or a liquidated damages clause. Lengthy proceedings are something parties always want to avoid. If a breach is deliberate, a common law court should automatically label the clause as a penalty clause in order to avoid arguments on the status of the clause. If the sanction on deliberate breach is not sufficiently clear and severe, the debtor can strategically attempt to consider committing breach without immediately facing the penalty he himself agreed to.

5.13 Conclusion: 4 arguments, 6 recommendations; a general approach or case-by-case solutions?

This chapter offers an answer to two fundamental research questions of this thesis:

Why should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?

How should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?

The first question is answered by presenting four arguments which explain the necessity of recognizing the relevance of deliberateness as an element of influence on the availability and extent of remedies in contract: a moral, a systematic, a practical and an economic argument. All of these arguments reject counterarguments in their own area.

The moral argument reasons that mutual trust between parties to the contract and the trust of the parties in the system of contract law proves the moral relevance of deliberate breach and the need to prevent parties from being confronted with deliberate breach of contract.

The systematic argument reasons that the general absence of attention for motive of breach of contract is not compatible with the function of remedies in the law of contract in various legal systems.

The practical argument reasons that deliberate breach of contract is not a single-definition term and that the most relevant types of deliberate breach for this thesis and its remedy- based approach may be made plausible by the aggrieved party without proving actual subjective intent.

The economic argument argues on the one hand that efficient breach is not a concept which should be implemented in the law of contract, because it is based on assumptions which are all disputable and on the other hand that the risk of overcompensation in the case of specifically dealing with deliberate breach of contract is not a good reason to deny the relevance of deliberate breach. Undercompensation still remains a larger risk than overcompensation and the risk of overcompensation in specific cases of deliberate breach of contract does not threaten the systematic and economic stability of the law of contract.

The second research question is answered by presenting five recommendations which are based on the four arguments mentioned before. These recommendations are proposals for adaptation of the law of remedies in contract in several ways in order to deal with deliberate breach in an appropriate way, taking into account preconditions such as the vagueness of the term "deliberate breach", the variety in legal systems and the objectives which should be achieved with the adaptations.

I *In case of deliberate breach of contract a claim for performance of the contractual obligation should be accessible and strong.*

II *Expectation damages should be assessed in favor of the aggrieved party in case of deliberate breach of contract. Limits on recovery of unforeseeable damages, costs for legal representation, consequential losses, damages for immaterial losses should be applied with reluctance in case of deliberate breach of contract.*

III *Account of profits as a remedy after breach of contract should be more readily available in case of deliberate breach of contract.*

IV *Punitive damages in exceptional cases may serve as a last resort for excessive deliberate breach situations.*

V *Termination should be more easily accessible for the aggrieved party in case of deliberate breach of contract.*

VI *Penalty clauses should not be mitigated in case of deliberate breach of contract. Penalty clauses should not be declared invalid if the breach concerned is deliberate.*

Based on these general recommendations, it is necessary to make a last step. The recommendations are not generally applicable on every single case of deliberate breach, because this legal phenomenon occurs in many different situations and the recommendations regard various solutions. The value of a general approach is to signal that the law of contract needs to refocus on breach of contract and this chapter offers arguments and tools in order to shape a structured framework to be able to solve individual cases of deliberate breach of contract. The next chapter will use this framework in an attempt to solve five different and concrete cases. At the same time, links with current legal systems are inevitable and suggestions on a concrete level will be the last step in order to effectively plea for the legal acknowledgement of deliberate breach of contract.

6 Eight case studies on deliberate breach of contract: the pudding and the eating

6.1 Introduction

This chapter attempts to answer the second normative research question:

How should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?

As Chapter 5 provided a first step in answering this question in a theoretical way by formulating recommendations on how remedies in contract should be applied in case of deliberate breach of contract, this chapter illustrates how these recommendations may work out in concrete case studies. This chapter presents case studies which are designed in order to show the way deliberateness of the breach can be part of a remedial solution. The case studies are not randomly chosen and designed. Most of them are loosely based on existing cases, some of them are specifically designed for this chapter, but they are all created to illustrate the various ways deliberateness can be incorporated in the law of remedies in contract in concrete cases.

The case studies illustrate that deliberate breach should be a relevant element in deciding on the application of remedies in contract. This chapter is essential, because a general approach towards the influence of deliberateness on remedies as provided in Chapter 5 is not sufficient. Although the general recommendations formulated in the previous chapter may serve as guidelines, case by case solutions are often inevitable. Differences in solution inter alia depend on the type of contract, on the type of invoked remedies, on the capacity of the parties and on the exact reason for breach. It has been said before, but deliberateness is not a notion with a single definition and the nature of the deliberateness is a serious indication for the applicable remedy.

The 8 case studies attempt to deal with all these variables. The main thread is that deliberateness should be taken into account in the decision on the application of the remedies. Nevertheless, type of contract, type of specific obligation breached, the capacity of the parties – professional or non-professional –, the preference of the remedy invoked by the aggrieved party, they all affect the exact remedial solution and the influence of deliberateness of the breach on the solution on a case by case basis. The classic example of the deliberate breach is dealt with in the first case study, the double sale case. The tension between performance and damages needs a satisfactory solution. The second case study also deals with a sales contract, albeit sale of land, but the type of violated obligation is different: not the primary, but a secondary obligation has been deliberately violated. This difference has consequences for the influence of the deliberateness on the remedies invoked. The third case study centralizes a long-term service contract. Moreover, the obligation deliberately breached is one to pay money. Both circumstances should be taken into account, once the effect of deliberateness on the remedial solution is assessed. The fourth case study also deals with a contract concerning rent of a premises and an attached obligation to run a business in the premises for a longer period of time. This specific type of obligation, which is part of a long-term contract is again a different and relevant circumstance to take into account. The fifth case study is an example of deliberate breach in a building and construction contract. This case study provides a good example of a deliberate breach which causes only minimal material damage, when a swimming pool is built with only minimal deviations from the contractual specifications. The sixth case study is concerns an overbooking case

with strong resemblances to the first classic double sale case. This case study is relevant for demonstrating the influence of deliberateness on the remedy of damages, when the consequences of the breach are severe, perhaps even beyond the foreseeability limit, whereas the airline company also relies on an exclusion clause. The seventh case study reveals an unexpected feature of the influence of deliberateness, once the remedy of specific performance is invoked as defense mechanism. The eighth case study on bad faith insurances reveals the potential influence of deliberateness on the availability of punitive damages, which is a far from regular remedy in the area of contract law in general.

The case studies show that deliberate breach can often be retraced to a decision with financial motives. Nevertheless, not every deliberate breach is similar to the other. A breach in order to obtain a profit differs from a breach in order to avoid a loss. A breach in order to obtain a profit, preceded by a certain policy – such as in the airline tickets case or in the bad insurance case – differ from the single breach. The differences materialize in the degree of influence of deliberateness on the remedy. The conclusion of this chapter attempts to categorize the breaches against a 'severity' yardstick in terms of remedies.

This way of presentation justifies a general exoneration clause. These case studies are presented with the objective to visibly implement deliberateness as a relevant element in remedial solutions to breach of contract. They are designed to convincingly show the effect of the possible manifestations of deliberateness. Therefore, the cases are short and per definition simplifications of a more complex reality. The case studies are intentionally designed in order to emphasize the relevance of the element of deliberateness. The presented solution is a solution to the case, supported with arguments, but without extensive references to academic contributions, because this chapter presents the solutions of the author.

6.2 Case study 1: the double sale case

A sells an old but complete collection of Dostoyevsky writings in Russian to B for the amount of EUR 5000. B values the collection at EUR 6500. A complete collection in this type of print is rare, but not unique. After the conclusion of the contract between A and B, C approaches A and offers him EUR 7500 for the same collection. A sells and delivers the collection to C for EUR 7500.

a. B claims account of profits from A. Should his claim be allowed?

b. Suppose A and B have incorporated a penalty clause of EUR 8000 into the contract if A cannot deliver. Can B claim the entire amount after the breach?

Type of contract: sales contract

Primary obligation A: selling and delivering the collection to B

Primary obligation B: Paying EUR 5000

Breach of contract: A does not deliver the collection to B

Element of deliberateness in breach: A sells collection to C for a larger sum of money. Aim of A to achieve a larger profit as a result of the breach

Remedial solutions: Account of profits and on validity and granting the amount in the penalty clause to prevent the double sale.

Ad a

The breach in this case can be considered as a deliberate breach. A commits breach of contract, because he wants to achieve a financial advantage which he misses if he performs instead of committing breach of contract. The motive for the breach is not to inflict damage on B – although A apparently does not care what the consequences of the breach for B are –, but for opportunistic reasons.

The claim for account of profits seems somewhat unusual compared to the 'ordinary' remedies such as a claim for performance or a claim for compensatory or expectation damages. Both claims are considered to be standard remedies in case of every breach of contract. It is to be assumed that B is primarily interested in the collection. However, although B seems to have a theoretical right to performance, a straightforward claim for performance is not a logical step for B, because A already sold and delivered the collection to C. Performance of the original obligation is therefore difficult. A claim for performance is therefore not effective. Furthermore, the collection may not be completely unique, but it is assumed to be not easy for A to find an exact copy on the market. The availability of a right for performance in cases like these should however not be underestimated. As we shall see, a strong right to performance will help B to sustain his claim for account of profits.

If B claims expectation damages (EUR 1500), he may be adequately compensated in this specific case, but this remedy in general does not prevent A from committing breach, because A still profits from the breach (EUR 1000).

A claim for account of profits in this case serves a double purpose. If the claim is allowed, this remedy adequately compensates B, disgorges the profit from A and prevents future breaches. Both objectives are justified once the breach is labeled as deliberate.

If B claims account of profits, i.e. the profits which A gained as a result of the breach of contract. He effectively claims EUR 2500. The decision to allow this claim in full would mean a visible manifestation of the relevance of deliberateness of the breach in establishing remedies in contract as described in the third situation. Account of profits is not a standard remedy in cases of breach of contract. Allowing the claim would increase the remedial possibilities of B. B should have access to this remedy, because of the two reasons mentioned above. B wants adequate compensation and he wants to minimize the risk that A or any other future contracting party may be tempted to sell twice.

Seeking the right reasons for allowing B access to account of profits can only be explained if the two standard remedies performance and expectation damages are addressed again. B in essence wants to obtain the collection. That means that the so-called adequate compensation according to the standard criteria may be adequate in financial terms, but it is never the same as receiving the collection itself. Especially because it is hard for B to buy another similar collection, the difference between performance and adequate compensation is large. C offered EUR 7500 for the collection. Although the case does not offer any additional information, C probably attaches an even higher value to the collection; otherwise he would not have bought it for this price. If B can claim performance, the only feasible way for A to answer this claim is to rebuy the collection. He should at

least pay EUR 7500 to C in that case and probably more. However, allowing this claim in this situation is problematic, because the claim is too burdensome for A and too uncertain for B. A does not know whether C is willing to resell the collection to him and if he does not succeed, the claim itself is worthless. For B, it is highly unlikely that he receives the collection A promised to him.

A claim for account of profits is feasible in this case, because A commits a deliberate breach of contract. The factor of deliberateness justifies a remedy which is compensatory and preventive as well. The value of the claim overrides the compensation limit (EUR 2500 and EUR 1500), but the overcompensation can be justified by two reasons. First, the incentive to commit breach again is taken away by disgorge the profit from A if the claim is allowed. Second, the value of the claim may not represent the value B attaches to the collection, but it is – apparently – the most up-to-date market value, because C paid EUR 7500 for the collection.

Ad b

If A fails to deliver the collection to B, B in essence wants to have the books. Unfortunately, as argued under Ad a, the practical and formal problems to enforce performance will not invite B to choose this option as a remedy. In this example, A and B anticipated on a possible breach of contract by incorporating a penalty clause into their contract. The value of the penalty oversteps the value both parties attach to the collection, so it is clear that the clause not only pre-estimates potential damages but also serves as a trigger to perform correctly. Nevertheless, A ignores the clause and delivers the collection to A. Dependent on the type of jurisdiction – civil law or common law, but the presentation of this concrete case law solution does not require a full explanation of both systems again – the contract is subject to, A may rely on two possible escapes. The first is mitigation of the penalty. In a jurisdiction where penalty clauses are allowed, they are in general enforced without interference of the court. However, under circumstances, the court may interfere. A discrepancy between concrete damages and the amount mentioned in the penalty clause is often not sufficient to justify mitigation, but a large discrepancy sometimes allows the court to interfere, certainly when other circumstances point in the direction of mitigation, such as the role of B or the potential bad financial position of A. No indication of extra circumstances is given. In cases like these, the suggestion for a solution is that the court avoids mitigating the penalty, if breach is deliberate, even if the amount of the penalty is substantially larger than the incurred losses or missed profits. Parties exercised their freedom of contract to secure performance in their own contract. Circumstances may justify that a court afterwards interferes, but not in case of deliberate breach, because the party committing deliberate breach takes into account the possibility of mitigation once he decides to commit breach. In this case, A should be prevented to sell the collection to C. The threat of full payment of the penalty, a threat parties themselves included into the contract, should be clear in advance.

The second 'hope' for A after his deliberate decision to sell the collection to C is the decision of a court to label the clause as a forbidden penalty clause, because a clause may only be legitimate once it represents a genuine pre-estimate of damages – a liquidated damages clause. In case of deliberate breach, this discussion on the validity of penalty clauses should be avoided, because it is a source of uncertainty on which the debtor, A, can gamble once he decides to commit breach. Litigation on the nature of the clause scares both parties and A has a good chance of a good position to negotiate even though he is the one committing breach of contract. If the clause is rendered invalid, B still has the possibility to claim expectation damages, but A may have taken into account this option, because

he obtains a profit after selling the collection to C and paying B expectation damages (EUR 7500 – EUR 6500 = EUR 1000). In other words, if the court renders the breach to be deliberate, as it is in this case, a clause foreseeing in payment of a certain amount of money, should be declared valid and not subject to mitigation as argued in the previous paragraph.

6.3 Case study 2: the farmland case

Farmer A, sells a piece of his land to his neighbor B. B's piece of land is situated next to A's land. Both pieces are farm land at the time of the sale. B has non-material interests in order to agree on a clause in the contract with A that A will not use the piece of land sold by B for building purposes – B has an attractive view from his own house. At the time of the conclusion of the contract A is not allowed to build houses on his piece of land due to public law. The public law situation changes shortly after the sale and A is allowed to build houses. He starts to build immediately, because he is able to make a large profit from building and selling the houses. Although the value of B's own farmland is not affected, the view from his house is less attractive.

a. B claims account of profits from A. Should his claim be allowed?

b. B claims non-pecuniary damages, because of the loss of the view due to the building activities. Should his claim be allowed?

Type of contract: Sales contract

Primary obligation B: transferring the piece of land

Primary obligation A: Paying the price

Breach of contract: Although A paid the price according to the contract, B commits breach of the secondary obligation not to build any constructions on the sold piece of land by building several houses on it.

Element of deliberateness: B consciously deviated from the contract, because he can obtain a larger profit from the piece of land by buying houses on it instead of leaving the land in its original state.

Remedial solutions: Account of profits and/or damages for non-pecuniary losses

Ad a

Although this case is completely different from the previous case study, the aggrieved party – in this case B – invokes similar remedies. B claims account of profits in the sense that he claims the full profits A has earned by building houses on his land contrary to the contractual obligation he has towards B. This case study is included to illustrate that the concrete circumstances of the case, such as the type of contract and the object of the contract, are relevant in deciding which remedies are allowed taking into account the deliberateness of the breach.

The breach in this case can be considered as a deliberate breach. A concluded a contract with B and agreed to the specific clause not to build on his land. Once he got the opportunity, he built houses on his land anyway. This decision is conscious and the reason for A to build houses and neglect his contractual obligation towards B is the promise of financial gain. By building houses A obtains a profit which he would not have received if he had abided by the contractual obligations.

Although this analysis does not differ from the analysis in the previous case study, the circumstances under which A commits deliberate breach in this case are different. The most important difference is that A fulfills his main obligation of the contract, whereas he breaks a secondary obligation. A's main obligation is to pay the money for the piece of land he obtained. The obligation he did not fulfill is a secondary obligation – i.e. the obligation to use the piece of land in a specific way. This circumstance is relevant, because the deliberateness of the breach is not aimed at the destruction of the contract with B, whereas it is in the first case study. Although A does not fulfill all his obligations according to the contract – and A does so deliberately – the trust argument is not as strong in this case as in the previous case study. Another circumstance which may decrease the influence of the deliberateness in this case is that B as the selling party in the process of negotiations – the object is a piece of land, so these contracts are not concluded overnight – could have negotiated for more contractual or property-related guarantees in order to be sure that A would not commit breach of contract. Taking into account these circumstances, the approach to a claim for account of profits differs from the approach in the previous case. B would perhaps also like to claim performance of the contract, but this option is not discussed in this case, because the contractual claim for performance may interfere with the freedom of A as the owner of the land to build on his own land. It may not be easy to force B to demolish the buildings based on a contractual claim.

As explained in the first case study, perfect compensation for B and prevention of future deliberate breaches should be the core objective of the remedy of account of profits. However, B again will probably be overcompensated once his claim is allowed in full. He already received the price for the piece of land. A suffers damage on a non-material level, but no measurable other material losses. A on the other hand obtains a large financial gain. The gap between the compensation of the non-material losses and the profits of A is considerable. The overcompensation B receives is not in general an insurmountable problem in case of deliberate breach as the previous case study. Nevertheless, the circumstances of the specific case should justify the overcompensation specifically taking into account the validity of the objective of prevention of future deliberate breaches. The circumstances in this case do not justify a quite severe remedy such as account of profits in this case. Allowing this remedy would not only give an incentive to B to lure A into committing breach of contract, because he would have access to a too generous remedy, but allowing account of profits in this case would frustrate A in his capacity as the owner of the piece of land, because he is factually deprived of the possibility to make a profit of his own property. Taking also into account that A fulfills his primary obligation by paying the price and only commits deliberate breach of a secondary obligation, the conclusion that account of profits should not be available in this case is justified.

All in all, in this case B should not be allowed to receive account of profits in case of deliberate breach of contract.

Ad b

The conclusion under 1 raises the question whether deliberateness of the breach is relevant at all for the availability of remedies. The second remedy B invokes is a more modest one. The case study assumes that B does not suffer any material damages. The value of his own land did not decrease as a consequence of the breach. The only type of damage is that B has not the attractive view from his window. A claim for expectation damages does not seem to be too useful, because there is no difference between the current situation and the situation when A would have performed correctly.

B suffers a loss which, as the English courts would say, can be qualified as a 'loss of an opportunity to bargain'. In general, courts are not too eager to award damages for non-pecuniary losses in cases of breach of contract. In this case, the claim for non-pecuniary losses, consisting of the loss of an attractive view, as a result of the breach of contract should be allowed, because the breach was deliberate. It is strongly advised to include the deliberateness of the breach as a reason for awarding this type of damages. Non-pecuniary losses in a voluntary transaction are normally not recognized as losses to be claimed by the aggrieved party. However, denying the claim in this situation would mean that B is deprived of any serious possibility to react on the breach of contract committed by A. Because the breach is assumed to be deliberate, contract law would fall short of its task if it allows this situation. The incorporation of the specific provision in the contract would not have any value at all, if B cannot claim damages. Another question may be whether it is most convenient to label the suffered losses as non-material and to allow a claim for damages for non-material losses. In this situation, it seems logical to do so. A loss of view could perhaps also be construed as a material value. In that case, B may also be able to claim expectation damages. In short, it seems that the deliberateness of the breach should be made visible by allowing B to have access to an increased box of remedies, in this case consisting of damages for non-pecuniary losses. This solution falls into the third category mentioned in the introduction.

In conclusion, this case study shows that general rules on the influence of deliberateness on availability and extent of remedies in contract are not a good way to tackle the problem of motive. In other words, there is no rule that every deliberate breach of contract should allow the aggrieved party to have access to the remedy of account of profits. On the other hand, it seems unwise in many situations, even in cases of deliberate breach of *secondary* obligations, not to pay attention to the motive of the party committing breach. This case study shows that a claim for damages for non-pecuniary losses is justified by the deliberateness of the breach. This justification should be included as such in a positive decision on B's second claim.

6.4 Case study 3: the car service case

A runs a transport company. A has 30 vans. He decides to conclude a contract with B, who runs a van maintenance company. Both parties agree to a contract, according to which B has the obligation to service A's fleet of cars for a period of 5 years for EUR 40000 each year. After 2 years A decides that he can do most of the maintenance himself and he terminates the contract with B.

B claims expectation damages, which consists of missed profits during the remaining three years (EUR 45000 in total). During the litigation B concludes contracts with other parties. A argues that profits resulting from contracts with other parties in the three year period after termination should be deducted of the amount of missed profits claimed by B.

<u>Type of contract: long-term service contract</u>

<u>Primary obligation A: payment for servicing fleet of cars</u>

<u>Primary obligation B: servicing fleet of cars</u>

<u>Breach of contract: A terminates without explicit reason after two years. He stops paying.</u>

<u>Remedial solution: Expectation damages</u>

Element of deliberateness: A terminates in order to achieve a financial advantage or at least to avoid a financial disadvantage by servicing the cars himself instead of hiring B. The financial advantage is achieved *as a result of* the breach.

Remedial solutions: Expectation damages. B claims expectation damages. His claim should be allowed, because the breach is deliberate. Deliberateness is relevant and the court should pay attention to the motive of the party committing breach in order to justify the remedy. This case study reveals that the relevance of deliberateness can be made visible only by explicit reference to deliberateness in the solution itself (situation 1 in the introduction). The remedy of expectation damages is a standard remedy after every breach of contract.

The reference to deliberateness is necessary, because the extent of the expectation damages depends for a substantial part on the deliberateness of the breach. However, it is not the deliberateness which increases the extent of the remedy itself. This case study is therefore not a 'situation 3' example. In this case study, it is problematic that B seems to cash twice as a result of the award of full expectation damages. He receives missed profits from the contract and he receives profits from the contracts he concluded with other parties in at least part of the time he could have worked for A. Question is whether profits incurred from the contracts with other parties should be deducted from the claim. Apart from the issue whether the claim for full expectation damages can be qualified as overcompensation – this issue is mainly a technical one – it is morally, systematically and economically not conceivable that A's conscious decision to breach would be without any serious consequence towards B, because B attempted and succeeded to remain active in his business. The argument is that A deliberately walks away from the core obligation in order to avoid a financial loss. This type of deliberateness may be one level less severe than the profit-driven breach such as in the first case study, but in this case the avoidance of the loss could be reconstructed as an incurred profit as a result from the breach as well. Furthermore, the primary obligation and consequently the core of the contract is affected by the decision. Any award less than full expectation damages would provide an incentive for A and any other party in a similar situation to commit a breach like this again. This situation would undermine the trust in the law of contract, it would systematically damage the position of the aggrieved party and the economic loss is evident, because the costs of additional guarantees in new contracts – transaction costs – will increase in the future, whereas in the concrete situation B would not receive the profits he is entitled to .

In conclusion, B's claim for expectation damages should be allowed in full without deduction. The law of contract in general allows this possibility, although it also leaves room for application of exceptions. Access for A to any exception should be a priori closed under reference to the deliberateness of the breach for the reasons just mentioned.

6.5 Case study 4: the supermarket case

A runs a supermarket chain. He opens a supermarket in town X. He rents a building in the city center. In the contract between A and the owner of the building B, a duty to run the supermarket for a period of 15 years is incorporated. This duty to run the supermarket is incorporated, because the owner of the building operates as a shopping mall. If the supermarket, the largest store, closes down, the other stores do not have a chance to survive. A suffers losses, because the supermarket in X is not profitable. Keeping the supermarket open would financially damage A, but he would not face a serious risk of bankruptcy. He decides to close down the supermarket after 10 years.

B claims enforced performance from A in the sense that A should run the supermarket for the remaining 5 years. Should this claim be allowed?

Contract: long-term contract for rent and exploitation of a building

Primary obligation A: running a supermarket in the building for the agreed period and paying the rent

Primary obligation B: To make the part of the shopping mall available for A.

Breach of contract: A leaves the building before the end of the agreed period.

Element of deliberateness: A deliberately closes the supermarket because of financial reasons. He does so in order to avoid any further financial loss.

Remedial solution: Enforced performance

The main problem in this case is that both parties have good reasons to follow the line of action they chose. B wants to keep his shopping mall open on a profitable basis. He negotiated for contractual guarantees in order to secure the participation of A for a specific period, so that he could make calculated decisions on the accompanying stores and the type of contracts with every party. It is therefore logical, that B's first concern is that there will be a comparable supermarket in the shopping mall. For A, on the other hand, it makes sense that he does not want to continue to run a loss-making business. The decision not to continue is a conscious one and a deliberate breach of contract. However, A does not commit breach in order to make a larger profit, but to avoid an obvious loss. A commits breach of contract and is liable in damages. However, B's position entails that he is not primarily interested in damages. In situations like these it is very hard for B to indicate his economic losses due to the breach. He does not only miss payments of rent, but the future for the shopping mall has also changed significantly. Other stores may move or close down due to financial difficulty, which in turn affects the value of the mall and the economic position of B. It is not certain that B can prove that it is only A's breach of contract which caused these losses.

In various legal systems contracts which involve renting premises for personal or professional use are subject to specific rules. Specific provisions take into account the long-term character of these contracts and the problem of cancellation of the contract before the due period. These system-specific rules are not included in the solution of this case study, because the focus in the presented solution is on the relevance of the element of deliberateness in applying the remedy of enforced performance.

B's claim for performance is logical, because he has an interest in A staying in the rented premises. At first sight it does not seem easy to qualify the type of situation mentioned in the introduction once the claim is allowed. According to a civil law approach, B has a strong right to performance, although it is not certain that taking into account the specific rules regarding the rent of premises, such a claim would be honored by the courts. According to common law, specific performance is generally not available as a remedy in cases like these.

This case requires a nuanced approach. Starting point should be that the claim for performance represents the desired reality of both parties at the moment of the conclusion of the contract. The reality in practice – well after conclusion of the contract – reveals that the contract has become a

burden for A. However, the situation A faces is far from a case of 'unforeseen circumstances'. Circumstances such as changing markets or ex-post disadvantageous economic decisions are examples of situations the institution of contract is made for. These circumstances are fixed in the contract and parties are assumed to be able to assess the risks of concluding the contract. The case study explicitly denies the immediate risk of bankruptcy which would make the decision of A to commit breach still conscious, but forced. Under the current circumstances, A decides to commit breach of contract to minimize his financial losses at the expense of B without a sound justification B is able to understand in order not to run the risk of losing his faith in the contract he concluded. It is also questionable whether it would make economic sense if A would have the opportunity to commit breach of contract without a proper sanction under reference to economic malaise.

However, the solution to award B's claim for performance without any further conditions would be somewhat severe too. It is also a reality that A – if the supermarket would have done well financially – would not have terminated the contract and, perhaps even more important, that a legal mechanism forcing parties to continue running a loss-making business meets resistance. Therefore, the eventual solution could be that the right to performance is interpreted as A having the responsibility within a reasonable period of time to find a replacement for himself. In other words, if A can find another supermarket to replace him, he is released from the duty to perform. This solution does not rule out the relevance of the deliberateness of the breach. This solution is still aimed at minimizing the negative consequences of the breach for B. A should find a replacement and bear any costs involved and if he does not succeed, he is still compelled to continue to run the supermarket. Whether A will continue to run a loss-making business is questionable, but his position to negotiate is sufficiently weaker than in a case where he does not run the risk of facing a claim for performance. The exact conditions of the way the claim for performance may be exercised may differ from case to case, but it is obvious that the deliberateness of the breach as an element which steers the severity of the solution for A should play a decisive role.

6.6 Case study 5: the swimming pool case

B concludes a contract with builder A to construct a swimming pool. The depth of the intended pool is specified in the contract and so is the type of stones. The pool is built and afterwards it turns out to be 10 cm shallower than agreed, a small deviation. The swimming pool can be used for the same purposes as if it had the intended depth: swimming is possible, diving is not. B decreased the depth of the pool, because he stumbled upon a layer of stones at the intended depth. Digging through this layer would have been more costly and the builder would not have agreed on the same price as he actually did, had he known the layer existed. Furthermore, B used a cheaper type of stones, because the market price of the contractually specified type of stones unexpectedly rose to a level at which A would incur a loss instead of the estimated profits. The type of stones used in practice is less exclusive, but of comparable quality. As a consequence, the value of the pool decreased a fraction as a result of this deviation. B only learns of the double deviation after the pool is finished. The pool can only be adapted to its contractual specifications, if it is completely rebuilt. The value of the existing pool is not significantly higher than the value of the virtual pool in the contractual specifications.

a. B claims enforced performance of the contract or cost of reinstatement. Should his claim be allowed?

b. B claims partial termination or – in other words – price reduction. Should his claim be allowed?

<u>Type of contract: building and construction contract</u>

<u>Primary obligation A: building a swimming pool</u>

<u>Primary obligation B: paying the price for the construction</u>

<u>Breach of contract: A deviates twice from the contractual specifications: he builds a shallower pool and he uses a different type of stones.</u>

<u>Element of deliberateness: A deviates twice. The first time the deviates consciously, but not per se for opportunistic reasons, when he discovers the layer of stone. The second time he deliberately deviates because he uses a cheaper type of stone in order to make a larger profit.</u>

<u>Remedial solutions: Enforced performance, costs for reinstatement or partial termination/price reduction</u>

Ad a

B's primary objective is to receive a swimming pool built according to the contractual specifications. The current swimming pool deviates from the intended pool: it is slightly shallower than intended and a different type of stone is used. Both deviations can be labeled as breach of contract. The nature of each particular breach differs. The first breach – building the pool at a depth not according to the specifications – was not conscious in the sense that B deviated in order to make a larger profit. At the building site he was confronted with an unexpected, solid layer of stone. Digging through this layer would be far more expensive than originally thought. Therefore, A's thought not to dig through the layer of stone seems logical, especially because he could foresee that the contractual deviation would be minimal. Nevertheless, the deviation is a breach and there is also an element of deliberateness to it. The decision not to dig deeper was taken by A alone without informing B. B only realized the pool was shallower after it had been completed. This circumstance entails that the breach of contract should have consequences, because without a sanction it is not clear why A should take into account contractual specifications at all. The second breach is a profit driven decision made by A. A cheaper type of stone yields larger profits for A. This breach is clearly deliberate in a more serious way. With regard to the second breach, it is also necessary that B has access to a form of remedial relief in order to visualize the relevance of a building contract with detailed specifications.

The claim for enforced performance and the claim for costs for reinstatement are in this respect comparable. In the first case, A has to rebuild the pool himself, in the second case, he has to pay the amount for rebuilding the pool. Both remedies are equal in financial terms and they are equally severe. The case study states that the value of the pool did not significantly decrease after the two deviations. Nevertheless, B did not receive the pool he was entitled to according to the contract. In principle, the claim should be allowed. Reference to deliberateness is necessary, because it is the deliberateness of the breach which justifies this remedy. A cannot pay the difference in value of the intended pool and the existing pool, because there is hardly any difference. Awarding only this difference would mean that no sanction follows on the breach of contract the same time, A himself

decided to deviate from the contract before informing B that he was going to do so. By committing deliberate breach, A cannot claim that B is not entitled to the pool he has paid for. If the claim is not awarded, A knows in advance he can force B to accept a pool which is not built according to his own contractual specifications. As for a claim for costs of reinstatement, a defense could be that B did not suffer any serious damage, because the value is nearly intact. This defense is not sufficient in order to justify a calculated deviation from the contract.

Ad b

B's claim for price reduction would be a modest claim, because he at least partly gives up his expectations resulting from the contract. By claiming price reduction, B in fact argues that A's performance has not been up to standard. Therefore, it is logical that A does not pay the full price for the construction of the swimming pool. Price reduction can also be formulated as partial termination of the contract. B only pays for what A delivers. Because A builds a complete swimming pool, it is not easy to assess which part of the contract should be partly terminated. In other words, it is not easy to apply a yardstick to assess the level of price reduction. The difference in value between the cheaper stone and the intended stone is a good start. Furthermore, B could argue that a shallower pool is per definition smaller and therefore cheaper to build for A. This difference can also be taken into account in deciding the level of price reduction. These two considerations can lead to a first step to price reduction. These steps do not involve the deliberateness of the breach as a relevant element. The deliberateness should also have an independent effect on the level of price reduction. A should be deterred from taking one-sided decisions on the construction of the pool. The problem is that A would have probably faced the same consequences if he had informed B of the problem with the layer of stones at the moment of discovery and if he had informed B of the use of another type of stones in advance. A renegotiation would probably have resulted in a price reduction on the basis just explained. A should be encouraged to inform B on potential deviations he plans as a basis for renegotiation. A remedy after this deliberate breach of contract should therefore be more burdensome for A than the most probable renegotiation result. The level of extra reduction is not easy to establish. The result of application of this remedy is in any situation preferable for A compared to the first option, because the cost of performance or payment of costs of reinstatement would be considerably larger.

B's claim for price reduction should be allowed. In order to effectively apply this remedy, deliberateness should be assessed as a relevant element in deciding on the level of price reduction. Deliberateness as an element becomes visible, because the price will be more seriously reduced as a result of the deliberateness. The exact level of extra reduction depends on the concrete circumstances of the case.

6.7 Case study 6: the airline tickets case

B books a flight on a suitable website of airline company A on the Internet from Amsterdam to Barcelona. The conditions attached to the sale of the ticket include a limitation clause in the contract on the booking contract, limiting liability of the airline company for damages as a result of breach of contract to a maximum amount of EUR 1000. On the day of the flight B arrives at the airport and he cannot board the flight, because the flight is overbooked. A offers A EUR 150 for his additional expenses and books a flight for him 5 hours later.

B claims expectation damages at the amount of EUR 10.000 consisting of extra costs.

Should his claim be allowed? Assess the relevance of the defense of B based on firstly the limitation clause and secondly on the argument that the damages claimed are not foreseeable.

Type of contract: service contract

Primary obligation A: transporting B from Amsterdam to Barcelona on the time specified on the ticket.

Primary obligation B: paying the price for the airline ticket

Breach of contract: A does not offer the airline services on the agreed time, because the plane is overbooked.

Element of deliberateness: A deliberately allows the possibility of overbooking as a company policy because it is financially efficient. In this concrete case, A wants to delivers his service to B on the one hand, but on the other hand his interest is primarily aimed at keeping the company efficient and profitable at a maximum level.

Remedial solution: Expectation damages without application of a contractually agreed limitation clause or without application of a rule limiting damages to foreseeable damages

This case study provides an example of the relevance of deliberateness on generally justifiable possibilities to contractual and legal limitations on the remedy of damages. International rules on air law are ignored; it is not relevant for solving this case study.

In this case B cannot achieve any longer what he would have wished most, namely a timely arrival on schedule. This case study is an example of a situation where correct performance is simply not possible any longer. A certain delay would minimize the default, but as time passes, the impossibility of a correct performance becomes an undeniable fact. A's default is a breach of contract and a deliberate breach of contract as well. A has a formal policy which allows overbooking. This calculated risk is taken in order to make the largest profit possible on every flight. A attempts to minimize the negative financial consequences as a result of the frequent breaches of contract by incorporating limitation clauses into the contract. As an alternative or subsidiary defense he may rely on a general foreseeability limit on damages. Furthermore, A also offers some compensation to the unlucky passengers such as B in order to enable them to cover the direct delay expenses.

B claims full expectation damages. This claim should be allowed because the breach is deliberate. The most important argument is that B concludes the contract – i.e. buys the ticket – because he primarily believes he can board the booked plane at the time on the ticket. He realizes that something can frustrate the journey. The plane can be broken, the weather can be bad etc. Some of these circumstances lead to breach of contract for which A can be held accountable. However, in these cases, it is reasonable that A limits his liability. Although B has a justified claim for damages in these cases, B also takes into account that something can go wrong. If he seriously wants to minimize the risk that the plane does not fly, he should book a private jet. However, B does not take into account that A can choose not to perform his primary contractual obligation. If the law does not compensate B for his losses, A has the relative freedom not to perform. That is incomprehensible,

because in that case B does not know what he buys. The risk for non-performance cannot be dependent on the will of a party. The incorporation of a limitation clause is the tool for A to be able to commit breach at will. A deliberate breach should block the possibility to rely on such clauses in that situation. The deliberateness of the breach is therefore vital to incorporate into the decision, because limitation clauses as such are not 'bad', but in cases of deliberate breach of contract they cannot be relied upon by A. A same line of reasoning can be followed once A relies on the defense that damages are not foreseeable in case of absence of a limitation clause or in addition to invoking the limitation clause. A general rule that only foreseeable damages can be claimed – or a similar rule – covers justified objectives. However, this rule is abused in this situation of deliberate breach of contract. Nevertheless, in case of a calculated decision not to perform according to the contract, A should not be able to rely on this rule for the same reasons.

In conclusion, B may claim full expectation damages. Deliberateness is essential to mention in order to justify this specific mix of existing remedies. The box of remedies is not increased, the application of limitation clauses and rules is only denied under explicit reference to deliberateness of the breach.

6.8 Case study 7: the aluminium pipes case

A runs a transport company and concludes a contract with van driver B to transport 200 aluminium pipes for EUR 2000. When B arrives at A's terrain to pick up the pipes, A insists on loading 220 pipes without paying an additional amount of money. The overload causes a risk for B, because he does not have the license to transport more than 200 pipes on this van. A threatens to conclude a contract with another party to transport the pipes if B does not agree with the extra overload. B refuses to accept the extra overload and leaves A's property without anything to transport.

B claims enforced performance of the contract. Should his claim be allowed?

Type of contract: contract of carriage

Primary obligation A: paying the price for carriage of the 200 aluminium pipes.

Primary obligation B: transporting 200 aluminium pipes.

Breach of contract: A refuses to pay the price after conclusion of the contract, while attempting to force B to carry more pipes for the same price.

Element of deliberateness: A attempts to exploit his position as a company towards a sole carriage driver. He consciously attempts to change an existing contract to his favor and terminates the original contract when he does not succeed. The motive seems to be financial. A can make a larger profit once B carries more pipes for the same price.

Remedial solution: Enforced performance without the duty to perform of the aggrieved party

This case study is included in order to emphasize the versatile relevance of deliberateness of a breach of contract. A's behavior is aimed at two consequences. First, he does not want to perform his obligation of the original contract. The refusal to pay is a breach of contract and a deliberate one. The financial motive of the breach becomes apparent, once the reason for the refusal is given. Second, A wishes to conclude another contract, but he attempts to force B to agree with his own conditions: a larger amount of pipes for the same price.

B faces a practical problem in this case which cannot only be solved by law. B is the weaker party once he arrives on A's property, because his opportunity to earn money at that moment depends on the cooperation of A. If B has to make a choice on the spot between accepting the new contract – included the risk to be fined for the overload – and leaving without a job, B is likely to be forced to choose the first option. If B refuses to agree to the new terms and walks away, as the facts state in this case, it is questionable whether B in practice would start legal proceedings, but if he does, the law should pay relevant attention to the element of deliberateness of the breach in the sphere of remedies.

If B had the opportunity, he would have carried the pipes according to the contract. Although A did not frustrate the possibility for B to carry the pipes, he stated that he would not pay on the original contract. Neither A nor B performs correctly in this situation. A does not pay and B does not carry the pipes. In the current situation, B nevertheless claims payment on the contract – i.e. performance of the obligation to pay – *without* having to perform his side of the contract. In other words, he claims performance and at the same time relief from performance of his own obligation, which in fact means performance 'for free'.

The claim for performance in this case study should be allowed with a reference to the deliberateness of the breach of contract. A deliberately speculates on the weak position of B as a negotiation partner and he attempts to make a profit by committing breach and subsequently by exercising pressure to conclude a new contract.

In any situation, it is relevant to mention the deliberateness of the breach when the claim for enforced performance is awarded. A attempts to abuse B's position, not only his economic position, but also his legal position. B's decision to walk away is the only right decision he could make, because accepting the new contract would mean surrender to economic threats and exercise of unlawful behavior. B should be encouraged in law to take the right decision, whereas A should be discouraged to exercise oppressive behavior. The decision to enforce A's original contractual obligation is a good solution, as long as B suffers no losses from the breach of contract. The decision to block A's defense that B should perform according to the original contract prevents A from attempting to force B or another party into a new contract again.

6.9 Case study 8: the bad faith insurance case

B is a construction worker. He often works with heavy building materials in dangerous environments. He receives several periods of training provided by his employer during his career. He has obtained a disability insurance with disability insurance company A. After 10 years, B falls off a roof in a moment of distraction. He has severe back injuries and he cannot work as a construction worker. B contacts the disability insurer in order to claim loss of income and prospective income, which are covered by the policy. Insurer A conducts an elaborate investigation and refuses to pay on the policy. He offers an extensive research report and raises many objections, including a reference to gross negligence of the construction worker. A is compelled to consult a lawyer and to start legal proceedings. After lengthy proceedings, which take more than 4 years, the courts in first instance and in appeal decide in favor of B. Although the courts express their understanding for the necessary possibility for A to defend himself, the courts also refer to the accusation of gross negligence as regrettable considering the lack of evidence in the research report. After the court decisions A and B start negotiations and a

part of the money is paid, but it takes another several years and litigation for B to receive what he is entitled to.

a. B claims full recovery of costs for legal representation as a result of a continued delay of payment of the insured amount on the policy, to which A is entitled. Should his claim be allowed?
b. B claims punitive damages as a result of a continued delay of payment of the insured amount on the policy, to which A is entitled. Should his claim be allowed?

Type of contract: Insurance contract

Primary obligation B: paying the insurance premium

Primary obligation A: Paying the insured amount on the policy once the insured event has taken place

Breach of contract: Refusing to pay the whole insured amount on the policy within a reasonable period

Element of deliberateness: A consciously applies delaying tactics in order to demotivate B to attempt to cash in the whole insured amount. Not having to pay the whole insured amount would mean a larger profit for insurance company A.

Remedial solutions: Costs for legal representation and/or punitive damages

Ad a

The solution to the first question could raise many issues on the various approaches to costs for legal representation in legal systems. In other words, and this argument is more or less applicable for all case studies, it is impossible to say anything coherent on an award for costs of legal representation without knowing anything of the concrete legal background against which the claim is decided. According to English law for example the principle of 'the winner takes it all' generally applies. In that case, A would be entitled to receive the whole sum for legal representation even without taking into account the deliberateness of the breach.

However, this solution only generally offers an approach to a connection between claim for costs of legal representation and the notion of deliberateness without taking into account the system specifics on this topic. The relevance of deliberateness can be made visible in more general terms.

This case offers an example of the potential powerlessness of the standard remedies and – more specifically – of the primary objective of the law of remedies in contract. The idea that remedies in contract should enable parties to receive what they have contracted for or at least its financial value - no more, no less - does not solve the problem in this case. The problem is that enforcement of the contract in practice means payment of the insured amount on the policy. All extra costs made in order to receive payment are often not covered by a claim for performance. A standard claim for costs of legal representation in cases of delay of payment is also not feasible. Insurance companies should be able to defend themselves and they can have good reasons not to pay on the insurance policy. Under these circumstances, A would not succeed in claiming costs for legal representation.

However, it would be convenient for an insured party to know in advance that he can claim all incurred costs once he can prove that an insurance company showed deliberate unwillingness to pay the insured amount, because the delay of payment continued after establishing the justification of the claim in court or because the insurance company does not pay the complete amount or if he – as he does in this case – evidently attempts to use frivolous defenses which are used to discourage the claimant to proceed with litigation. This type of deliberateness nearly closes the gap between the deliberate breach as an opportunistic, profit-driven act and the deliberate breach as a malicious act, which may be labeled as a form of tortious conduct as well. In these cases, from a perspective of compensation and from a perspective of prevention it would be wise to allow a claim for full recovery of costs for legal representation. The tempting idea for insurance companies as repeat players to increase the threshold for the insured to claim on their policy may not be encouraged by systematic flaws in the law of remedies in contract. Even stronger, the deliberate attempt to prevent insured parties to have access to justified claims on their policy by implementing conscious delaying tactics and expensive procedural hurdles should be discouraged by the law of remedies in contract.

In conclusion, A's claim should be allowed under explicit reference to the deliberateness of the breach.

Ad b

A claim for punitive damages in contract law is generally not allowed. In general, punitive damages should not be available even in cases of deliberate breach of contract. As the previous case studies have shown, the aggrieved party can achieve his primary or his next-best objective with a mix of new and old remedies connected to the notion of deliberate breach of contract without the use of the too severe tool of punitive damages. It is worth repeating that only US law openly recognizes punitive damage, albeit somewhat reluctantly, in some cases of contract law, whereas the notion of punitive damages in private law in general is approached very carefully, if accepted at all in other legal systems.

This caution should warn A. His chances to succeed on the claim for punitive damages are minimal. If a case has certain specifics, the remedy may be appropriate. A bad faith breach case may be such a case. It is evident that delaying tactics and putting up frivolous defenses in order to avoid payment to which the insured is entitled is a deliberate breach as stated in the previous section. It is in the interest of A and in the interest of all future insured parties that B will not decide to act in the same way again. In this respect, the preventive aspect of a possible remedy is important. Allowing a claim for costs for legal representation may be burdensome for the insurance company, but it is questionable whether it will deter B from attempting to commit breach again in the same way, because the costs for legal representation can be estimated at any time during the process of litigation. The problem with public authority maintaining rules which insurance companies have to follow in a specific case is that insurance companies have the strong argument that they should be able to defend themselves against frivolous claims. Public authority may be able to act after a concrete case, but it is not clear whether the private insured parties are sufficiently certain that public authority will deal adequately with this problem of bad faith breach. Allowing the possibility of punitive damages in cases of established and proven deliberate breach of contract such as in this case study with multiple and subsequent acts of conscious misbehavior in order to avoid paying on the policy, the mere threat of having to pay a considerable amount of money to a private party may

deter insurance companies from exercising such behavior. Furthermore, it should not be underestimated that A's confidence in one of the key players in modern capitalistic market economies, the insurance companies is severely damaged. If contract law does not respond adequately, he also feels abandoned by the law.

In conclusion, A should only be able to claim punitive damages in exceptional circumstances. The case study provides sufficient material to argue that B grossly abused his own position in order to avoid paying the insured amount. Under these circumstances, A's claim should be allowed.

6.10 Conclusion

Eight case studies in which concrete solutions to cases of deliberate breach are proposed justify the following general conclusion. Deliberate breach of contract is not only in general terms a concept which is difficult to grasp or to define, it also returns on a concrete level in a variety of different cases. The case studies show that the general recommendations provided in Chapter 5 are not easily applicable in all cases. A case-by-case approach is needed to solve cases of deliberate breach in a satisfactory way.

Nevertheless, the case studies also show that deliberate breach of contract is a concept which requires attention and concrete solutions. These solutions need to 'fit' into a specific case, but a general structure in formulating concrete answers to deliberate breach of contract is not only possible, but also necessary in order to provide a framework with general and case-by-case elements which can be used to solve problems of deliberate breach of contract. Based on the insights created in the previous chapter and based on the proposed solutions for the case studies in this chapter, deliberateness of the breach can be categorized in three ways from a perspective of remedies.

First, the solution does not imply another or a more severe remedy than in any other breach of contract situation, but the solution supports its remedy choice under *explicit* reference to deliberateness of the breach. In other words, deliberateness as a factor determining application of a specific contractual remedy should be acknowledged in a more explicit way. *Explicit reference to deliberateness in a decision without changing anything in the sphere of remedies is a first manifestation of the relevance of deliberateness.*

The aluminium pipes case is a good example. B has a right to performance, but in practice it is difficult to exercise the right. If the court explicitly acknowledges the deliberateness of the breach, the step towards performance may be easier to make. Another example may be the enforcement of the penalty clause in the double sale case. Parties may enforce the clause, but an explicit reference to deliberateness of the breach makes the position of the aggrieved party – as well in eventual negotiation after the court's decision – stronger.

Second, deliberateness can manifest itself in a solution when a mix of possible remedies is different from the available mix in non-deliberate breach of contract situation. For example, where enforced performance is not – or only theoretically – available in a non-deliberate breach of contract situation, it may be available in case of deliberate breach of contract. *Availability of another mix remedies compared with a non-deliberate breach of contract situation is the second manifestation of the relevance of deliberateness.*

A good example is the servicing vans case. The remedy of expectation damages should be available in full without too many – in other, non-deliberate, breach cases justifiable – limits and deductions. The airline tickets case also provides an example of this type of remedial relief: it already exists, but with too many limits in a case of deliberate breach of contract. One could also mention the swimming pool case here and the remedy of enforced performance or cost of reinstatement, because in theory enforced performance could be available to the creditor – in a civil law jurisdiction – and cost of reinstatement as well – in a common law jurisdiction. The deliberateness of the breach increases the position of the aggrieved party to rely on a stronger version of existing remedies.

Third, the solution implies availability of more severe remedies than in the case of a non-deliberate breach situation. For example, in case of a claim for damages, the rules on application of this remedy may be less strict in case of deliberate breach, such as with regard to the exclusion of unforeseeable damages, the application of exclusion clauses, the restricted availability of account of profits or the availability of punitive damages. *Availability of more severe remedies in deliberate breach cases compared with a non-deliberate breach situation is the third manifestation of the relevance of deliberateness.* It is logical that in both the second and third situation an explicit reference to deliberateness of the breach should be made in order to justify the different mix or more severe remedies.

The most explicit example would be the award of punitive damages in the bad faith insurance case. It is evident that punitive damages are generally not available in the law of contract. The insurance relationship is a special one and it requires prudent behavior of both parties. If a claimant justifiably claims and a court decides on the basis of specific circumstances of the case that the insurer showed an unwillingness to pay by excessively delaying payment, a claim for punitive damages may be considered to be a good remedy. Another good example is the availability of account of profits as a standard, alternative remedy next to expectation damages. This option returns in the first case study, but perhaps, as the US debate on account of profits in case of deliberate breach shows – see Chapter 4 and 5 – this remedy is the most adequate vindication of contractual rights – apart from enforced performance. The remedy of account of profits – which cannot be labeled as such in many jurisdictions – would offer the law of remedies in contract the useful perspective of the loss of expectation of the promisor instead of the loss of the promise. The latter justifies expectation damages, but although they are systematically most convenient in the current system, they do not seem to fulfill parties' expectations once they are confronted with deliberate breach of contract.

Finally, a common denominator in finding adequate remedies for cases of deliberate breach of contract seems to be that aggrieved parties do not want to be confronted with deliberate breach in the first place. The paradox is that the ultimate objective of the increase of severity of remedies is that they will ideally not be used, because debtors will dismiss the option to commit breach in advance once they foresee the type of remedies they will face.

7 Summary

7.1 Principal argument and research questions

Four research questions and the according answers are the construction on which the principal argument of this thesis is built:

1. What is deliberate breach of contract?
2. Does deliberateness of the breach of contract play a role in existing contract law, more specifically in contract law related legal provisions – 'law in the books' – or in case law –' law in action' – , in the sense that deliberateness as a relevant factor influences the choice for application of remedies in contract and if so, how?
3. Why should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?
4. How should deliberateness of the contractual breach influence the availability and the extent of remedies in contract

This thesis argues that motive in committing breach of contract should matter in the application of remedies in contract. Deliberate breach of contract requires a different and sterner answer from the law of contract than any other breach of contract, because equally remedying all breaches of contract threatens parties' trust in the law of contract. This statement should be reflected in the law of remedies in contract. The box of remedies available to the victim of deliberate breach of contract should be designed accordingly. In general, this thesis argues, that the victim of contractual breach should have a stronger right to enforced performance of the contract and that he should have easier access to damages and to a larger amount of damages as a result of *deliberate* breach of contract.

7.2 Deliberate breach of contract: a notion with many faces

The concept of deliberate breach can be approached from various perspectives. The notion of deliberate breach of contract is not well-defined in any legal culture. Exploring the notion is necessary and useful, but it is questionable whether it is useful to unequivocally define the concept. This thesis has shown that a clear, one-sentence definition of deliberate breach of contract does not prove to be a feasible way of defining deliberate breach.

A working definition for purposes of clarity and as a point of reference for author and reader is introduced, but further analysis and exploration shows that such a one-sentence definition does not suffice to explain the variety of interpretations of the notion of deliberate breach of contract.

"Breach is considered to be deliberate when the party in breach commits breach of contract in order to obtain a financial advantage or to avoid a financial disadvantage, which he would have missed or incurred in the case of performance of the contract."

The definition provided as a guideline may have seemed to be adequate at the beginning of the exploration, it has lost its clarity at the end of it. Various perspectives on deliberate breach differently emphasize and contextualize specific aspects of the definition.

First, the borderline between excusable and non-excusable breach of contract shows that the existence of a lawful excuse does not always mean that the excused party did not realize he was committing breach of contract. In other words, even excusable breach may be deliberate in the sense that a party knew what he was doing, but also in the sense of the definition. He may have had a lawful excuse to commit breach in order to prevent a substantial loss. A deliberate breach need not always be a non-excusable breach. The borderline between deliberate and non-deliberate breach gets a new dimension especially if the last part of the provisional definition is focused upon. When a breach is deliberate in order to avoid a financial loss which would be large but bearable or so large that financial breakdown is inevitable is not so easy to determine. A first shade of grey in defining deliberateness is established.

Second, the relationship between deliberate breach and its reception until now in US legal doctrine on the one hand and the theory of efficient breach on the other hand reveals interesting information on the content of the term deliberate breach of contract. The terminological chaos regarding deliberate breach is paramount, although the notion of willful breach is most common. Efficient breach is regarded as a positive notion in US law and economics scholarship, whereas deliberate breach is generally not. Efficient breach can generally be circumscribed as deliberate breach plus the efficiency aspect which means that the aggrieved party should be paid full compensation after deliberate breach. Once the efficiency component is stripped from the definition, willful breach generally remains according to many academic contributions. The problem of assessing efficiency and the problem of undercompensation are well-known arguments to question the efficient breach theory. However, the law and economics theory tends to neglect the intentional aspect of the act of breach. Only recently in several contributions, the aspect of deliberately neglecting the contractual bond between the parties resulted in a fierce academic discussion.

Third, the notion of deliberateness within the area of tort law may also have a sharp edge. An element of maliciousness may be added to the deliberate economic consideration to commit breach of contract. Although maliciousness and economic reasoning at a first glance may be two separate manifestations of deliberateness, they may also coincide and catalyze each other as the example of bad faith breach of contract in insurance cases shows. The example of bad faith breach shows in its own way that the dynamics of defending against a claim by an insured cannot be completely shut down by awarding high punitive amounts for delay in payment. The freedom for parties to litigate and build their own defenses according to the applicable procedural rules may not too easily be set aside. On the other hand, the example of bad faith breach already shows that proving deliberate misconduct may be extremely difficult.

Fourth, the perceptions of the parties concerned are also relevant in determining the meaning of deliberateness and, moreover, its potential legal relevance. Empirical research on contracts, in the socio-legal experiments in the US, but also in sociological experiments in Europe, shows that the element of trust in the contractual relationship is very important. Contract and trust are not synonyms. Contracts are partly used to fill in the gaps trust cannot fill between the parties. However, a contract between parties may only be concluded once there is an element of trust between the contracting parties. Contracting parties experience a serious feeling of deceit once they discover the other party deliberately committed breach of contract in order to achieve a larger financial gain. It is not to be said that an immediate increase of legal remedies would be a good solution in all cases, because parties would also like to postpone the moment they have to invoke legal assistance almost

at any cost, especially when more forceful extra-legal remedies are available, such as causing reputation damage. On the other hand, parties may experience a feeling of understanding once they discover the other party had to breach in order to avoid a destructive financial loss. The empirical legal studies mentioned in this section seem to cover the ground for the assumption that deliberateness of the breach in the sense of a more severe loss of mutual trust is a factor which should be taken into account in the assessment of legal remedies after the breach occurred.

Finally, it is clear that the provisional working definition may be used in order to communicate in a simple sentence what a general interpretation of deliberate breach may imply, but it definitely falls short in providing a complete account of the range of aspects deliberateness as a notion may imply. A start of a more detailed analysis of the concrete features of deliberate breach of contract is only possible once the notion of deliberateness is examined further in relation to the law of remedies in contract.

7.3 Deliberate breach of contract in current practice: a denied reality?

The second research question this thesis attempts to answer is the following:

Does deliberateness of the breach of contract play a role in existing contract law, more specifically in contract law related legal provisions – 'law in the books' – or in case law –' law in action' – , in the sense that deliberateness as a relevant factor influences the choice or application of remedies in contract and if so, how?

The answer to this question, which comes between the question what deliberate breach of contract is and how deliberateness of the breach *should* influence remedies in contract, should provide material in order to build an analytical framework on which the answer to the normative research questions of this thesis may be developed.

In a selection of case law examples a picture is drawn of how the law and the courts deal with the notion of deliberateness as far as the use of remedies in contract is concerned. The conclusion of this exercise is that sufficient concrete examples in current law exist to argue that deliberateness as part of breach of contract at least in some jurisdictions is already taken seriously as far as some key remedies in contract law are concerned. However, in no jurisdiction explored a coherent and consistent approach towards deliberate breach of contract in relation to all remedies or at least the standard remedies in contract is found.

First, the strongest examples of explicit recognition of deliberateness combined with a serious and noticeable adaption of the standard remedies are can be found in French law, English law and in US law. In French law, deliberateness of the breach directly influences the standard remedy of expectation damages. Art. 1150 Cc shows that unforeseeable losses become available inter alia in case of deliberate breach of contract, whereas in a case of a breach which is not accompanied by deliberateness or gross negligence only foreseeable losses can be recovered. In English law, deliberateness of the breach is relevant in deciding the question whether the debtor committing the breach may successfully request specific performance. Deliberateness of the breach may help the aggrieved party to successfully argue that the debtor is not relieved from forfeiture. In US law, deliberateness of the breach explicitly triggers the availability of punitive damages. Punitive damages are generally not available in contract. The link between deliberate breach and punitive damages is not direct, because the tort of bad faith breach has to be established in between. Labeling the

deliberate breach as a tort opens the gate to punitive damages, though in a very limited amount of cases, i.e. specific cases of insurance law. The Fletcher case is a good example. Furthermore, § 39 of the Draft Third Restatement on Unjust Enrichment in US law offers a direct link between deliberateness of the breach and the availability of account of profits as a standard alternative for expectation damages. This provision does not have any binding force at the moment, but it is the strongest example of the relevance of motive for remedies in contract. Opportunism in deciding to perform cannot be left without a serious sanction. The choice for this unorthodox approach rendered much criticism, but the recent academic debate reveals the current tension in the law of contract regarding the potential relevance of deliberateness.

Second, deliberateness may be mentioned explicitly, whereas a potential influence on the application of remedies is explicitly denied. The strongest examples are visible in Dutch law and US law. In Dutch law, the Hoge Raad in the *Ymere* case explicitly mentioned the existence of a breach being deliberate, but confirmed the traditional view that motive cannot influence the award of account of profits. Account of profits in Dutch law remains a way of calculation of damages – formulated in the Civil Code as a discretionary competence of the court at the request of one of the parties – according to art. 6:104 BW and it is not a separate remedy next to expectation damages. In US law, the influence of motive on the remedy of expectation damages is explicitly denied by courts.

Third, deliberateness of the breach may be explicitly recognized by courts as an existing fact, but the influence on remedial relief remains unclear. Examples can be found in Dutch law, English law and US law. In Dutch law, deliberateness of the breach in insurance cases is mentioned as a fact, but the remedy – award of statutory interest – is not influenced by deliberateness and only a theoretical escape in specific circumstances remains. In English law, deliberateness of the breach is mentioned in several cases which dealt with the remedy of account of profits, but the courts do not seem to accept to use the argument of deliberateness of the breach as an element in deciding on the award of account of profits. In US law, deliberateness of the breach is acknowledged as a potential factor in order to establish material breach. The fulfillment of the requirement of material breach may trigger the remedy of termination. Whether deliberateness of the breach renders a breach material is not so clear, but it is likely that a certain connection between deliberateness and termination in US law exists.

Fourth, in some situations deliberateness of the breach is left undiscussed by the court, whereas it seems to play an implicit role in the decision of the court. Dutch law and English law provide strong examples. In Dutch law, the Hoge Raad in the *Vos/TSN* case seems to deny the party committing breach of contract access to a debtor-friendly way of calculating expectation damages. An explicit reference to the deliberateness of the breach is absent, whereas the arguments to support the strict application of the full expectation damages are technical. In English law, a similar reluctance towards acknowledging a breach as deliberate can be found in the *Golden Victory* case, although the minority of the House of Lords is less reluctant.

A specific position in this debate is reserved for contractual remedies arranged by parties such as the penalty clauses and the exclusion clause and the influence of deliberateness thereon. In the area of exclusion clauses deliberateness of the breach negatively influences the possibility of the party to rely on an exclusion clause. In English law, the *Astrazeneca* case is an example. In the area of penalty clauses, there are examples in Dutch law where the court specifically denies mitigation of the penalty

due to the deliberateness of the breach, such as the *Buck* case. Although in several jurisdictions an explicit link between deliberateness and the application of the contractual remedy can be established, the aggrieved party can generally only achieve full application of the contractual remedy - i.e. enforced performance – in the case of the penalty clause or full application of the standard remedy – in case of denying the validity of an exclusion clause – but nothing more.

Finally, taking in account the modest ambition of this chapter in being descriptive and eclectic, this chapter delivers sufficient material to answer the research question asked in this chapter. The answer is affirmative with restrictions. Deliberateness plays a role in current law in different jurisdictions as a relevant factor in deciding which remedy should be awarded in a breach of contract case and to what extent it should be awarded. On the other hand, the influence of deliberateness is limited. Its influence is sometimes explicitly denied. In other cases, a specific breach of contract situation is not labeled as a deliberate breach by the court itself. The label of deliberate breach is attached by the author of this chapter, which makes the specific case perhaps less convincing. Furthermore, even if deliberateness is explicitly mentioned in relation to a specific remedy, it is not always clear how it influences the concerned remedy, for example because there is not concrete case law example available.

7.4 Deliberateness of the breach, a factor to take into account: why and how?

The descriptive analysis in the first part of the thesis offers sufficient material to answer the two following normative questions:

1. *Why should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?*
2. *How should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?*

The law of contract wrongfully underestimates or denies the relevance of deliberateness as an element in breach of contract cases in formulating and awarding remedies for breach of contract. In every legal system touched upon in the previous chapters the law of contract generally denies the relevance of motive – more specifically deliberateness – for the availability and extent of remedies in contract in case of breach of contract. Four arguments are presented which explain the reluctance towards the relevance of motive for availability and extent of remedies in contract, a moral, a systematic, a practical and an economic argument. This thesis shows that all arguments mentioned lack sufficient power to deny the relevance of motive for the availability or extent of remedies in contract.

The moral argument reasons that mutual trust between parties to the contract and the trust of the parties in the systems of contract proves the moral relevance of deliberate breach and the need to prevent parties from being confronted with deliberate breach of contract. The systematic argument reasons that the general absence of attention for motive of breach of contract is not compatible with the function of remedies in contract in the law of contract in various legal systems. The practical argument reasons that deliberate breach of contract is not a single-definition term and that the most relevant types of deliberate breach for this thesis and its remedy- based approach may be made plausible by the aggrieved party without proving actual subjective intent. The economic argument argues on the one hand that efficient breach is not a concept which should be implemented in the

law of contract, because it based on assumptions which are all disputable and on the other hand that the risk of overcompensation in the case of specifically dealing with deliberate breach of contract is not a good reason to deny the relevance of deliberate breach. Undercompensation still remains a larger risk than overcompensation and the risk of overcompensation in specific cases of deliberate breach of contract does not threaten the systematic and economic stability of the law of contract.

The second research question is answered by presenting five recommendations which are based on the four arguments mentioned before. These recommendations are proposals for adaptation of the law of remedies in contract in several ways in order to deal with deliberate breach in an appropriate way, taking into account preconditions such as the vagueness of the term “deliberate breach”, the variety in legal systems and the objectives which should be achieved with the adaptations. With these recommendations, this thesis advocates a new approach towards the concept of deliberate breach of contract in relation to remedies in contract, because it attempts to offer a coherent and consistent package of outcomes in the sphere of remedies in contract as a result of deliberate breach of contract.

I *In case of deliberate breach of contract a claim for performance of the contractual obligation should be accessible and strong.*

The certainty to receive what the creditor is entitled to should be visible in the law of remedies in contract, especially in case of deliberate breach of contract. According to this recommendation, the law of contract should not be considered as a pure economy driven structure, but as a structure with an own identity. According to the recommendation, revaluing the remedy of specific performance should be taken seriously. In case of deliberate breach, the formal requirements to have access to the remedy of performance should minimal. Furthermore, cost and benefit considerations should not be paramount in the decision to grant the aggrieved party the remedy of enforced performance in case of deliberate breach of contract.

II *Expectation damages should be assessed favor of the aggrieved party in case of deliberate breach of contract. Limits on recovery of unforeseeable damages, costs for legal representation, consequential losses, damages for immaterial losses should be applied with reluctance in case of deliberate breach of contract.*

In case of deliberate breach of contract, limits on the remedy of expectation damages which are generally justifiable, such as limits on foreseeability and remoteness of damages, should be applied with the utmost reluctance. Full compensation is already a second best option for the aggrieved party, so the remedial structure should allow the victim of deliberate breach access to the smoothest way to minimize the risk of undercompensation.

III *Account of profits as a remedy after breach of contract should be more readily available in case of deliberate breach of contract.*

Account of profits should be revalued as a standard alternative remedy next to expectation damages in case of deliberate breach of contract. The ground for such a remedy should be the expectation of the debtor who committed breach. He should be brought in the position as if he had performed correctly, which means that he does not incur the extra gain achieved by committing deliberate breach of contract

IV Punitive damages in exceptional cases may serve as a last resort for excessive deliberate breach situations.

Whereas this thesis does not advocate the introduction of punitive damages in general into the law contract, because the negative effects would be too large, the ban on punitive damages should be not absolute in extreme cases of deliberate breach of contract, especially in the area of insurance contracts.

V Termination should be more easily accessible for the aggrieved party in case of deliberate breach of contract.

Termination is a remedy with severe consequences, because the contractual relationship comes to an end. Certain general thresholds, such as the requirement of a breach being fundamental or the requirement of giving the debtor a second chance to perform are understandable and justifiable. In case of deliberate breach of contract, these thresholds are no longer relevant, because a deliberate breach of contract may trigger the aggrieved party to end a contractual relationship because he does not longer have confidence in the debtor. Deliberateness of the breach should be a good reason to grant the aggrieved party a more direct access to the remedy of termination.

VI Penalty clauses should not be mitigated in case of deliberate breach of contract. Penalty clauses should not be declared invalid if the breach concerned is deliberate.

Complete enforcement of penalty clauses is a form of enforcement of the contract and in general available in civil law jurisdictions. Nevertheless, a court has a power to mitigate the penalty if circumstances point into that direction. According to this recommendation the court should not make use of his power to mitigate the penalty if the breach concerned is deliberate. The main reason is that parties secured performance of the primary obligation by incorporating the penalty clause into their contract. Deliberate breach of contract is the most severe violation of the primary obligation, so mitigation of the penalty would not be logical. Deliberateness of the breach should also lead to automatic validation of the clause, because otherwise a party considering committing deliberate breach could calculate in his decision the chance that the penalty clause is declared invalid. Such a 'gamble' should be prevented.

Based on these general recommendations, it is necessary to make a last step. The recommendations are not generally applicable on every single case of deliberate breach, just because this legal phenomenon occurs in many different situations. The value of a general approach is to signal that the law of contract needs to refocus on breach of contract and this chapter offers arguments and tools in order to shape a structured framework to be able to solve individual cases of deliberate breach of contract. This framework provides sufficient material to solve eight different and concrete cases.

7.5 The pudding and the eating: case studies to explore the effects of deliberateness on remedies in contract.

The fourth research question needs also an answer on a more concrete level by a concrete application of the thoughts presented in the previous section on a concrete level. The fourth research question is repeated again for purposes of clarity:

How should deliberateness of the contractual breach influence the availability and the extent of remedies in contract?

The case studies illustrate that deliberate breach should be a relevant element in deciding on the application of remedies in contract. Case by case solutions are often inevitable, although the general recommendations formulated in the previous section may serve as guidelines. Differences in solution inter alia depend on the type of contract, on the type of invoked remedies, on the capacity of the parties and on the exact reason for breach. It has been said before, but deliberateness is not a notion with a single definition and the nature of the deliberateness is a serious indication for the applicable remedy. The way of presentation of the case studies justifies a general exoneration clause. These case studies are presented with the objective to visibly effectuate deliberateness as a relevant element in remedial solutions to breach of contract. They are designed to convincingly show the effect of the possible manifestations of deliberateness. Therefore, the cases are short and per definition simplifications of a more complex reality. The case studies are intentionally designed in order to emphasize the relevance of the element of deliberateness. The presented solution is a solution to the case, supported with arguments, but without extensive references to academic contributions, because this chapter presents the solutions of the author.

Eight case studies in which concrete solutions to cases of deliberate breach are proposed justify the following general conclusion. Deliberate breach of contract is not only in general terms a concept which is difficult to grasp or to define, is also returns on a concrete level in a variety of different cases. The case studies show that the general recommendations provided in the previous section are not easily applicable in all cases. A case-by-case approach is needed to solve cases of deliberate breach in a satisfactory way.

Nevertheless, the case studies also show that deliberate breach of contract is a concept which requires attention and concrete solutions. These solutions need to 'fit' into a specific case, but a general structure in formulating concrete answers to deliberate breach of contract is not only possible, but also necessary in order to provide a framework with general and case-by-case elements which can be used to solve problems of deliberate breach of contract. Based on the insights created in the previous chapter and based on the proposed solutions for the case studies in this chapter, deliberateness of the breach can be categorized in three ways from a perspective of remedies.

First, the solution does not imply another or a more severe remedy than in any other breach of contract situation, but the solution supports its remedy choice under *explicit* reference to deliberateness of the breach. In other words, deliberateness as a factor determining application of a specific contractual remedy should be acknowledged in a more explicit way. *Explicit reference to deliberateness in a decision without changing anything in the sphere of remedies is a first manifestation of the relevance of deliberateness.*

The aluminium pipes case is a good example. B has a right to performance, but in practice it is difficult to exercise the right. If the court explicitly acknowledges the deliberateness of the breach, the step towards performance may be easier to make. Another example may be the enforcement of the penalty clause in the double sale case. Parties may enforce the clause, but an explicit reference to deliberateness of the breach makes the position of the aggrieved party – as well in eventual negotiation after the court's decision – stronger.

Second, deliberateness can manifest itself in a solution when a mix of possible remedies is different from the available mix in non-deliberate breach of contract situation. For example, where enforced performance is not – or only theoretically – available in a non-deliberate breach of contract situation, it may be available in case of deliberate breach of contract. *Availability of another mix remedies compared with a non-deliberate breach of contract situation is the second manifestation of the relevance of deliberateness.*

A good example is the servicing vans case. The remedy of expectation damages should be available in full without too many – in other, non-deliberate, breach cases justifiable – limits and deductions. The airline tickets case also provides an example of this type of remedial relief: it already exists, but with too many limits in a case of deliberate breach of contract. One could also mention the swimming pool case here and the remedy of enforced performance or cost of reinstatement, because in theory enforced performance could be available to the creditor – in a civil law jurisdiction – and cost of reinstatement as well – in a common law jurisdiction. The deliberateness of the breach increases the position of the aggrieved party to rely on a stronger version of existing remedies.

Third, the solution implies availability of more severe remedies than in the case of a non-deliberate breach situation. For example, in case of a claim for damages, the rules on application of this remedy may be less strict in case of deliberate breach, such as with regard to the exclusion of unforeseeable damages, the application of exclusion clauses, the restricted availability of account of profits or the availability of punitive damages. *Availability of more severe remedies in deliberate breach cases compared with a non-deliberate breach situation is the third manifestation of the relevance of deliberateness.* It is logical that in both the second and third situation an explicit reference to deliberateness of the breach should be made in order to justify the different mix or more severe remedies.

The most explicit example would be the award of punitive damages in the bad faith insurance case. It is evident that punitive damages are generally not available in the law of contract. The insurance relationship is a special one and it requires prudent behavior of both parties. If a claimant justifiably claims and a court decides on the basis of specific circumstances of the case that delaying tactics of the insurer caused the unwillingness to pay, a claim for punitive damages may be considered to be a good remedy. Another good example is the availability of account of profits as a standard, alternative remedy next to expectation damages. This option returns in the first case study, but perhaps, as the US debate on account of profits in case of deliberate breach shows – see Chapter 4 and 5 – this remedy is the most adequate vindication of contractual rights – apart from enforced performance. The remedy of account of profits – which cannot be labeled as such in many jurisdictions – would offer the law of remedies in contract the useful perspective of the loss of expectation of the promisor instead of the loss of the promise. The latter justifies expectation damages, but although they are systematically most convenient in the current system, they do not seem to fulfill parties' expectations once they are confronted with deliberate breach of contract.

Finally, a common denominator in finding adequate remedies for cases of deliberate breach of contract seems to be that aggrieved parties do not want to be confronted with deliberate breach in the first place. The paradox is that the ultimate objective of the increase of severity of remedies is that they will ideally not be used, because debtors will dismiss the option to commit breach in advance once they foresee the type of remedies they will face.

8 Samenvatting

8.1 Aanleiding, onderzoeksvragen en doel

Dit proefschrift behandelt het verschijnsel 'opzettelijke contractbreuk' en de mogelijke en wenselijke invloed daarvan op de toepassing van contractuele remedies. Aanleiding voor dit proefschrift is het tot op heden structurele en ongewenste gebrek aan coherente belangstelling voor het motief van de tekortschietende schuldenaar als relevant element bij de sanctiebepaling in het contractenrecht. De volgende onderzoeksvragen staan in dit proefschrift centraal:

1. Wat is opzettelijke contractbreuk?

2. Speelt de opzet van de schuldenaar ten aanzien van de contractbreuk een rol in het huidige contractenrecht, zowel in de wet als in de rechtspraak, in de zin dat opzet ten aanzien van de contractbreuk de mogelijke acties van de schuldeiser mede invulling kan geven? Zo ja, hoe ziet deze invulling er dan uit?

3. Waarom zou het element 'opzet' de beschikbaarheid en de omvang van contractuele remedies moeten beïnvloeden?

4. Hoe zou het element 'opzet' de beschikbaarheid en de omvang van contractuele remedies moeten beïnvloeden?

Over het verschijnsel opzettelijke contractbreuk is wel een en ander geschreven, met name in Anglo-Amerikaanse jurisdicties, maar in Europese continentale jurisdicties heeft ten aanzien van de mogelijke betekenis van de opzettelijkheid van de contractbreuk voor toepassing voor sancties in het contractenrecht al dan niet bewust praktisch nauwelijks gedachtevorming plaatsgevonden. Dit proefschrift beoogt door zijn rechtsvergelijkende invalshoek een bijdrage te leveren aan het debat over opzettelijke contractbreuk – binnen de Europese continentale jurisdicties door dit verschijnsel op de agenda te zetten en binnen de Anglo-Amerikaanse jurisdicties door een poging te doen de mogelijke invloed van opzet van de schuldenaar ten aanzien van de contractbreuk ten aanzien van een breed scala van remedies te toetsen.

Dit proefschrift betoogt dat opzettelijkheid van de contractbreuk een relevant element zou moeten zijn bij de toepassing van sancties in het contractenrecht in die zin dat de bestaande sancties – nakoming, schadevergoeding in de vorm van het positief contractsbelang en ontbinding - in het algemeen vlotter en strenger moeten worden toegepast dan in andere gevallen van tekortkoming in de nakoming van de contractuele verbintenis. Bovendien zou in het geval van opzettelijke contractbreuk het sanctiearsenaal in bepaalde gevallen moeten worden uitgebreid. Te denken valt daarbij aan een eenvoudiger toegang tot winstafdracht en in zeer specifieke gevallen privaatrechtelijke boetes ('punitive damages'). Het belangrijkste argument voor dit standpunt is dat de schuldenaar die opzettelijk een contractuele verplichting schendt niet alleen het vertrouwen van zijn wederpartij in de contractuele band beschaamt, maar – indien juist aan die opzettelijkheid geen aandacht wordt besteed in termen van contractuele sancties – ook het vertrouwen in de werking van het contractenrecht als systeem op ontoelaatbare wijze op de proef stelt.

8.2 De betekenis van het begrip 'opzettelijke contractbreuk'

De beantwoording van de eerste onderzoeksvraag beoogt de lezer ervan te doordringen dat het begrip opzettelijke contractbreuk geen afgebakend concept is. OM daaraan invulling te geven wordt de volgende 'werkdefinitie' gehanteerd:

"Contractbreuk wordt als opzettelijk beschouwd wanneer een partij contractbreuk pleegt om daarmee financieel voordeel te verwerven dat hij zou hebben gemist dan wel financieel nadeel te vermijden dat hij zou hebben opgelopen als hij zijn contractuele verplichtingen correct zou zijn nagekomen."

Deze werkdefinitie wordt tegen andere specifieke vormen van opzettelijk (wan)gedrag in het recht aangehouden. Deze exercitie maakt duidelijk dat definities geen zekerheid bieden, terwijl wordt benadrukt dat de betekenis van opzettelijke contractbreuk van situatie tot situatie kan verschillen. Deze definitie geeft duidelijk een economisch calculerende invulling aan het begrip opzettelijke contractbreuk. Dit hoofdstuk zet deze definitie ten eerste af tegen het onderscheid tussen toerekenbare en niet-toerekenbare tekortkoming, waarbij naar voren komt dat veel vormen van contractbreuk bewust geschieden, zelfs al is een succesvol beroep op overmacht niet uitgesloten. Ook komt de verhouding tussen opzettelijke contractbreuk en het zeker in Anglo-Amerikaanse jurisdicties en in de rechtseconomie bekende begrip efficiënte contractbreuk aan de orde. Op dit terrein bestaat echter veel terminologische verwarring. Elke efficiënte contractbreuk is opzettelijk, maar de duiding van beide begrippen verschilt niet alleen per rechtssysteem, maar ook per auteur. Het Amerikaanse recht staat het meest positief ten opzichte van efficiënte contractbreuk, maar dat geldt niet voor elke Amerikaanse auteur en ook niet voor elke opzettelijke contractbreuk. De houding van het Engelse recht ten opzichte van efficiënte contractbreuk is in het algemeen onduidelijk, maar niet erg welwillend, terwijl Europese continentale systemen negatief staan ten opzichte van dit fenomeen. Ten derde blijkt uit een vergelijking tussen de opzettelijke contractbreuk en de onrechtmatige daad dat de opzet niet per se financieel van aard hoeft te zijn, maar ook gericht kan zijn op het schade toebrengen aan de positie van de wederpartij. Ten vierde komt uit een analyse van enkele emirische studies naar voren dat partijen motief van de schuldenaar bij tekortschieten als belangrijk kenschetsen, met name voor het bestaan van vertrouwen in de contractuele relatie. Ten slotte brengt de vergelijking met het strafrechtelijke opzetbegrip een belangrijk bewijsprobleem naar voren en tegelijkertijd een werkbare oplossing. Een belangrijk probleem is dat de vermeende opzet van de schuldenaar moeilijk kan worden bewezen – het gaat bij een stricte interpretatie van dit begrip immers om de interne gemoedstoestand van de schuldenaar. Niettemin geeft juist het strafrecht ook aan dat de opzet ook geobjectiveerd kan worden. In het geval van de werkdefinitie kan dat bijvoorbeeld betekenen dat als een schuldenaar meer winst heeft behaald door het schenden van zijn contractuele verplichtingen dan hij zou hebben behaald wanneer hij correct zou hebben gepresteerd, de opzettelijkheid van de contractbreuk zou kunnen worden aangenomen.

8.3 Opzettelijke contractbreuk als erkend verschijnsel in het bestaande recht?

De beantwoording van de tweede onderzoeksvraag biedt inzicht in de wijze waarop de opzettelijkheid van de contractbreuk als mogelijk relevant element in de sanctiebepaling in het bestaande recht van verschillende systemen een plaats krijgt. Deze descriptieve en rechtsvergelijkende analyse, die eclectisch van aard is en geen volledigheid nastreeft, biedt een

fundament voor de beantwoording van de derde en vierde onderzoeksvraag, die meer normatief van aard zijn. De invloed van opzettelijkheid wordt per sanctie onder de loep genomen aan de hand van wetgeving en rechtspraak en, indien relevant, literatuur. Een preliminaire vraag is steeds of opzettelijkheid van de contractbreuk op zichzelf als verschijnsel wordt erkend. Vervolgens wordt de koppeling met de sanctie gemaakt, te weten de nakoming, de schadevergoeding in de zin van het positief contractsbelang, de vergoeding van immateriële schade, de winstafdracht, de privaatrechtelijke boete ('punitive damages') en de ontbinding. Voorts wordt de relatie tussen opzettelijkheid van de contractbreuk en de toepassing van boetebedingen en exoneratieclausules nader geanalyseerd. In hoofdlijnen dienen zich ten minste vier varianten aan.

A. De sterkste voorbeelden van signalering van het verschijnsel opzettelijke contractbreuk gecombineerd met een heldere doorwerking in de sancties zijn te vinden in het Amerikaanse recht en in het Franse recht. In het Franse recht beïnvloedt de opzettelijkheid van de contractbreuk de vergoeding van het positief contractsbelang, omdat niet alleen voorzienbare verliezen maar ook niet-voorzienbare verliezen voor vergoeding in aanmerking komen (art. 1150 Cc). In het Amerikaanse recht kan de opzettelijkheid van de contractbreuk de beschikbaarheid van 'punitive damages' beïnvloeden, zij het onder zeer bijzondere omstandigheden, met name in de sfeer van verzekeringsovereenkomsten, in het bijzonder wanneer verzekeraars weigeren uit te keren of lang wachten met uitkeren, terwijl duidelijk is dat zij aansprakelijk zijn. Bovendien lijkt het Amerikaanse recht steeds ontvankelijker voor de winstafdracht als sanctie na opzettelijke contractbreuk. Een bewijs daarvan vormt § 39 van het Draft Third Restatement on Unjust Enrichment.

B. De tweede groep voorbeelden kenmerkt zich door signalering van het verschijnsel opzettelijke contractbreuk zonder dat daaraan rechtsgevolgen in de toepassing van sancties worden verbonden. In het Amerikaanse en Nederlandse recht zijn daarvan voorbeelden te vinden. In het Amerikaanse recht is de invloed van het motief van de schuldenaar niet relevant bij het vaststellen van de omvang van het positief contractsbelang ('expectation damages'). In het Nederlandse recht heeft de Hoge Raad expliciet ontkend dat een bijzondere mate van verwijtbaarheid van het gedrag van de schuldenaar relevant is voor de toepassing van de sanctie van winstafdracht, onder meer in de zaak *Doerga/Ymere*, hoewel die verwijtbaarheid dan wel weer een rol kan spelen bij de invulling van die remedie. Het laatste voorbeeld is aldus minder sterk, omdat de Hoge Raad hier weinig duidelijkheid schept.

C. De derde groep voorbeelden kenmerkt zich door de expliciete signalering van het verschijnsel opzettelijke contractbreuk, terwijl de invloed daarvan op de toe te passen remedies onduidelijk blijft. Voorbeelden daarvan kunnen in elk rechtsstelsel worden aangetroffen. In het Engelse recht is winstafdracht mogelijk na contractbreuk, zoals blijkt uit bijvoorbeeld de landmark case *Attorney-General v Blake*. De relevantie van opzettelijkheid van de contractbreuk voor toepassing van die sanctie is op zijn minst onduidelijk, en waarschijnlijk zeer gering.

D. De vierde groep voorbeelden kenmerkt zich doordat het verschijnsel opzettelijke contractbreuk niet in concrete situaties benoemd wordt, terwijl het erop lijkt dat bij de toepassing en vormgeving van de sanctie het gedrag van de schuldenaar wel een rol heeft

gespeeld. In het Nederlandse recht kiest de Hoge Raad in de zaak *Vos/TSN Logistics* voor een schuldenaar-onvriendelijke oplossing bij de vaststelling van het positief contractsbelang met een louter technische onderbouwing zonder het gedrag van de schuldenaar te kwalificeren laat staan die kwalificatie van invloed te laten zijn op de vormgeving van de sanctie. In het Engelse recht wordt in de zaak *The Golden Victory* ook vermeden om de opzettelijkheid van de contractbreuk als relevant element te benoemen bij het vaststellen van de schadevergoedingsverplichting, althans door een meerderheid van de House of Lords.

De algemene conclusie die na dit hoofdstuk kan worden getrokken is dat opzettelijkheid van de contractbreuk in een beperkt aantal gevallen als relevant element bij de sanctiebepaling betrokken wordt.

8.4 De noodzaak van erkenning van opzettelijke contractbreuk als relevant juridisch verschijnsel

De descriptieve analyse in en de antwoorden die voortvloeien uit de eerste hoofdstukken noopt ertoe antwoord te geven op de vraag waarom opzettelijkheid van de contractbreuk relevant zou moeten zijn als afzonder element bij de toepassing van contractuele remedies. Dit is noodzakelijk, omdat uit de eerste hoofdstukken blijkt dat het in het algemeen het contractenrecht ten onrechte de relevantie van de opzettelijkheid van de contractbreuk miskent dan wel bagatelliseert wanneer het aankomt op de toepassing van contractuele remedies. Het contractenrecht neemt ten opzichte van dit verschijnsel terughoudendheid in acht. Daarvoor kunnen vier argumenten worden aangedragen: een moreel, een systematisch, een praktisch en een economisch argument. Niettemin is geen enkele van deze argumenten overtuigend. Ter beantwoording van de vierde onderzoeksvraag worden deze vier argumenten besproken en weerlegd.

1. Het morele argument dat kan worden aangevoerd is dat het contractenrecht geen duidelijk morele lading heeft. Het doel van het contractenrecht is het soepel laten verlopen van het handelsverkeer. Contractuele relaties kunnen daarom zonder morele bezwaren worden verbroken zolang de schuldeiser maar adequaat wordt gecompenseerd. Daartegen kan worden aangevoerd dat partijen op basis van vertrouwen met elkaar een contract aangaan. Vertrouwen is een functioneel begrip, maar het heeft ook een morele lading. Een contract is in die zin een paradox, omdat partijen pas met elkaar contracteren als zij vertrouwen in elkaar hebben, terwijl het contract er juist onder meer toe dient om die situaties te regelen wanneer partijen niet doen wat zij hebben toegezegd. Partijen houden dus wel rekening met contractbreuk, maar niet met opzettelijke contractbreuk, omdat anders de ratio van het sluiten van het contract in het geding komt. Het is slecht voorstelbaar dat partijen bij het sluiten van het contract – zij hopen beiden daarvan de vruchten te plukken – al stilstaan bij de vraag wat te doen wanneer een van de partijen opzettelijk niet nakomt. Daar komt bij dat er bescheiden empirisch bewijs is voor de stelling dat schuldeisers die geconfronteerd worden met opzettelijke contractbreuk zich ernstiger benadeeld voelen dan wanner zij te maken krijgen met een 'gewone' contractbreuk of zelfs een onrechtmatige daad. Als het contractenrecht niet adequaat reageert op een opzettelijke contractbreuk door dat verschijnsel niet te erkennen en er geen gevolgen aan te verbinden in termen van aanpassing van de contractuele remedies, dan kunnen partijen het vertrouwen in de helende werking van het contractenrecht kwijt raken. Die functie is essentieel, omdat het contractenrecht pas

werking krijgt als een van partijen in eerste instantie al niet nakomt en in het contract of gebrekkig is voorzien in een oplossing. Het contractenrecht heeft dus ten minste ook een morele grondslag en daaraan dient in geval van opzettelijke contractbreuk gevolg te worden gegeven.

2. Het systematische argument is dat het motief van de schuldenaar niet relevant is, omdat het niet past in het systeem. In de Europese continentale jurisdicties staat het recht op nakoming van de schuldeiser voorop. Het motief van de schuldenaar bij contractbreuk is dan niet relevant, omdat de schuldeiser toch krijgt waarop hij recht heeft. Voor de sanctie van schadevergoeding geldt – in zowel Europese als Anglo-Amerikaanse jurisdicties – kortweg dat deze is gebaseerd op de gedachte dat de schuldeiser gecompenseerd wordt. Als dat doel is bereikt, is het motief van de schuldenaar voor het plegen van contractbreuk minder relevant. Aangezien recht op nakoming vaak lastig te effectueren is als – al was het maar omdat de schuldeiser zijn vertrouwen is kwijtgeraakt in de schuldenaar – en volledige schadevergoeding in compensatoire zin zeker in gecompliceerde zaken vaak geen haalbare kaart is, is juist de weging van het motief van de schuldenaar in geval van contractbreuk een reden om het recht op nakoming in die gevallen te versterken door barrières voor de effectuering ervan weg te halen en bepaalde limieten op de vaststelling van de schadevergoeding te relativeren, zoals de grens van de voorzienbaarheid van de schade.

3. Het praktische argument is dat opzettelijkheid van de contractbreuk moeilijk, zo niet onmogelijk te bewijzen is. Of contractbreuk opzettelijk is, kan daarom theoretisch relevant zijn, maar vanwege een onmogelijke bewijspositie van de schuldeiser kan dat element nauwelijks van invloed zijn op de toe te passen concrete sanctie. Dit argument kan worden weerlegd door te stellen dat opzettelijke contractbreuk niet eenduidig is te definiëren. Bovendien kan opzet in veel gevallen – zeker in financieel-economische zin – worden geconstrueerd en geobjectiveerd, waardoor het bewijsprobleem niet wordt weggenomen, maar wel wordt gerelativeerd.

4. Het economische argument is dat in veel gevallen partijen baat kunnen hebben bij contractbreuk, ook de teleurgestelde schuldeiser, met name in het geval van de efficiënte contractbreuk.. Dit argument kan afdoende worden weerlegd. De figuur van de efficiënte contractbreuk is een interessante rechtseconomische constructie om bepaalde gedragspatronen van partijen te verklaren, maar het is geen werkbare rechtsfiguur dat ten grondslag zou moeten liggen aan het contractenrecht. De belangrijkste redenen zijn dat de theorie van de efficiënte contractbreuk aanneemt dat alle prestaties op geld waardeerbaar zijn en dat het de schuldeiser om het even is of hij de prestatie zelf ontvangt of het equivalent van de prestatie in geld. Dat is, zelfs in het op handelsverkeer gerichte contractenrecht, een illusie. Niet alle prestaties zijn op geld waardeerbaar en partijen lijken dat ook niet aldus te ervaren, getuige het eerder genoemde bescheiden empirische bewijs. Bovendien gaat de theorie van de efficiënte contractbreuk uit van volledige compensatie van de schuldeiser. De praktijk leert dat lang niet alle geleden schade na contractbreuk voor vergoeding in aanmerking komt. Dus zelfs als de schuldeiser op zichzelf de vervangende waarde van de prestatie even hoog waardeert als de prestatie zelf, dan blijft hij nog met kosten zitten die niet vergoed worden, terwijl wel wordt aangenomen dat hij 'volledig'

gecompenseerd is. Te denken valt aan kosten van juridische bijstand, kosten van het zoeken naar andere contractspartijen enzovoort.

8.5 De invloed van opzettelijkheid van de contractbreuk op de toepassing van contractuele remedies

Deze verklaring voor de relevantie van opzettelijkheid van contractbreuk als relevant element bij sanctiebepaling biedt een ingang voor de beantwoording van de vijfde onderzoeksvraag. De beantwoording van de vijfde onderzoeksvraag valt in twee delen uiteen. Ten eerste geeft dit proefschrift een aantal algemene aanbevelingen, waaruit blijkt hoe opzettelijkheid van de contractbreuk doorwerkt in remedies bij niet-nakoming in het contractenrecht. Ten tweede geeft dit proefschrift acht 'case studies' waaruit blijkt hoe die algemene aanbevelingen in concrete gevallen hun toepassing vinden. De algemene aanbevelingen worden als volgt geformuleerd:

I. In geval van opzettelijke contractbreuk zou een recht op nakoming sterk en gemakkelijk toegankelijk moeten zijn.

II. De omvang en begroting van het positief contractsbelang zou in het voordeel van de schuldeiser moeten uitvallen wanneer sprake is van opzettelijke contractbreuk. Ten aanzien van in het algemeen gerechtvaardigde limieten die bestaan ten aanzien van de bepaling van de omvang van de schadevergoeding, bijvoorbeeld ten aanzien van het causaal verband, de voorzienbaarheid, maar ook ten aanzien van de vergoeding van immateriële schade of gevolgschade, dient in het geval van opzettelijke contractbreuk terughoudendheid te worden betracht.

III. Winstafdracht als vervangende dan wel aanvullende remedie voor vergoeding van het positief contractsbelang dient eenvoudig toegankelijk te zijn wanneer sprake is van opzettelijke contractbreuk.

IV. Voor specifieke en ernstige gevallen van opzettelijke contractbreuk dient als ultimum remedium een privaatrechtelijke boete ('punitive damages') als sanctie tot de mogelijkheden te behoren.

V. Ontbinding zou toegankelijker moeten zijn als remedie in het geval van opzettelijke contractbreuk.

VI. Boetebedingen zouden niet ongeldig mogen worden verklaard dan wel worden gematigd in het geval van opzettelijke contractbreuk.

Het spreekt vanzelf dat deze aanbevelingen niet steeds van toepassing kunnen zijn op elk geval van opzettelijke contractbreuk. Voor de hand ligt natuurlijk dat dat in ieder geval geldt voor cumulatie van deze aanbevelingen, maar ook dient zorgvuldig te worden bezien welke sanctie en welke vorm van een sanctie per geval dient te worden toegepast. De gemene deler van deze aanbevelingen is dat de opzettelijke contractbreuk als afzonderlijk privaatrechtelijk verschijnsel signalering krijgt in de toepassing van contractuele remedies. De relevantie van dit verschijnsel blijkt ook uit de gepresenteerde acht 'case studies'. De gemene deler van zowel de aanbevelingen als de case studies is dat partijen niet geconfronteerd willen worden met opzettelijke contractbreuk. De bedoeling van

de aanbevelingen is dan ook in ultimo dat zij niet in concrete gevallen tot toepassing hoeven te leiden, omdat er een afschrikwekkende werking vanuit gaat. De schuldenaar die overweegt opzettelijke contractbreuk te plegen zal na een afweging met het oog op de (strenge) sancties besluiten om opzettelijke contractbreuk achterwege te laten.

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