

4 Failure in performance of an obligation in Dutch law

A confusing mix of national, transnational and linguistic interpretation

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1 INTRODUCTION

In this contribution the Dutch notion of ‘tekortkoming in de nakoming van een verbintenis’ – i.e. failure in performance of an obligation: hereafter also ‘failure in performance’ – will be examined from a European and transnational perspective. Only the obligations arising from a *contract* are subject to research. This contribution focuses on the relationship between the notion ‘failure in performance’ and the concept of default (*verzuim*) on the one hand and setting aside the contract or termination (*ontbinding*) on the other hand.

This contribution starts with an exploration of the notion of ‘failure in performance’ and its context in Dutch law. This step is necessary before dealing with the two following issues, which are both from a transnational origin and are relevant for the interpretation of the relevant notion in Dutch law.

First, the connection between failure in performance and the notion of default deserves attention. The already delicate balance between these terms in Dutch law is complicated further by the recent implementation of the Directive on consumer rights, resulting in the new provision in art. 7:19a DCC on default and written notice in a consumer sales contract.¹

Second, the relationship is discussed between the Dutch notion of failure in performance and the notion of fundamental non-performance – a notion returning in several jurisdictions surrounding the Netherlands and in practically all European and transnational instruments regarding contract law. Is there

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1 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (PbEU L 304/64); see also *Kamerstukken II* 2012/13, 33 520, no. 2 (legislative proposal) and no. 3 (explanatory memorandum). The provision entered into force on 13 June 2014; *Stb* 2014,140.

any sign of acceptance of this notion in the Dutch jurisdiction, implicitly or explicitly, and should Dutch law be more in line with ‘Europe’ on this point?

Finally, this contribution pulls some threads together in a conclusion, focusing on a common denominator which returns when attempting to discover the positive and negative aspects of European and transnational influences on national law: language and translation.

2 FAILURE IN PERFORMANCE: A BRIEF INTRODUCTION TO DUTCH LAW

2.1 Positioning the term and language problems

Failure in performance of an obligation is a key notion in the Dutch Civil Code. It is a central requirement for establishing liability in contract leading to the availability of remedies to the obligee or creditor. The link with liability and the connection to the various remedies contributes to the legal relevance of this notion. Consequently, failure in performance of an obligation cannot be interpreted and commented on – certainly not from a European and transnational perspective – without linking this notion to various other relevant notions in this respect, in particular the notions of possibility or impossibility to perform (*(on)mogelijkheid van nakoming*), attribution (*toerekenbaarheid*), default (*verzuim*) and written notice (*ingebrekestelling*). Knowledge of these terms is necessary to come to better understanding of the implications of ‘failure in performance of an obligation’ and how this term and its connected terms may be influenced by European or transnational instruments.

First, it is necessary to address a common problem for any research with comparative connotations. If a Dutch element from the Civil Code or one or several provisions from that Code have to be translated into and analysed in the English language, one should be very careful to avoid linguistic confusion.

The phrase ‘failure in performance’ returns several times in the Dutch Civil Code, especially to indicate which remedial options the obligee or creditor may have when he is faced with such a failure in performance.² A concrete and logical starting point to start from is art. 6:74 par. 1 DCC. This provision represents the Dutch way of approaching the idea of failure in performance of an obligation and one of the most logical consequences: damages.

Art 6:74 par. 1 DCC:³

2 See for example articles 6:263 and 265 DCC on suspending performance and setting aside the contract.

3 All translations of Dutch Civil Code provisions are from H.C.S. Warendorf, R. Thomas, I. Curry-Sumner, *The Civil Code of the Netherlands*, Alphen a/d Rijn: Kluwer Law International 2013.

‘Every failure in performance of an obligation shall require the obligor to repair the damage which the obligee suffers therefrom, unless the failure is not attributable to the obligor.’

According to Dutch law, the concept of ‘failure in performance of an obligation’ is more limited than the notion of non-performance in general.⁴ Non-performance is a purely objective assessment – the debtor did not or not fully perform the obligation for any reason. For example, the justifiable suspension of performance of an obligation can be qualified as non-performance, but not as a failure to perform. The notion of failure to perform is still a neutral term, but nevertheless more specified. This notion implies that the performance of the obligation is not what may be expected from the debtor. Failure to perform implies non-performance, delayed performance and defective performance.⁵ It may be that the failure to perform cannot be attributed to the debtor – therefore the term itself is still neutral – but the evidentiary threshold to be overcome by the debtor is high.⁶ The debtor may exonerate himself from facing the consequences of failing to perform, but he has to prove that the failure cannot be attributed to him in any way.

The translation used of the aforementioned provision is not without difficulties, because it may give a wrong impression of its meaning. The term which may cause a certain level of confusion is the term ‘repair’. This term has two meanings. The most common translation in Dutch is ‘*herstellen*’,⁷ an English synonym is ‘to mend’. However, an obligation to ‘mend’ is not what the provision in Dutch intends to impose on the obligor. The obligor is not required to physically repair or mend the damage caused by the failure to perform, at least not according to art. 6:74 par.1 DCC. The obligor is required to *compensate* the obligee for the damage suffered as a result of the failure in performance. This is a monetary sanction.⁸ ‘To repair’ may also imply ‘to compensate financially’, but it is certainly not the most straightforward meaning.

However, this linguistic confusion coincidentally points at a strong systematic presumption of Dutch contract law, which is characteristic of most legal

4 Asser/Hartkamp & Sieburgh 6-I* 2012/317; GS Verbintenissenrecht, art. 74 Boek 6 BW, note 2 (Broekema-Engelen).

5 Asser/Hartkamp & Sieburgh 6-I* 2012/370.

6 Asser/Hartkamp & Sieburgh 6-I* 2012/345 et seqq.

7 Van Dale Online Woordenboek Engels-Nederlands; <http://surfdiensten2.vandale.nl/zoeken/zoeken.do> (18 February 2015).

8 In theory, a creditor may demand ‘performance in kind’, but this exception is still ‘*specialis*’ of monetary damages and, furthermore, only available if the court uses its discretionary power to award a specific form of damages. The full text of the relevant provision (art. 6:103 DCC) is as follows: ‘Damages shall be paid in money. Nevertheless, upon the demand of the person suffering the loss, the court may award compensation in a form other than payment of a sum of money. Where such judgment is not complied with within a reasonable period, the person suffering the loss shall recover the right to claim damages in money.’

systems with a ‘civil-law’ background. The presumption is that the law encourages performance of contractual obligations, because contractual obligations *should* be performed (*pacta sunt servanda*). This well-known maxim provides for a system which gives the obligee not merely a remedy, but a right to performance of the contractual obligation.⁹

The right to performance of contractual obligations is not codified, although some would say it should be, but the idea is that the right to performance – self-evidently – follows from the underlying principle that parties are bound to their contractual obligations.¹⁰ Therefore, codification is not strictly necessary.

In case of failure in performance, the obligee may in theory choose between performance, damages or termination. However, the gateway to the remedy of damages (and, for that matter, the gateway to termination as well, see art. 6:265 DCC), requires the obligor to be in default according to art. 6:74 par.2 DCC.¹¹

In most cases, the obligor should provide written notice in order to put the obligee into default (arts. 6:81 and 6:82 DCC). Giving written notice is in fact nothing more than giving the obligor a second chance to perform correctly. This requirement underlines the level of significance given to eventual performance of the contractual obligation. Notice has to be given accompanied with a clear moment, until which the obligor has the opportunity to perform correctly. If he does not, the obligor will be in default, and only if the other requirements of art. 6:74 par. 1 are fulfilled, will the obligor be liable for damages.

Therefore, although the translation of art. 6:74 par. 1 DCC is not the most convenient one in my opinion, it unintentionally points at this important feature of Dutch contract law.

2.2 Failure in performance, default, written notice, impossibility and attribution

Following the justification of the requirement of default – giving the obligor the opportunity to perform correctly – it is logical that the obligor *must be able*

⁹ Asser/Hartkamp & Sieburgh 6-I* 2012/380.

¹⁰ D. Haas, *De grenzen van het recht op nakoming* (diss. Amsterdam), Deventer: Kluwer 2009, pp. 49, 50. Moreover, the ‘right in action’ is codified in art. 3:296 DCC s.1: ‘Unless it otherwise follows from the law, the nature of the obligation or a juridical act, the person obliged to give, to do or not to do something as regards another may be ordered to do so by the court upon the demand of the person to whom the obligation is owed.’ This provision is more of a procedural nature and, if anything, may indirectly imply a substantive right to performance of a (contractual) obligation.

¹¹ ‘To the extent that it is established that performance is and will remain impossible, paragraph (1) shall apply only if in accordance with the provisions of §2 regarding the default of obligors.’ See also art. 6:81 DCC.

to perform correctly. If performance has become impossible,¹² default is not required, because it is useless to give the obligor more time to perform.

If a debtor delivers 50 lorries instead of the promised 100, he fails to perform the contractual obligation. However, it is not impossible for the obligor to perform and to deliver the remaining 50 lorries. When a debtor has to deliver a painting that has been destroyed by a fire, it is impossible for the debtor to perform the original obligation.

The law also provides for situations where performance may be theoretically possible but where the requirement of default automatically applies without the requirement to give notice (art. 6:83 DCC). In this respect, the most important category is the obligation with a set term. If the term expires, default is not required.¹³ Performance of the obligation may still be possible – the remaining 50 lorries can be delivered – but not within the term set in the contract. A theoretical discussion arises on the topic whether the term set in the contract is part of the obligation or not. If so, one could also argue that performance is impossible – and default is not required in that case – or that performance is possible, but default applies automatically. Because legal consequences do not differ substantially, this discussion does not have any substantive relevance in this respect.¹⁴

Another theoretical discussion is whether the requirement of default and the term failure in performance are really distinguishable. In other words, can a failure in performance in the sense of art. 6:74 DCC exist without liability because the obligor is not (yet) in default? The Dutch Supreme Court rules that these terms are not distinguishable, because it asserts that the situation before being in default gives the obligor the opportunity to perform without failing to perform.¹⁵

The connections between failure in performance and default and between failure in performance and impossibility in Dutch law have been briefly

12 The distinction between absolute and temporary impossibility will not be discussed in this contribution (see the difference on this point between art. 6:74 par. 2 and art. 6:265 par. 2 DCC).

13 Case law on this issue is quite extensive. See e.g. Dutch Supreme Court 6 October 2000, NJ 2000/691 (*Verzicht/Van Eijndhoven*); Dutch Supreme Court 4 February 2000, NJ 2000/258 (*Kinheim/Pelders*); Dutch Supreme Court 4 October 2002, NJ 2003/257 (*Fraanje/Götte*); Dutch Supreme Court 22 October 2004, NJ 2006/597 (*Endlich/Bouwmachines*); Dutch Supreme Court 13 January 2012, RvdW 2012/107 (*Cubeware/A-line*).

14 See Dutch Supreme Court 27 June 2008, NJ 2010/ 83 (*Moerings/Mol*), note J. Hijma; A.C. van Schaick, 'Blijvende onmogelijkheid', *Nederlands Tijdschrift voor Burgerlijk Recht* (NTBR) 2012/40.

15 Dutch Supreme Court 20 September 1996, NJ 1996/748 (*Büchmer/Wies*): 'Daarbij verdient nog aantekening dat een ingebrekestelling niet de functie heeft om 'het verzuim vast te stellen', doch om de schuldenaar nog een laatste termijn voor nakoming te geven en aldus nader te bepalen tot welk tijdstip nakoming nog mogelijk is zonder dat van een tekortkoming sprake is, bij gebreke van welke nakoming de schuldenaar vanaf dat tijdstip in verzuim is.' Legal doctrine does not agree unanimously with this line of reasoning. See e.g. Asser/Hijma 7-1* 2013/421-422.

indicated. A last thread in this respect is the link between failure in performance and the requirement of attribution in relation to the remedies available to the obligee.

As stated earlier, the obligee has a self-evident right to performance of the contractual obligation. This right is more than a remedy in reaction to failure in performance. This right can be exercised not only after failure in performance of the obligor, but in any case, provided that the applicable obligation is due. The right to performance naturally evolves from the contract. The circumstances of an eventual failure to perform are therefore not relevant. Whether the failure in performance can be attributed to the obligor is not relevant for access to the right to performance. The only impediment to invocation of the right to performance is an impossibility to perform, but the interpretation of the notion of impossibility is quite strict, because the right to performance should not be limited more than strictly necessary.¹⁶

In conclusion, the Dutch concept of failure in performance has its peculiarities, which mainly evolve from the principles underlying the Dutch Civil Code. In practice, failure in performance simply means that performance is not up to standard according to the obligation agreed upon in the contract. However, the notion of failure in performance can only be understood when it is connected with other notions such as impossibility, attribution and default on the one hand and with the remedies triggered by failure in performance, such as damages and termination on the other hand. The next section analyses two specific sources of influence on the national interpretation of the notion of failure in performance.

3 FAILURE IN PERFORMANCE: A EUROPEAN AND TRANSNATIONAL PERSPECTIVE

3.1 Failure in performance and default in Directive 2011/83/EU and 7:19a DCC

On a European level, instruments regarding *general* contract law are in general not binding, such as the PECL and DCFR.¹⁷ In that sense, it does not directly affect national contract law.

However, the good exception is the area of consumer law, including the part of consumer law regarding the law of contract. The European Union is concerned about the position of consumers and strives to protect consumer

16 See art. 3:296 DCC and also Dutch Supreme Court 5 January 2001, *NJ* 2001/79 (*Multi Vastgoed/Nethou*)

17 The Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM/2011/635) (CESL) is the most recent project which was cancelled in February 2015.

interests via Directives, which should be implemented on a national level.¹⁸ The influence on national law is therefore considerable.

In 2011, the European Parliament issued a new Directive in order to harmonise and improve regulations from previous directives concerning consumer law. The development of the Directive was not without problems, because the Parliament wanted to adopt a Directive with maximum harmonisation.¹⁹ This objective caused severe problems – an earlier proposal for a much more ambitious Directive did not survive, mainly because of the maximum harmonisation objective²⁰ – and the predictable result was that the new Directive in 2011 did not contain many substantive provisions changing the level of consumer protection substantively, except for incorporating a range of information obligations on the side of the seller.

An exception is formed by art. 18 of the Directive. This provision is specifically drafted for sales contracts. The most relevant parts of the provision are the first section and the first part of the second section:

1. Unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract.
2. Where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract. (...)

The highlights of this provision are the following. The trader should deliver the goods within a period of 30 days or within a time of delivery. If the trader fails to do so, the consumer gives the trader an additional period of time appropriate to the circumstances. If the trader fails to deliver within that additional period of time, the consumer is entitled to terminate the contract.

At first glance, the rationale behind this rule seems to be a guarantee to a quick delivery by the trader. If quick delivery cannot be triggered, the consumer may terminate the contract. The implementation of this provision causes problems which have a direct effect on the notion of failure in performance in Dutch law.

18 Art. 169 TFEU.

19 See art. 4 of the Directive. See e.g. A.L.M. Keirse, S.A. Kruisinga & M.Y. Schaub, 'Nieuws uit Europa: Twee nieuwe wetgevingsinstrumenten: de Richtlijn Consumentenrechten en het gemeenschappelijk Europees kooprecht', *Contracteren* 2012/1, pp. 11-26; M.B.M. Loos & J.A. Luzak, 'De nieuwe Richtlijn consumentenrechten', *Tijdschrift voor Consumentenrecht* 2011/5, pp. 184-191.

20 C.A.N.M.Y. Cauffman, M.G. Faure & T. Hartlief, 'Het richtlijnvoorstel consumentenrechten: quo vadis?', *Contracteren* 2010-3, pp. 71-78.

A first hint at problematic implementation is that the scope of the provision is slightly blurred by section 53 of the Preamble. This section says that

‘in addition to the consumer’s right to terminate the contract where the trader has failed to fulfil his obligations to deliver the goods in accordance with this Directive, the consumer may, in accordance with the applicable national law, have recourse to other remedies, such as granting the trader an additional period of time for delivery, enforcing the performance of the contract, withholding payment, and seeking damages.’

This sentence may imply that the rule of art.18 of the Directive does not only trigger termination as a remedy, but also, amidst other remedies, damages, but this recourse is only possible if it is in accordance with national law.

Art. 18 Directive is implemented via art. 7:19a DCC.²¹ The relevant part of the provision says:²²

‘If, in the case of a consumer sale, a seller fails to perform the contract within a prescribed or agreed period as referred to in Article 9 (4) (*the 30-day period, MvK*), he shall be in default if he is given notice of default by the buyer in which he is allowed a further reasonable period for delivery but still fails to perform within this period.’

Several authors have already criticized this provision.²³ One of the most problematic issues is the use of the terms ‘default’ (*verzuim*) and ‘notice’ (*ingebrekestelling*). Both terms are already embedded in a Dutch context, so a lawmaker should be extremely careful when using these terms in another context.

First, a translation issue hides an obvious dichotomy in Dutch law. Within the context of arts. 6:74 BW and 6:265 BW, the obligee has to provide *written* notice in order to put the obligee into default. The Dutch term is ‘*ingebrekestelling*’. However, in the case of art. 7:19a DCC, the Dutch term ‘*ingebrekestelling*’ is translated to notice: without the adjective ‘written’. In other words, apparently the consumer may give notice over the telephone or in person. This situation causes problems, for according to Dutch law, an obligee can only be notified

21 *Kamerstukken II* 2012/13, 33 520, no. 2 (legislative proposal) and no. 3 (explanatory memorandum).

22 ‘Komt de verkoper bij een consumentenkoop de in artikel 9 lid 4 gestelde of overeengekomen termijn niet na, dan is hij in verzuim wanneer hij door de koper in gebreke wordt gesteld bij een aanmaning waarbij hem een redelijke termijn voor de aflevering wordt gesteld, en nakoming binnen deze termijn uitblijft.’

23 A.G. Castermans, ‘Verzuim en ingebrekestelling bij consumentenkoop: de beperkte reikwijdte van artikel 7:19a BW’, *NTBR* 2014/38; H.N. Schelhaas, ‘In verzuim’, *NTBR* 2013/37.

correctly, if written notice is provided.²⁴ The term '*ingebrekestelling*' implies that the notice given is written. Through the incorporation of the new art. 7:19a DCC the meaning of the term '*ingebrekestelling*' is not certain anymore, because two manifestations of the term now exist in the Civil Code.

A second issue is the introduction of the term 'default' in combination with the requirement of giving notice. In section 2 of this contribution it has been made clear that the notion of default is one with a very specific meaning especially in combination with the notion of written notice and failure in performance. One of its features, laid down in the law (art. 6:83 DCC), is that giving written notice is unnecessary when a set term expires. In this situation, the obligor is *automatically* in default after expiry of the set term. Art. 7:19a DCC confuses this system, because this provision *always* requires giving notice to the obligor, even when a set term is agreed upon. The only exception is when timely performance is essential for the performance because of the nature of the contractual obligation – e.g. in case of the delivery of a wedding dress on a specific date. Again, the use of the terms default and notice is questionable, because of the incongruent meaning of the terms.

A third matter is the scope of the provision in the DCC compared with the scope of art. 18 in the Directive. The scope of the provision in the Directive is clearly limited. The obligee has access to termination when the obligor fails to deliver. As mentioned before, the consumer may have access to other remedies, but only if in accordance with national law. In art. 7:19a DCC the connection with termination is not clearly made. This omission suggests that this provision may also be applicable in case a creditor claims compensation via art. 6:74 DCC. The European legislator did not prescribe this elaboration, because now it is slightly unclear whether the 'national' default rules apply or the 'European' rules. The aim of this contribution is to establish any influence of transnational law on the interpretation of Dutch law. Since this provision has been implemented quite recently, it is difficult to assess the degree of influence, especially because there is no case law yet. However, a few predictions can be made.

First, the relationship between the new art. 7:19a DCC and the concepts of default and (written) notice needed to trigger damages and termination in general (arts. 6:74 DCC and 6:265 DCC) need to be clarified. The practical result could be, as Castermans already suggested, always to remain on the safe side and send a written notice in any case in which the buyer-consumer would like to get access to a remedy.²⁵ To be fair, the Dutch system of default

24 There are exceptions (Dutch Supreme Court 22 October 2004, NJ 2006/597 (*Endlich/Bouwmachines*)), where the Dutch Supreme Court allows other forms of notice, but the law is clear on this point.

25 Castermans 2014.

and notice is in itself quite hard to understand: the advice to practitioners has always been to give written notice in any situation.²⁶

Second, although the national system is not without flaws either, an important ‘tool’ in the law of obligations to prevent unfair solutions is the application of the principle of good faith (or reasonableness and fairness). This principle is not without significance in the area of failure of performance, default and notice. For example, notice is by law only valid when it is written, but in exceptional circumstances, good faith may imply that notice may be given in another form (e.g. by telephone).²⁷ Art. 7:19a DCC provides a strict application of giving notice in every applicable case, but in practice one may want to deviate from this legal principle in exceptional circumstances. The absence of a general principle of good faith to deal with such situations may hamper the smooth application of this new provision.²⁸

Most importantly, implementation of the new provision seems to have a negative influence on the internal coherence of the Dutch Civil Code. The Dutch Supreme Court aligns the concepts of failure in performance and default, but the new provision seems to disentangle these two concepts. Avoidance of these specific terms in the concepts would have been preferable, but maybe this new provision provides a trigger to review the complete system of default and written notice. Then, the concept of failure in performance will be affected too.

3.2 Failure in performance, non-performance and fundamental non-performance

According to Dutch law, failure in performance is required to have access to damages and to termination. As far as termination is concerned, art. 6:265 DCC applies. It is necessary to take a closer look at this provision, par. 1:

‘Every failure of one party in the performance of one of its obligations gives the other party the right to set aside the contract in whole or in part, unless the failure, given its special nature or minor significance, does not justify the setting aside of the contract and the consequences flowing therefrom.’

For the purpose of this contribution, the focus lies on the phrase ‘unless the failure, given its special nature or minor significance, does not justify the setting aside of the contract’. This phrase suggests that the obligee cannot set aside the contract in *every* case of failure in performance. As a remedy, termina-

26 See e.g. V. van den Brink, ‘Verzuim en ingebrekestelling (deel I/II)’, *Maandblad voor Vermogensrecht* 2005-10/11.

27 Dutch Supreme Court 22 October 2004, NJ 2006/597 (*Endlich/Bouwmachines*).

28 Castermans 2014.

tion is considered to be severe. Therefore, apart from the requirement of 'failure in performance' in general – and default according to par. 2 – an extra threshold is applicable.

Nevertheless, the Dutch Supreme Court decided that applicability of the exception of minor breach is exceptional and that in virtually all cases of failure in performance, termination is available as a remedy.²⁹ On the other hand, it should be taken into account that seriousness of the failure is a factor which is taken into account in assessing the availability and extent of remedies in contract and possible defences of the party that fails to perform.³⁰

Most European or supranational bodies of law or legal instruments, as well as many national legal systems, also recognize a qualified level of breach necessary to have access to the remedy of termination, but not in the same way.³¹ Most commonly, the term 'fundamental breach of contract' is introduced. The instruments mentioned all have their own specific provision on fundamental breach of contract.

Art. 25 CISG states:

'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 i[t] 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.'

29 Dutch Supreme Court 4 February 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 M.M. Stolp, *Ontbinding, schadevergoeding en nakoming: De remedies voor wanprestatie in het licht van de beginselen van subsidiariteit en proportionaliteit* (diss. Leiden), Deventer: Kluwer 2007.

30 See for an example Dutch Supreme Court 25 March 2011, ECLI:NL:HR:BP8991, NJ 2013, 5, note T.F.E. Tjong Tjin Tai (*Ploum/Smeets II*); T. Hartlief, *Ontbinding* (diss. Groningen), Deventer: Kluwer 1994; F.B. Bakels, *Ontbinding van wederkerige overeenkomsten* (diss. Leiden), Deventer: Kluwer 1993.

31 M.B.M. Loos & H. Schelhaas, 'Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention', *European Review of Private Law* 2013 (21), Issue 1, pp. 105–130; G. Dannemann & S. Vogenauer (eds.), *The Common European Sales Law in Context, Interactions with English and German Law*, Oxford: Oxford University Press 2013. The practical value of the CESL provisions has naturally declined due to its cancellation.

Art. III.3:502 (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 (2) Unidroit 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 par. 2 reads:³²

‘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 non-performing 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.’

Before analysing the meaning of the term ‘fundamental breach of contract’, it is relevant to note that the different instruments use different terms for what in Dutch law is called ‘failure in performance of an obligation’. The terms used are ‘breach of contract’ (CISG) and, more commonly, ‘non-performance’.

The CISG tends slightly more towards the common-law terminology, where ‘breach of contract’ is also used to indicate a ‘failure to perform’. This term

32 See for an elaboration of this term M. von Kossak, ‘The Remedial System under the Proposed Common European Sales Law (CESL)’, *European Journal of Commercial Contract Law* 2013-1, p. 9.

does not take into account the notion of fault or 'attribution'. Under English 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 for another reason, in general the other party does not have to establish fault to obtain a remedy due to breach of contract.³³ Strict liability can be considered as the starting point instead of fault liability. However, it is very dangerous to make general statements like this when referring to English law, as the bottom-up structure of English contract law seldom allows one to generalize solutions and approaches chosen in specific cases.³⁴

The other instruments all use the term 'non-performance'. According to Dutch law, as mentioned before, this term is more neutral than the term 'failure in performance', because non-performance can be justified, for example in case of a justified withholding of the performance.

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 severe 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 one way or another. The question is what fundamental breach means exactly. When is a breach fundamental? As shown by the three provisions mentioned, the three instruments use different definitions.

All instruments in general recognize that fundamental breach occurs when the aggrieved party is substantially deprived of the very object of the contract. The PICC contains the clearest explicated notion of fundamental breach and devotes 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.³⁵ In case a breach is intentional, but insignificant, the principle of good faith can block the non-performance from becoming fundamental.

33 E. Peel & G.H. Treitel, *The Law of Contract* (13th ed.), London: Sweet & Maxwell 2011, p. 834.

34 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.

35 www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf, art. 7.3.1, p. 222. See also S. Vogenauer & J. Kleinheisterkamp, *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, Oxford: Oxford University Press 2009, pp. 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).'

The PECL and the DCFR are also very brief about the connection between fundamental breach and intentional breach.³⁶ Seriousness of the breach gets a lot of attention, but this factor is not directly linked to the intention of the party in breach. It should be mentioned that an intentional breach as mentioned in the provisions of the PECL and DCFR does not qualify directly as a fundamental breach. A second requirement next to the deliberateness of the breach is that the aggrieved party must have reason to believe that the debtor's future performance cannot be relied on. In my opinion, an intentional breach by its very nature causes a 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. 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.

From this exercise it may be derived that termination should not be easily available, but only in case of a serious breach. The difference between the threshold in Dutch law and the requirement of fundamental breach is not a theoretical one. In principle, every failure in performance should give access to termination.³⁷ The refusal to incorporate the 'fundamental' requirement into Dutch law is not an accidental, but a conscious decision by the lawmaker, mainly because the requirement was thought to be too vague.³⁸ Although the available transnational or European instruments show that the requirement is interpreted in different ways, I am not certain that this argument alone is sufficiently convincing to deny incorporation of this requirement. In my opinion, the relevant question should be whether Dutch law recognizes the principle behind the 'fundamental' requirement, in particular that termination should not be accessible too easily.

36 See for a more in-depth analysis on this point M. van Kogelenberg, *Motive matters! An exploration of the notion of 'deliberate breach of contract' and its consequences for the application of remedies*, Cambridge: Intersentia 2013, Chapters 2 and 4.

37 Dutch Supreme Court 4 February 2000, NJ 2000, 562 (*Mol c.s./Meijer Beheer BV*); Asser/Hartkamp & Sieburgh 6-III* 2014/671.

38 Asser/Hijma 7-I* 2013/425 with references.

At first glance, the Dutch Supreme Court seems to deny this principle by stating that ‘a failure in performance justifies termination of the contract’.³⁹

However, it is too simple to conclude that Dutch law does not at all recognize the idea behind the requirement of fundamental breach. First, the requirement of default already mentioned also applies in order to acquire access to termination. Default is not by definition a requirement in every transnational instrument. The objective of a ‘default’ requirement – an attempt to ‘save’ the contract – is comparable with the objective of the requirement of fundamental breach. Second, in transnational instruments the requirement of fundamental breach is not always necessary when the obligee/buyer wants price reduction. Price reduction is not much more than partial termination, which is a possibility under Dutch law (art. 6:270 DCC). Third, the provision itself already excludes the possibility of terminating the contract due to minor failures.

Taking into account this systemic approach, the addition of a requirement such as ‘fundamental non-performance’ is not really necessary in Dutch law, if not causing the wrong idea that termination is a last resort option. It is not the vagueness of the term itself, but the systemic vagueness caused by adding this requirement which leads me to the conclusion that international ‘pressure’ should not lead to incorporation of this term into Dutch law.

The purpose of this contribution is to analyse whether transnational interpretations of well-known concepts influence the interpretation of a comparable concept in Dutch law and if so, how. As far as the idea of fundamental non-performance is concerned, one could say that until now Dutch law has held firm in refusing to incorporate this concept into its own legal system. The law allows the court to rule that failure is too minor to have the contract terminated. However, a simple circumvention by limiting the access to termination via the principle of reasonableness and fairness is not going to work. This principle does not stretch the exception laid down in art. 6:265 significantly further.

The provisional conclusion is slightly ambiguous. Dutch law recognizes a higher threshold for termination – there is an extra requirement added to failure in performance alone – but the requirement of fundamental non-performance is not accepted in Dutch law.

4 CONCLUSION

The purpose of this contribution is to consider whether the Dutch concept of ‘failure in performance of an obligation’ has been influenced by European and transnational developments and/or instruments. Two specific developments have been discussed. First, the recent implementation of art. 7:19a DCC has

³⁹ Dutch Supreme Court 22 July 2007, ECLI:NL:HR:2007:BA4122, NJ 2007/343 (*Fisser/Tycho*), par. 5.2.

been discussed. Second, the widely accepted notion of fundamental non-performance and its possible effects on Dutch law have been analysed.

Both issues show that the term ‘failure in performance’ cannot be understood and analysed in isolation. The term ‘failure in performance’ and its European and transnational counterparts ‘breach of contract’ and ‘non-performance’ have close relationships with concepts such as attribution, default, impossibility and the remedies performance, damages and termination.

The concept of failure in performance as used in the Dutch Civil Code in general is not directly influenced by European or transnational developments or instruments. Courts do not refer to European or transnational instruments when they apply provisions in which the relevant notion returns.

Related concepts such as default and written notice are influenced by the European Directive on consumer rights, implemented via art. 7:19a DCC. This implementation may have its implications for the interpretation of the notion of failure in performance.

The notion of fundamental non-performance, although present in many other national legal systems and in European and transnational systems, has not found its way into the Dutch Civil Code. Nevertheless, art. 6:265 DCC has its own way of limiting access to termination as a remedy, though the principle of easy access to termination prevails according to the Supreme Court.

Nevertheless, there is a more general way in which the influence of transnational and European instruments finds its way into the Dutch legal environment more and more convincingly. For many years the CISG has been applicable to certain contractual (sales) relationships. The scope of certain European instruments seems to widen as the years pass and consequently, the influence of the national code may decline. Although the draft Regulation on a Common European Sales Law has been withdrawn, a new, more focused, initiative on the development of a so-called Digital Single Market is already announced, which will be accompanied by – inter alia – rules of contract law.⁴⁰ It is not clear yet, whether these new rules will be developed on a basis of minimum or maximum harmonisation. The most recent Directive on consumer rights is largely based on a principle of maximum harmonisation, which leaves no serious room for national provisions to be of added value, because they ought to be replaced or rewritten.

Finally, the comparison and analysis of comparable concepts in national law and transnational law always triggers language problems. It is not just a matter of possible misunderstandings in communication. Due to linguistic confusion, the legal interpretation of terms and its connection to other terms and concepts can be influenced. The implementation of art. 7:19a DCC shows

40 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 6 May 2015, COM(2015) 192, pp. 4, 20.

that this well-known concern is not obsolete or outdated. This lesson may even be the most significant one of this contribution.

