

2 | *Redelijkheid en billijkheid*: a view from English law

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1 INTRODUCTION

Amongst the core concepts in the Civil Code of The Netherlands, *redelijkheid en billijkheid* ('reasonableness and fairness') marks one of the most fundamental differences from the common law. The principle of 'reasonableness and fairness' appears to be part of the Dutch lawyer's DNA; and it is as surprising – perhaps even shocking – to the Dutch lawyer to find that it is not matched in the common lawyer's thinking, as it is to the common lawyer to discover the reliance placed on 'reasonableness and fairness' in Dutch law. The purpose of this paper is to explore why the common lawyer does not see a similar place for such a principle.

It is not unusual for a legal system to use an objective norm of 'reasonableness' or 'fairness' in a variety of contexts. English law is no exception: much use is made of the standard of 'reasonableness' in both private law and public law, at common law and in statute. To give just a few examples: the standard of 'reasonableness', often personified as a hypothetical 'reasonable person',¹ is used in both tort and contract in a range of matters, such as defining the standard of conduct which constitutes negligence,² the extent of recoverable

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1 See also J. Cartwright, 'The Fiction of the "Reasonable Man"' in: A.G. Castermans, Jac. Hijma, K.J.O. Jansen, P. Memelink, H.J. Snijders & C.J.J.M. Stolker (eds), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, p. 143.

2 Court of Exchequer 6 February 1856, *Blyth v. Birmingham Waterworks* (1856) 11 *Exch.* 781, p. 784 (Alderson B: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'); House of Lords 16 April 1943, *Glasgow Corporation v. Muir* [1943] *AC* 448, p. 454, 457, 468; High Court 26 February 1957, *Bolam v. Friern Hospital Management Committee* [1957] 1 *WLR* 582, p. 586 (situation involving special skill or competence: 'the ordinary skilled man exercising and professing to have the special skill').

loss,³ how to interpret the contract,⁴ and how to determine the price where the contract is silent on the matter.⁵ Whether a decision of an administrative authority can be challenged may depend on whether it is so ‘unreasonable’ that no reasonable authority could properly have made it;⁶ and whether a decision of a fact-finding jury or court can be re-opened on appeal may depend on whether no reasonable jury or court could have come to such a decision.⁷ Legislative provisions use tests based on ‘reasonableness’, and ‘(un)fairness’ to determine the validity of certain contractual or non-contractual exemption clauses and notices,⁸ or other contract terms;⁹ and sometimes a court has

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- 3 The test of ‘remoteness of damage’, based on whether the loss suffered was of the kind that a reasonable person in the defendant’s position would have foreseen when he committed the wrong (tort): Privy Council 18 January 1961, *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co. Ltd (The Wagon Mound)* [1961] AC 388, p. 423, 426; or would have had in contemplation at the time of formation of the contract (contract): House of Lords 17 October 1967, *Koufos v. C. Czarnikow Ltd* [1969] 1 AC 350, p. 385.
 - 4 In the case of a contract constituted by (written or oral) offer and acceptance, ‘an offer falls to be interpreted ... objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer’: Court of Appeal 4 March 1983, *Centrovincial Estates plc v. Merchant Investors Assurance Co* [1983] Com. LR 158, p. 158 (Slade L.J.). In the case of a contract contained in a single written document agreed by the parties, the courts look for ‘the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’: House of Lords 19 June 1997, *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, p. 912 (Lord Hoffmann).
 - 5 The ‘reasonable price’ for the goods or services in question: e.g. Court of Appeal 16 March 1934, *Foley v. Classique Coaches Ltd* [1934] 2 KB 1; Sale of Goods Act 1979, s. 8; Supply of Goods and Services Act 1982, s. 15.
 - 6 So-called ‘Wednesbury unreasonableness’: Court of Appeal 10 November 1947, *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223; W. Wade & C. Forsyth, *Administrative Law*, 11th edn, Oxford: Oxford University Press 2014, p. 302-305.
 - 7 See, e.g., House of Lords 24 October 2002 *Grobbelaar v. News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024, par. 66, 73, 74 (jury in civil proceedings in defamation trial).
 - 8 Unfair Contract Terms Act 1977, which applies only to non-consumer contracts and non-consumer notices, and uses in ss. 2(2), 3(2), 6(1A), 7(1A) and 7(4) ‘the requirement of reasonableness’, defined in s. 11 by reference to whether the contractual term was ‘a fair and reasonable one to be included’ in the contract, or, in the case of a non-contractual notice, whether it is ‘fair and reasonable to allow reliance on it’. Further guidance on the operation of this test is given in s. 11 and Sched. 2.
 - 9 Consumer Rights Act 2015 Part 2, providing in s. 62(1) that an ‘unfair term of a consumer contract is not binding on the consumer’ (but, in so far as it is transparent and prominent, excluding by s. 64 the assessment of a term for fairness to the extent that it specifies the main subject matter of the contract, or the assessment is of the appropriateness of the price payable). The Act implements Council Directive 93/13/EC on unfair terms in consumer contracts, and in consequence defines a contract term as ‘unfair’ if ‘contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer’: s. 62(4), following the language of art. 3(1) of the Directive. There were earlier implementations of the Directive in 1994 (Unfair Terms in Consumer Contracts Regulations 1994, S.I. 1994 No. 3159) and 1999 (Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999 No. 2083).

power by statute to determine an issue by reference to what the court judges to be ‘just’ and/or ‘equitable’, classic terminology indicating a judicial discretion.¹⁰

In the Dutch Civil Code there are many references to ‘reasonableness’ (*redelijkheid*), or to ‘fairness’ (*billijkheid*), often in situations which will sound familiar to the English lawyer.¹¹ However, here we are concerned not with such instances but with the composite term, ‘reasonableness *and* fairness’ (*redelijkheid en billijkheid*), which is referred to as a set of ‘standards’ or ‘requirements’.¹² The pervasive role of ‘reasonableness and fairness’ in Dutch private law is demonstrated by its reference in many articles throughout the Civil Code,¹³ but we shall focus on its use within the general law of contract. In that context, two provisions are relevant as the starting-point.¹⁴ First, amongst the general provisions governing *obligations in general*, at the start of Book 6 (General Part of the Law of Obligations) the Dutch Civil Code provides:¹⁵

- ‘1. An obligee and obligor must, as between themselves, act in accordance with the requirements of reasonableness and fairness.
2. A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.’

10 Law Reform (Frustrated Contracts) Act 1943, s. 1(2), (3); Law Reform (Contributory Negligence) Act 1945, s. 1(1); Civil Liability (Contribution) Act 1978, s. 2(1).

11 E.g. where a decision hangs on whether a price or another term of a contract meets a standard of ‘reasonableness’ or ‘fairness’ (e.g. DCC Book 7, art. 618: remuneration under an employment contract where the rate is not settled by the parties’ agreement or by custom); or where ‘fairness’ requires a particular solution in the circumstances of the case, such as the reduction or increase of the sum to be paid under a penalty clause (Book 6, art. 94), the reduction of damages to take account of the claimant’s own fault (Book 6, art. 101) or the departure from the general rule requiring equal contribution to damages by joint tortfeasors (Book 6, art. 166)). Occasionally, ‘fairness’ is also used in a similar context to the general principle of ‘reasonableness and fairness’ discussed in this paper (e.g. Book 7, art. 440 and 685: termination of commercial agency contract or employment contract where ‘fairness’ so requires as a result of change of circumstances).

12 See esp. DCC Book 6, art. 2:2 and 248:2 (*maatstaven* – standards) and Book 6 art. 2:1 and 248:1 (*eisen* – requirements), set out below.

13 DCC Book 1 (Family Law and the Law of Persons), art. 137, 141, 157, 159, 401; Book 2 (Legal Persons), art. 8, 15, 322, 334r, 444; Book 3 (Law of Property), art. 12, 30, 298; Book 4 (Inheritance Law), art. 123, 133, 139; Book 5 (Rights *in rem*), art. 78, 80, 97; Book 6 (General Part of the Law of Obligations), art. 2, 23, 211, 248, 258; Book 7 (Specific Contracts), art. 176, 269, 333, 394, 613, 904, 906, 909; Book 7A (Specific Contracts, continued), art. 1686; Book 8 (Law of Carriage and Means of Transportation), art. 28, 68, 88, 89, 162, 396, 524, 525, 912, 914, 1116, 1162, 1163, 1193, 1363, 1407, 1408.

14 See also DCC Book 6, art. 258 (below, section 3) for change of circumstances; and Book 3, art. 12 (below, section 4) for a definition of ‘reasonableness and fairness’.

15 DCC Book 6, art. 2.

This general provision generates a particular application within the provisions governing *contracts in general*:¹⁶

- '1. A contract not only has the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, apply by virtue of law, usage or the requirements of reasonableness and fairness.
2. A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.'

The purpose of this paper is not to examine these provisions in detail, nor to attempt to give a detailed account of the use of 'reasonableness and fairness' within Dutch law. Rather, drawing on the general approach to 'reasonableness and fairness', and some particular illustrations of its use, we can identify some significant points of contrast with English law: contrasts both of principle and in the substantive law of contract in the two systems.

In the provisions of the Civil Code set out above, we can see two distinct uses of 'reasonableness and fairness' which contrast with the common law approach. First, 'reasonableness and fairness' is set as a general standard of conduct within the law of obligations, imposed by the law as a positive general (and mutual) duty on the parties to an obligation (and therefore on the parties to a contract). Secondly, 'reasonableness and fairness' is used as a standard by reference to which the terms of the contract can in certain circumstances be judged, and in particular to fill out the terms and to justify the modification of the effects of the contract or the disapplication of rules that would otherwise be binding on the parties as a result of the contract.

2 THE GENERAL STANDARD OF CONDUCT BASED ON 'REASONABLENESS AND FAIRNESS'

One of the most striking things for the English lawyer is the provision that 'an obligee and obligor must, as between themselves, act in accordance with the requirements of reasonableness and fairness'¹⁷ – that is, that the law should impose a general legal duty of this kind on obligors and obligees, and therefore on parties to a contract. Whatever the analysis of this legal duty within Dutch law – as a norm for judicial decision-making (addressed to the court in order to resolve disputes in particular cases) or as a mandatory norm addressed to the parties in their mutual dealings, itself based on a broader societal norm of 'reasonableness and fairness';¹⁸ and even if it does not create

16 DCC Book 6, art. 248.

17 DCC Book 6, art. 2:1.

18 P.S. Bakker, *Redelijkheid en billijkheid als gedragsnorm* (thesis Amsterdam VU), Deventer: Kluwer 2012 (there is an English summary at p. 147-153).

a directly actionable private law obligation in itself but operates more in the nature of a pervasive fundamental principle, underlying and justifying other more particular legislative rules¹⁹ and allowing the development of new particular rules by the courts²⁰ – this general approach to the use of general principle and generally-stated duties is not the way in which English law works, nor does a general duty, or principle, of ‘reasonableness and fairness’ fit with the general approach to obligations, or contracts, in English law.

2.1 The use of general principle

English lawyers do refer to ‘principles’ of the law of contract: most commonly, freedom of contract;²¹ and sanctity of contract²² or the binding force of contract.²³ *Chitty on Contracts*,²⁴ the leading practitioner work on the law of contract, even contains within its opening chapter a section headed ‘Fundamental Principles of Contract Law’, identifying a number of legal norms which might be given the label of ‘principle’²⁵ although it is made clear that there is no

19 E.g. DCC Book 6, art. 248, itself a broad provision which allows the contract to be both supplemented and derogated from in a range of contexts, and Book 6, art. 258 (see below, section 3).

20 E.g. the development of the principles of precontractual liability by the Dutch Supreme Court beginning in HR 15 November 1957, ECLI:NL:HR:1957:AG2023 (*Baris/Riezenkamp*) (by entering into negotiations with a view to concluding a contract, the parties come into ‘a special legal relationship, governed by good faith’: *een bijzondere, door de goede trouw beheerste, rechtsverhouding*; M. Hesselink in J. Cartwright & M. Hesselink, *Precontractual Liability in European Private Law*, Cambridge: Cambridge University Press 2008, p. 46-49); and the development by the Dutch Supreme Court of the judicial power to modify the contract in light of unforeseen circumstances, in anticipation of the legislative provision in Book 6, art. 258 of the new Civil Code: J. Chorus, P.-H. Gerver & E. Hondius (eds) *Introduction to Dutch Law for Foreign Lawyers*, 4th revised edn, Alphen aan den Rijn: Kluwer Law International 2006, p. 139. Before the new Civil Code of 1992, the legislature and the courts referred in such contexts to ‘good faith’ (*goede trouw*) which had both an objective sense and a subjective sense. The new Code replaces this terminology with ‘reasonableness and fairness’ (*redelijkheid en billijkheid*) when it is used in the objective sense: Chorus, Gerver & Hondius 2006, p. 138.

21 J. Beatson, A. Burrows & J. Cartwright (eds), *Anson’s Law of Contract*, 29th edn, Oxford: Oxford University Press 2010, p. 4-5; E. Peel (ed.), *Treitel’s Law of Contract*, 14th edn, London: Sweet & Maxwell 2015, par. 1-005; H. Beale (ed.), *Chitty on Contracts*, 32nd edn, London: Sweet & Maxwell 2015, par. 1-026 to 1-027.

22 Beatson, Burrows & Cartwright 2010, p. 7-8.

23 Beale 2015, par. 1-036 to 1-038.

24 Beale 2015, par. 1-025 to 1-056.

25 Beale 2015, par. 1-025: ‘There are a number of norms of the English law of contract of a generality, pervasiveness and importance to have attracted the designation of principle, though such a designation does not have a technical legal significance. A number of legal norms could be advanced as included within such a category of principle, including the principle of privity of contract, the principle of “objectivity” in agreement, and principles of contractual interpretation. However, two linked principles remain of fundamental

technical legal significance to the notion of underlying principles, but that by the two principles of freedom of contract and the binding force of contract:²⁶

‘English law has expressed its attachment to a general vision of contract as the free expression of the choices of the parties which will then be given effect by the law. However, while the modern law still takes these principles as the starting-point of its approach to contracts, it also recognises a host of qualifications on them, some recognised at common law and some created by legislation.’

The language here is significant. Even if we can identify underlying ‘principles’ of contract law, they do not equate to general *duties* imposed by the law on the parties, but form the philosophical basis of the law in this area: the ‘general vision’ of contract, the ‘starting-point’ of the law’s ‘approach to contracts’. This reflects a matter of legal technique in the common law which contrasts in general with the civil law: the reluctance to use general principle as a source of legal duties, and the preference for particular, concrete rules.

Given that the English law of obligations is essentially contained in the common law (case law) rather than statute, it is not surprising that it should not be expressed in broad general principles. The common law of contract is found in the body of cases which have decided particular points arising in litigation between particular parties. Decisions are fact-specific, and the *ratio decidendi* of a case – the legal rule which develops the law and forms a precedent for future cases – is grounded in the facts of the case. Judges may make broad statements of principle and general rules to support their decision, but do not generally formulate the decisions themselves in terms of principle – and so although we can state the general rules of the English law of contract or of tort,²⁷ the way in which we find the rules in the common law is by a process of inductive reasoning from the decided cases, rather than there being a general statement of a rule such as one might expect to find in the text issued by the civil law legislator. This different approach between the traditions is

importance, *viz* the principles of freedom of contract and of the binding force of contract’.

26 Beale 2015, par. 1-025.

27 The English textbooks on the law of contract, or the law of tort, necessarily contain general statements of the relevant principles of the law, in a form not dissimilar to that which one might find in a textbook on the law of obligations in a civil law system. There is, however, a significant difference in the authorities which lie behind the general statements in the text in an English law textbook: in effect, the difference lies in the footnotes. In the common law the authorities from which the textbook writers derive their general statements are usually cases, and often very particular cases for particular points rather than any authoritative general statement of principle for which the cases stand as evidence.

well known and has often been commented upon: for example,²⁸ Roscoe Pound wrote that the common lawyer:²⁹

‘prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals’

and Lord Cooper wrote from the perspective of the Scottish judge:³⁰

‘The civilian naturally reasons from principles to instances, the common lawyer from instances to principles’.

This difference, and its practical effects, must not be overstated, but it remains true to the extent that the English judges do not normally expect to start from general principles but from particular cases; and there is still a natural tendency to use the specific rule, often derived from a specific case, rather than to abandon the specifics in favour of some broader general principle even if it can be derived from the earlier cases.

An illustration can be found in the law of torts. English law does not have a single general principle of tort law, such as that found in art. 162 of the Dutch Civil Code,³¹ but a series of particular torts which have their own

28 The quotations from Roscoe Pound and Lord Cooper are both given by K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd edn, translated by T. Weir, Oxford: Clarendon Press, 1998, p. 259, with a caveat that ‘it would certainly be wrong to make out that there was an unbridgeable opposition between the [Common Law]’s method of inductive problem-solving and the [Civil Law]’s method of systematic conceptualism. Such an antithesis would emphasize the dominant trends and tendencies in the Common Law and Civil Law but, in its absolute form, it would be an increasingly inaccurate and incomplete reflection of what can actually be seen happening in these two great legal families today when lawyers set about the task of discovering the law.’ Zweigert & Kötz 1998, ch. 18 contains a valuable general comparative discussion of the different approaches of common law and civil law legal systems to finding the law, also giving many useful references to other accounts.

29 R. Pound, ‘What is the Common Law?’ in: R. Pound (ed), *The Future of the Common Law*, Cambridge, Mass.: Harvard Law School 1937, p. 19. Pound was Professor at Harvard Law School, and Dean from 1916 to 1936.

30 T.M. Cooper, ‘The Common Law and the Civil Law – A Scot’s View’ *Harvard Law Review* (63) 1950, p. 471. Lord Cooper was Lord Justice General and Lord President of the Court of Sessions of Scotland. Scotland is a ‘mixed’ legal system with influences of both the civil law tradition and the English common law: not codified, but still based heavily on the principles of law set out in the texts of institutional writers of the 17th, 18th and 19th centuries (Stair, Erskine and Bell), and now developed by the courts which have adopted the common law doctrine of precedent: Cooper 1950, p. 472-473; R. Zimmermann, D. Visser & K. Reid (eds), *Mixed Legal Systems in Comparative Perspective – Property and Obligations in Scotland and South Africa*, Oxford: Oxford University Press 2004, p. 8-12.

31 Liability under art. 162 requires proof of unlawfulness, fault, damage and a causal link between the act and the damage; but there are also separate provisions imposing liability for the acts of other persons and for damage caused by things: see Chorus, Gerber & Hondius 2006, p. 145-149. There is no common view amongst civil law systems about the

historical roots.³² In the modern law, the most general of the torts is negligence, although even that tort does not have a single general principle. We can say that that a person is liable for (reasonably foreseeable) damage caused by a breach of a duty of care, but the devil is in the detail, and in particular in the fact that there is no single general test for the existence of a duty of care: the courts begin by considering whether the case in question falls within an established category of duty, for which the authority can be found in particular cases; and they develop beyond those existing categories only cautiously. There are some apparently wide statements of general principle: for example, in *Donoghue v. Stevenson*, the case which is now seen as the origin of the modern tort of negligence Lord Atkin said:³³

‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.’

However, this was no more than an explanation of the common thread uniting the existing cases in the context of the case in hand – the claim by a consumer in respect of personal injury caused by a defective product. Lord Atkin built on the general idea that a person should be liable for foreseeable harm to persons whom he ought reasonably have had in contemplation, but by articulating a very precise rule for the type of case in hand:³⁴

‘if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him

appropriate structure for tortious liability: French law has a very broad principle of liability for damage caused by fault (with in addition strict liability for damage caused by persons and things for which one is responsible) (French Civil Code, art. 1382-1384; the provisions in the old Dutch Civil Code were based on this, and have been developed into the new form of art. 162 ff. of the new Code); German law defines liability for intentional and negligent harm by reference to protected interests (life, body, health, freedom, property or other rights of another person) and for other losses generally requires their intentional infliction contrary to public policy (German Civil Code, s. 823, 826). See generally C. van Dam, *European Tort Law*, 2nd edn, Oxford: Oxford University Press 2013, ch. 3 (France), 4 (Germany); W. van Gerven, J. Lever & P. Larouche, *Tort Law* (Ius Commune Casebooks for the Common Law of Europe), Oxford: Hart Publishing 2001, p. 57-68.

32 See generally van Dam 2013, ch. 5; van Gerven, Lever & Larouche 2001, p. 44-57; W.E. Peel & J. Goudkamp (eds), *Winfield & Jolowicz on Tort*, 19th edn, London: Sweet & Maxwell 2014, p. 35-40, 49-54.

33 House of Lords (Scotland) 26 May 1932 *Donoghue v. Stevenson* [2032] AC 562, p. 580.

34 House of Lords (Scotland) 26 May 1932 *Donoghue v. Stevenson* [2032] AC 562, p. 599.

with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.'

This decision was later applied by analogy to similar cases involving defective products where the defendant was not a manufacturer but was a repairer of a product whose defective workmanship resulted in a risk of injury to the user of the product³⁵ or to a third party;³⁶ or the seller of a second-hand product which resulted in injury to the user.³⁷ Moreover, the decision in *Donoghue v. Stevenson* was later extended beyond the case of products, and in particular from the 1960s onwards it came to be seen as the basis of a general development of the tort of negligence. However, it was still not simply a broad general principle under which a duty of care is based on foreseeability of harm, but was taken as the basis of the development of a series of very carefully particularised duties, which are defined by reference to types of factual situation – duties in relation to statements giving rise to economic loss,³⁸ but not duties in relation to economic loss generally;³⁹ duties to exercise control over third parties;⁴⁰ duties in relation to psychiatric (as opposed to bodily) harm,⁴¹ and so on.⁴² The 'categories of negligence' are not closed, as Lord Macmillan said in *Donoghue v. Stevenson*⁴³ – but although general tests have been devised to ascertain when a duty of care is owed,⁴⁴ there are still *categories* of duty; and the categories are defined by different types of factual situation, and above all their application depends on the particular facts of the case in hand.⁴⁵

35 Court of Appeal 31 July 1941 *Haseldine v. C.A. Daw & Son Ltd* [1941] 2 KB 343.

36 High Court 10 March 1939 *Stennett v. Hancock* [1939] 2 All ER 578.

37 High Court 23 October 1939 *Herschtal v. Stewart and Ardern Ltd* [1940] 1 KB 155; High Court 30 July 1956 *Andrews v. Hopkinson* [1957] 1 QB 229.

38 House of Lords 28 May 1963 *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] AC 465; House of Lords February 8 1990 *Caparo Industries plc v. Dickman* [1990] 2 AC 605.

39 House of Lords 14 July 1988 *D. & F. Estates Ltd v. Church Commissioners for England* [1989] AC 177; House of Lords 26 July 1990 *Murphy v. Brentwood District Council* [1991] 1 AC 398.

40 House of Lords 6 May 1970 *Home Office v. Dorset Yacht Co. Ltd* [1970] AC 1004.

41 House of Lords 28 November 1991 *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310, building on House of Lords 5 August 1942 *Bourhill v. Young* [1943] AC 92.

42 See generally Peel & Goudkamp 2014, ch. 5.

43 [1932] AC 562, p. 619.

44 e.g. House of Lords February 8 1990 *Caparo Industries plc v. Dickman* [1990] 2 AC 605, p. 617-618 (Lord Bridge: 'in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other').

45 See also J. Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, Oxford: Hart Publishing 2013, p. 34-42.

The same general approach can be seen in the law of contract. Judges will sometimes refer explicitly to general principles to explain their reasoning: for example, judges who reject an extension of the scope of mistake as a vitiating factor in contracts may explain that this reflects an underlying principle of the binding force of contract.⁴⁶ But they will not apply the general principle as a primary source of the decision. Even where a judge derives a general principle from a group of established cases which might then be applied in place of the particular cases there is a marked reluctance in the courts to accept the move from the specific to the general. Lord Denning sought to replace certain specific instances of contractual invalidity by a general principle of ‘inequality of bargaining power’.⁴⁷

‘There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms – when the one is so strong in bargaining power and the other so weak – that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court. ...

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on “inequality of bargaining power.” By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.’

This was rejected, however, by Lord Scarman in a later case on the basis that undue influence – one of the existing categories referred to by Lord Denning – is sufficiently developed not to need the support of a general principle; and he doubted ‘whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task – and it is essentially a legislative task – of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve

⁴⁶ House of Lords 15 December 1931 *Bell v. Lever Brothers Ltd* [1932] AC 161, p. 224.

⁴⁷ Court of Appeal 30 July 1974 *Lloyds Bank Ltd v. Bundy* [1975] QB 326, p. 336-337. The specific instances were duress of goods, unconscionable transactions, undue influence, undue pressure and salvage agreements.

against the mischief'.⁴⁸ Those legislative provisions are all specifically targeted; even legislation within the field of contract law is normally specific rather than laying down general principles.

2.2 No general duty of 'reasonableness and fairness' in English contract law

As we have seen above, English courts do not usually apply general principles in deciding cases in private law. In the particular context of contract law, we can add that there is no general principle of 'reasonableness and fairness', and certainly no general duty of 'reasonableness and fairness' of the kind stated in art. 2.1 of Book 6 of the Dutch Civil Code. This can be seen in *Chitty on Contracts* which, having discussed the 'fundamental principles' of freedom of contract and the binding force of contract,⁴⁹ goes on to note that, by contrast with civil law jurisdictions, and EU law, and even with some other common law systems, English common law does not recognise a general principle of 'good faith', or 'good faith and fair dealing'.⁵⁰ The standard of 'reasonableness' or the 'reasonable man' is used within the law of contract; but it is used for particular purposes, or in particular contexts, and not as an overarching general principle nor can it be translated into a general duty of 'good faith' or 'reasonableness and fairness'.

The standard of 'reasonableness' is used in interpreting contracts and contractual communications. A person is held to have intended not what he in fact meant his words to say, but what a reasonable person in the position of the recipient would have understood them to mean.⁵¹ But this does not mean that there is any overriding general rule the terms of the contract must in themselves be 'reasonable' or 'fair'. There is such a rule for certain types of clause, in particular types of contract – the most general being the requirement for terms (except the definition of the main subject matter and the adequacy of the price) not to be 'unfair' within the legislation governing

48 House of Lords 7 March 1985 *National Westminster Bank Ltd v. Morgan* [1985] AC 686, p. 708. See also Privy Council 9 April 1979 *Pao On v. Lau Yiu Long* [1980] AC 614, p. 634, where Lord Scarman rejected an argument that there was a rule of public policy by which unequal bargaining could be controlled in the absence of duress proved in accordance with the established cases: 'Such a rule of public policy as is now being considered would be unhelpful because it would render the law uncertain. It would become a question of fact and degree to determine in each case whether there had been, short of duress, an unfair use of a strong bargaining position'.

49 Beale 2015, par. 1-025, quoted above, n. 25.

50 Beale 2015, par. 1-025, 1-039 to 1-056.

51 For the interpretation of communications between negotiating parties, the 'reasonable man' is placed in the position of the other party; for the interpretation of written instruments the 'reasonable man' is rather more external, reading the instrument with knowledge of its context but not of what the parties themselves intended by their words: above, n. 4.

consumer contracts;⁵² but even this broad category is a targeted protection of a class of contracting parties (consumers), and is effected by a particular legislative rule, rather than by a rule of the common law: the courts may find ways to protect parties against unfair terms in certain situations, but they have rejected the idea that the common law should have a general rule requiring the terms to be reasonable, or giving the courts the power to strike down terms on the basis of substantive unfairness.⁵³ As we have already seen, the courts have rejected a general principle of ‘inequality of bargaining power’ in favour of the application of particular rules regulating specific forms of misconduct between parties negotiating a contract. There are specific categories of misconduct, such as misrepresentation, duress, and undue influence: but these have their own individual rules and have not become generalised into a broader principle.⁵⁴ Sometimes the common law does require a particular type of term to be ‘reasonable’: for example, a term in an employment contract restricting the employee’s work for third parties after the employment is terminated must be reasonable in both its physical scope and the time of its operation if it is not to be unenforceable as being in restraint of trade.⁵⁵ Such cases are the exception, however, rather than the rule.

A general duty on contracting parties to act in good faith, or ‘reasonably and fairly’, can be translated into duties to act in good faith in the negotiation, performance and enforcement of the contract. Dutch law is not alone in recognising such duties, which (in particular ways and with differences of detail and of nuance) are generally known and accepted amongst continental civil law jurisdictions.⁵⁶ English law, however, admits neither the general duty to act in good faith nor the more particular duties to negotiate, perform and enforce one’s contractual rights and remedies in good faith. There are particular types of contract where the courts have determined that the nature of the relationship between the parties is such that they should owe each other general duties of good faith in the negotiation and performance of the contract:

52 Consumer Rights Act 2015, Part 2; above, n. 9. For the control of exemption clauses in non-consumer contracts by a test of ‘reasonableness’ see Unfair Contract Terms Act 1977; above, n. 8.

53 Privy Council 22 May 1985 *Hart v O’Connor* [1985] AC 1000, p. 1018 (‘Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing’).

54 See the rejection of Lord Denning’s approach in *Lloyds Bank Ltd v Bundy* [1975] QB 326, above, n. 47, by Lord Scarman in *National Westminster Bank Ltd v Morgan* [1985] AC 686 (preferring to apply the rules of undue influence); *Pao On v Lau Yiu Long* [1980] AC 614 (duress); above, n. 48.

55 House of Lords 8 February 1916 *Herbert Morris v Saxelby* [1916] 1 AC 688.

56 In relation to precontractual duties, see generally Cartwright & Hesselink 2008 with case studies of 16 jurisdictions, and esp. p. 461-470 discussing English law and Dutch law as the two European jurisdictions with apparently the most marked differences of approach.

most obviously, a contract of partnership,⁵⁷ but also traditionally this was also applied to insurance contracts which are described as contracts *uberrimae fidei* – of ‘utmost good faith’.⁵⁸ However, these are the exception rather than the rule; and the courts do not accept a general principle that the parties must act reasonably, fairly or in good faith in their negotiations for a contract. In *Walford v. Miles* Lord Ackner said:⁵⁹

‘the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.’

If one party commits a recognised, actionable wrong during the course of the negotiations, such as a misrepresentation, then the other party will have a remedy. But there is no general positive duty of good faith.⁶⁰

Similarly, in English law⁶¹ there is no general positive duty of good faith during the performance of a contract, although recently a trial judge has said that he sees no reason why the courts could not more easily find an implied term of good faith in contracts, even commercial contracts:⁶²

‘Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between

57 Court of Appeal 20 December 2006 *Conlon v. Simms* [2006] EWCA Civ 1749, [2008] 1 WLR 484.

58 Marine Insurance Act 1906, s. 17; King’s Bench *Carter v. Boehm* (1766) 3 Burr. 1906, p. 1909-1910. The parties’ mutual duties of disclosure which flowed from this duty of good faith have however now been removed (for consumer insurance contracts) or replaced by more particularised duties (for commercial insurance contracts): Consumer Insurance (Disclosure and Representations) Act 2012, s. 2; Insurance Act 2015, s. 14 and Part 2.

59 House of Lords 23 January 1992 *Walford v. Miles* [1992] 2 AC 128, p. 138.

60 Nor does English law impose other positive duties during the negotiations which might be derived from a general duty of good faith, such as duties of disclosure: the general rule is that there is no liability for non-disclosure unless there is a particular duty of disclosure by reason of the type of contract or the relationship between the parties: Beatson, Burrows & Cartwright 2012, p. 332-347.

61 This is an even stricter approach than in some other common law jurisdictions: e.g. in the United States the Uniform Commercial Code (2002) §1-304 provides that ‘Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement’, ‘good faith’ being defined as generally meaning ‘honesty in fact and the observance of reasonable commercial standards of fair dealing’: §1-201(b)(20). See also Restatement of Contracts Second (1981) §205; E.A. Farnsworth, *Contracts*, 4th edn, New York: Aspen 2004, §7.17, noting that ‘some courts, concerned lest the doctrine of good faith get out of hand, have imposed a judicially fashioned restriction under which the doctrine does not create “independent” rights separate from those created by the provisions of the contract’, although ‘not all courts have been so respectful of the express provisions of the contract’.

62 High Court 1 February 2013 *Yam Seng Pte Ltd v. International Trade Corp. Ltd* [2013] EWHC 111 (QB), [2013] 1 CLC 662, par. 132 (Leggatt J.).

partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.’

This statement does not go so far as to argue for a general principle of good faith in contracts, and apart from the context of ‘relational contracts’⁶³ it has been received with some scepticism.⁶⁴

3 ‘REASONABLENESS AND FAIRNESS’ AS A STANDARD TO FILL OUT THE TERMS OF A CONTRACT, OR TO MODIFY ITS EFFECTS OR DISAPPLY OTHERWISE BINDING RULES

In the context of contracts, by virtue of art. 248 of Book 6 of the Dutch Civil Code, the general principle of ‘reasonableness and fairness’ has both a ‘supplementing’ function, and a ‘derogating’ function: it can be used as the justification for filling out the terms of the contract, and for modifying the effects of

63 High Court 2 July 2014 *Bristol Groundschool Ltd v Whittingham* [2014] EWHC 2145 (Ch), par. 196, following the reference of Leggatt J. to relational contracts in *Yam Seng* [2013] EWHC 111 (QB), [2013] 1 CLC 662, par. 142: ‘a longer term relationship between the parties which they make a substantial commitment. Such “relational” contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements’. In High Court 13 February 2015 *D & G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB), par. 175 Dove J. preferred to use the term ‘integrity’, rather than ‘good faith’, ‘to capture the requirements of fair dealing and transparency’ in a long-term relational contract.

64 See, e.g. Court of Appeal 15 March 2013 *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, par. 105, 150 (discussing an express term to co-operate in good faith); High Court 8 May 2013 *TSG Building Services plc v. South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), par. 46 (Akenhead J.: ‘Because cases and contracts are sensitive to context, I would not draw any principle from this extremely illuminating and interesting judgment which is of general application to all commercial contracts’); High Court 31 October 2013 *Hamsard 3147 Ltd v. Boots UK Ltd* [2013] EWHC 3251 (Pat), par. 86 (Norris J.: ‘I do not regard the decision in *Yam Seng Pte Ltd v. International Trade Corporation* as authority for the proposition that in commercial contracts it may be taken to be the presumed intention of the parties that there is a general obligation of “good faith”’).

the contract or disapplying rules binding on the parties as a result of the contract.⁶⁵

All legal systems need some form of ‘supplementing’ function in their law of contract, if only because the parties to a contract will often not fully articulate their intentions, or will fail to consider whether certain provisions might be necessary which turn out to be important in the performance of the contract. English lawyers see this in a doctrine of *implied terms*, but there is a certain restraint. Terms are implied into contracts on the facts to give effect to the intentions of the parties, or to what the parties can (objectively) be taken to have intended,⁶⁶ and sometimes terms are implied by law by reason of the nature of the contract, often to protect one party to such a contract;⁶⁷ and as a rule a term cannot be implied which would contradict an express term, so the parties’ freedom of contract is the clear starting-point (and often the end-point).⁶⁸ But there is no general principle by which a term will be implied on the facts into a contract simply on the basis that the term would be ‘reasonable’;⁶⁹ and, as we have seen above, there is no term implied by law into all contracts requiring the parties to perform the contract in good faith.⁷⁰

In relation to the ‘derogating’ function of the principle of ‘reasonableness and fairness’ within Dutch law we see a sharply different view in England. Indeed, when the courts have been faced with arguments that a party should be dispensed from a general rule of contract law on the basis that to do so would be ‘fair’, or ‘reasonable’, or ‘equitable’, there has been a clear tendency to reject the argument on the basis that it undermines the security of contracts. The rules of ‘Equity’ – those devised by the Courts of Equity from the fifteenth century onwards, to mitigate the strict rules applied by the Common Law

65 DCC Book 6, art. 248: 1 (supplementing), 248: 2 (derogating), quoted above, section 1. See generally Chorus, Gerver & Hondius 2006, p. 137-140; A.S. Hartkamp, M.M.M. Tillema & A.E.B. ter Heide, *Contract Law in the Netherlands*, 3rd edn, Alphen aan den Rijn: Wolters Kluwer Law & Business 2011, par. 32.

66 See, e.g. Privy Council 18 March 2009 *Attorney General of Belize v. Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, par. 27 (Lord Hoffmann: ‘the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant’).

67 E.g. terms in leases requiring landlords to maintain property in favour of residential tenants: House of Lords 31 March 1976 *Liverpool City Council v. Irwin* [1977] AC 239; Landlord and Tenant Act 1985, s.11.

68 The exceptions are where by statute a party is not permitted to exclude or restrict liability for breach of a particular kind of term implied by law, usually designed to protect a type of contracting party (such as consumers).

69 House of Lords 31 March 1976 *Liverpool City Council v. Irwin* [1977] AC 239, p. 253-254 (Lord Wilberforce, rejecting such a principle stated by Lord Denning M.R. in the Court of Appeal on the basis that it would ‘extend a long, and undesirable, way beyond sound authority’).

70 High Court 1 February 2013 *Yam Seng Pte Ltd v. International Trade Corp. Ltd* [2013] EWHC 111 (QB), [2013] 1 CLC 662, par. 132 (Leggatt J.); above, n. 62.

Courts⁷¹ – may have been motivated by the desire to inject fairness into the body of legal rules in our legal system, including the law of contract.⁷² But they have crystallised into rules in the modern law, and there is no general power in the courts to ‘do equity’ in individual cases.⁷³

A good illustration of this is *Union Eagle Ltd v. Golden Achievement Ltd* where the Privy Council rejected an argument that the seller of a flat in Hong Kong should not be entitled to forfeit the buyer’s deposit and rescind the contract of sale where the buyer missed by only ten minutes the deadline set in the contract to tender the balance of the purchase price. The argument was that the court should have power to dispense from the strict terms of the contract where their operation would be ‘unconscionable’. Lord Hoffmann noted that there are circumstances when the courts can relieve against forfeiture of property rights, but rejected the argument here and as a matter of general principle:⁷⁴

‘The notion that the court’s jurisdiction to grant relief is “unlimited and unfettered” (per Lord Simon of Glaisdale in *Shiloh Spinners Ltd v. Harding*⁷⁵) was rejected as a “beguiling heresy” by the House of Lords in *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana (The Scaptrade)*.⁷⁶ It is worth pausing to notice why it continues to beguile and why it is a heresy. It has the obvious merit of allowing the court to impose what it considers to be a fair solution in the individual case. The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see per Lord Radcliffe in *Campbell Discount Co. Ltd v. Bridge*⁷⁷) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be “unconscionable” is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation

71 J.H. Baker, *An Introduction to English Legal History* London: Butterworths LexisNexis 2002, ch. 6.

72 Equitable doctrines and rules in contract law include the remedies of specific performance and injunction, and rectification of a written contract; and a broader right to rescission of a contract in equity for misrepresentation (even innocent: the common law required fraud) and undue influence (the common law allowed rescission only for the more narrowly-defined duress): Beatson, Burrows & Cartwright 2010, p. 575-584, 262-265, 311, 349.

73 Cartwright 2013, p. 5-8.

74 Privy Council 3 February 1997 *Union Eagle Ltd v. Golden Achievement Ltd* [1997] AC 514, p. 518-519.

75 House of Lords 13 December 1972 *Shiloh Spinners Ltd v. Harding* [1973] AC 691, p. 726.

76 House of Lords 30 June 1983 *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694, p. 700.

77 House of Lords 25 January 1962 *Campbell Discount Co. Ltd v. Bridge* [1962] AC 600, p. 626.

to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.'

This is evidence against the proposition that a party must act reasonably and fairly, or in good faith, in exercising his contractual rights and the remedies provided by the law or expressly by the contract for the other party's breach. It does not mean that the courts cannot sometimes find solutions which lean in favour of finding a 'fair', 'reasonable' or 'equitable' result where they are able to use the established general rules of contract law in order to achieve a specific targeted result in an individual case.⁷⁸ Our judges are not immune to feeling that the law needs sometimes to be softened at the edges. But they reject the idea that there is a general power to allow them to dispense a party from the contract simply on the basis of a principle of reasonableness or fairness.

Similarly, the courts have rejected the idea that a party who makes a mistake about the subject-matter of the contract should be able to avoid the contract on the basis of a judicially-operated principle of fairness. Lord Denning proposed an approach to mistake based on fairness,⁷⁹ but this was contrary to an earlier clear statement by Lord Atkin in the House of Lords:⁸⁰

'All these cases involve hardship on A. and benefit B., as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts – i.e., agree in the same terms on the same subject-matter – they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them. ...

The result is that in the present case servants unfaithful in some of their work retain large compensation which some will think they do not deserve. Nevertheless it is of greater importance that well established principles of contract should be

78 For example, they may be able to interpret a contract term so as to achieve a fair result, even if it appears to be drafted to the contrary: Court of Appeal 30 June 2000 *Rice v. Great Yarmouth Borough Council* (2001) 3 *LGLR* 4 (clause allowing local authority to terminate 4-year contract with sole trader if 'the contractor ... commits a breach of any of its obligations under the contract' was construed as referring only to breaches sufficient to allow termination of a contract under the general law); S. Whittaker, 'Termination Clauses' in: A. Burrows & E. Peel (eds), *Contract Terms* Oxford: Oxford University Press 2007, p. 253.

79 Court of Appeal 25 November 1949 *Solle v Butcher* [1950] 1 *KB* 671, p. 692 ('the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscionable for the other party to avail himself of the legal advantage which he had obtained').

80 House of Lords 15 December 1931 *Bell v. Lever Brothers Ltd* [1932] *AC* 161, p. 229 (discussing both hypothetical cases of mistakes and the facts of the case itself, in which the House of Lords held that the parties' mistake was not sufficient to avoid the contract).

maintained than that a particular hardship should be redressed; and I see no way of giving relief to the plaintiffs in the present circumstances except by confiding to the Courts loose powers of introducing terms into contracts which would only serve to introduce doubt and confusion where certainty is essential.’

The stricter approach set out by Lord Atkin was reasserted, and Lord Denning’s broader approach was rejected, by the Court of Appeal in 2002.⁸¹ The Court noted that Lord Denning’s preferred equitable jurisdiction to grant rescission for mistake would give greater flexibility than the narrower common law doctrine of mistake but thought that the courts could not develop it, although there was scope for legislation on the point – but, as always, what the Court clearly had in mind was a specific legislative provision for mistake, and not any broader general legislative principle of reasonableness and fairness.⁸²

In addition to the general provision relating to ‘reasonableness and fairness’ in contracts under art. 248 of the Dutch Civil Code, there is also a more particular provision relating to change of circumstances in art. 258, where the court has power to modify the terms of the contract on the basis of ‘reasonableness and fairness’:⁸³

- ‘1. Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.
2. The modification or the setting aside shall not be pronounced to the extent that it is common ground that the person invoking the circumstances should be accountable for them or if this follows from the nature of the contract.
3. For the purposes of this article, a party to whom a contractual right or obligation has been transmitted, is treated as a contracting party.’

Every legal system needs to determine the appropriate provision to be made in the case of a significant change of circumstances during the performance of a contract, whether such a change has the drastic effect of rendering performance accordance with the terms entirely (physically) impossible, or merely makes some change in the nature or value of the contractual performance. The English common law developed the doctrine of ‘frustration’ for this case: if the performance of the contract becomes impossible, illegal, or ‘radically different’ as a result of an unforeseeable change of circumstances for which

81 Court of Appeal 14 October 2002 *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, par. 156-157, 160.

82 Court of Appeal 14 October 2002 *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, par. 161.

83 DCC Book 6, art. 258.

the contract makes no provision, the contractual obligations of both parties are automatically discharged in so far as they had not yet fallen due for performance;⁸⁴ and there is provision by statute for the court to have the power to make limited financial orders for repayment of money already paid under the contract, and for a party to pay for benefits already received under the contract.⁸⁵ The point to notice for present purposes, however, is that the court's role in the doctrine of frustration is limited: in the event of dispute it can adjudicate on whether the test for frustration has been satisfied; and it has a statutory power to determine (on a discretionary basis) certain particular aspects of the financial consequences of the discharge of the contract. But it has no power to intervene so as to change the terms of the contract itself. There are cases where a court has found a way of intervening indirectly, not by changing the terms but by interpreting the contract, or by implying terms, so as to decide that the contract in fact (objectively) provided for the change of circumstances.⁸⁶ But the idea that the court should have an express power to modify the contract or its effects, in the broad way described in art. 258 of the Dutch Civil Code, is simply unthinkable. The contract is for the parties; and even in the most extreme cases where performance becomes impossible or radically different, the most that the law can do is to terminate the contract to discharge the parties and leave them to re-negotiate their transaction in the light of the changed circumstances. Indeed, that is what the doctrine of frustration does within English law: it encourages the parties either to make provision within their contract for future events, in so far as they can do so; or to sort out the consequences of the change by renegotiation when the change occurs.⁸⁷ And in such a renegotiation – unlike in Dutch law⁸⁸ – the parties are free to act in their own interests: there is no general duty to negotiate in good faith, or to take the other party's interests into account in the negotiations; nor is there any duty to *re-negotiate* in good faith in light of change of circumstances.⁸⁹ This further highlights the different understanding of English and Dutch law in relation to the positions of the parties, as well as the role of the court, in solving the problems which arise in such cases.⁹⁰

84 Beale 2012, ch. 23; Beatson, Burrows & Cartwright 2010, ch. 14; Cartwright 2013, ch. 11.

85 Law Reform (Frustrated Contracts) Act 1943.

86 E.g. Court of Appeal 2 May 1978 *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* [1978] 1 WLR 1387 (long-term contract to supply water at fixed price could be terminated by notice, either on basis of interpretation of the contract, or implied term).

87 E. McKendrick, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in: A. Burrows & E. Peel (eds), *Contract Terms* Oxford: Oxford University Press 2007, p. 233.

88 cf. HR 15 November 1957, ECLI:NL:HR:1957:AG2023 (*Baris/Riezenkamp*), above, n. 20.

89 House of Lords 23 January 1992 *Walford v. Miles* [1992] 2 AC 128, p. 138 (above, n. 59). Even an express term of the contract requiring the parties to renegotiate is not effective in English law, although the courts are uncomfortable with this: Court of Appeal 15 July 2005 *Petromec Inc v. Petroleo Brasileiro SA* [2006] 1 Lloyd's Rep. 121, par. 121.

90 Bakker 2012, ch. 4 argues that DCC Book 6, art. 258 expresses the parties' own duty to act reasonably and fairly to solve the problems arising from the change of circumstances.

4 CONCLUSIONS

The use of a general standard, or norm, of ‘reasonableness and fairness’ feels natural – indeed, instinctive – to the Dutch lawyer; and both its articulation as a general duty, and its translation into particular rules of contract law, seem to be equally natural and instinctive. The Dutch Civil Code identifies the content of the requirement of ‘reasonableness and fairness’ in the general provisions at the start of Book 3 (Property Law):⁹¹

‘In determining what reasonableness and fairness require, generally accepted principles of law, current judicial views in the Netherlands and the societal and private interests involved in the case must be taken into account.’

Dutch lawyers explain this further in different ways, but it is not out of line for one to write:⁹²

‘Society cannot do without reasonableness and the legal community cannot do without the principle of reasonableness and fairness, which is based on this societal norm.’

English law does not share the same vision, at least in the context of the legal duties owed by parties in private law. We have seen that this results from a number of different factors. In the first place, English law prefers to use particular rules to identify particular legal responses, rather than deriving the answer for a case from a broad general principle. This may be a natural consequence of a case-law method such as typifies the common law, but even legislative intervention in England tends to be particular rather than laying down general principles as the source of legal rules.

Secondly, in the context of contracts the approach of the courts to intervention is generally rather restrained. There is a general view that it is for the parties to determine their bargain rather than for the courts, and as long as there is no particular misconduct by either party (such as fraud or duress in its formation) the parties should be free to regulate their own affairs. There are exceptions, often to protect particular classes of contracting parties (the broadest class being consumers) or where the contract is of a type which justifies closer judicial control. But these are exceptions to the general rule, which is based on the parties’ freedom of contract.

Thirdly, there is a clear view that if the courts had the freedom to intervene in contracts on the basis of some general principle such as ‘reasonableness and fairness’ this would undermine the certainty and security of contracts.

91 DCC Book 3, art. 12.

92 Bakker 2012, p. 153.

Even the power to intervene only in extreme cases⁹³ would be enough to open the door to parties claiming that their case was the one in which the court should exercise the power in their favour; so it is better to take a tough line for all at the expense of a few individual hard cases.

We cannot simply weigh these different views of the two legal systems against each other and conclude that one is right, the other wrong. The reality is that they represent different visions of contract, but we must not make the mistake of placing our systems in direct opposition, as if English law did not see any place for reasonableness and fairness, or Dutch law failed to respect freedom of contract, and certainty and sanctity of contract. The law of contract in any legal system must contain aspects of both views: there will be contracts where certainty is paramount, and the courts should not only hesitate to intervene but should simply not intervene on the basis that it is for the parties to determine their own affairs—such cases are typically those between commercial parties who negotiate at arm's length and for whom no paternalistic intervention is appropriate. But in all systems there are other cases where the contract is of a kind where the parties (or, generally, one of the parties) needs some protection by the courts' intervention, and one way for the courts to do this is to apply some overriding general rule based on fairness or reasonableness which can allow it to intervene in cases which do not have to be contained within the straightjacket of particular rules. However, in formulating its rules of contract law, a legal system needs to adopt a paradigm case: is a contract seen at its core as a co-operative venture between parties who in the creation, formation and enforcement of their venture can be expected to meet certain objectively-definable standards of behaviour? Or is it an arm's length commercial transaction, in which the parties are in principle entitled to determine their own risks and rewards, free from external intervention? English law has protective rules, for individual types of contract and individual types of contracting party – and in the modern law the range and scope of such protective rules, particularly in the case of non-commercial contracts, has grown very significantly. But the paradigm case of a contract in English law remains the arm's length commercial transaction; and given the general reluctance of the English courts to abandon particular duties in favour of a general principle as a source of legal obligation, it seems inherently unlikely that the English courts would wish to turn the particular protective rules within the sphere of contract law into an overriding general principle so as to reverse the paradigm business model.

93 In Dutch law the 'derogating' function of the principle of reasonableness and fairness under DCC Book 6, art. 248:2 can be applied only where the rule otherwise binding on the parties is 'unacceptable' (*onaanvaardbaar*): this 'indicates that such a decision should be reserved for exceptional situations, but even so the provision is frequently applied by the courts': Chorus, Gerber & Hondius 2006, p. 138.

Why does this difference in the two systems' vision of contracts matter? It is of course significant for parties negotiating a contract in relation to choice of law in cross-border transactions. But it may also help to explain the coolness (to say the least) of the reaction in England to proposals in recent years to harmonise the law of contract in Europe. For example, article 2 of the proposed Common European Sales Law provided:⁹⁴

- '1. Each party has a duty to act in accordance with good faith and fair dealing.
2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
3. The parties may not exclude the application of this Article or derogate from or vary its effect.'

The Dutch lawyer should see no difficulty with this: it fits the Dutch model of contract and its use of general principle as a source of legal duties to give effect to a basic underlying principle of the law. It is not so, however, for the English lawyer.

94 COM(2011) 635 final *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Annex 1, art. 2 ('Good faith and fair dealing'). See also O. Lando & H. Beale, *Principles of European Contract Law Parts I and II*, The Hague, Kluwer Law International 2000, art. 1:201; C. von Bar & E. Clive (eds), *Principles Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition* Munich: Sellier 2009, III.-1:103.