De bescherming van immateriële contractuele belangen in het schadevergoedingsrecht

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Summary (Engelse samenvatting)

THE PROTECTION OF NON-PECUNIARY CONTRACTUAL INTERESTS WITHIN THE LAW OF DAMAGES

1 *Non-pecuniary contractual interest and non-pecuniary benefits*

Parties enter into a contract for a reason. A company usually aims to make profit. A consumer, on the other hand, does not necessarily pursue any economic benefits, but rather aims for pleasure, enjoyment or relaxation: booking a holiday at a travel agency may merely serve to achieve fun, engaging a wedding photographer may help to share memories. A breach of contract by the other party can harm the innocent party's non-pecuniary interests in a contract: the flight to the holiday destination is cancelled, the wedding photos are hideous.

This thesis is about the protection of non-pecuniary contractual interests within the Dutch law of damages. Its aim is twofold. First, it describes and compares the gradual development of the right to damages for the loss of a non-pecuniary benefit in the Netherlands. Second, it evaluates the law and defends the proposition that in Dutch law a party should have a general right to damages for the loss of a non-pecuniary benefit when they fail to obtain this benefit due to a breach of contract by the other party.

Chapter 1 provides an outline of the subject matter and the aims of the thesis, explaining why it is relevant to conduct legal research on the right to damages for the loss of a non-pecuniary benefit. Until recently, non-pecuniary contractual benefits did not receive much attention in Dutch legal literature or case law. This changed in recent years due to some remarkable decisions by the Supreme Court which led to certain questions. For example, whether the loss of a non-pecuniary benefit constitutes a pecuniary or a non-pecuniary loss. Also, whether a party should have a right to damages for such a loss and, if so, which conditions have to be fulfilled, and how the quantum of damages should be assessed. German and English law face similar questions. Moreover, in these neighbouring legal systems, the law of damages is arguably more developed than here in the Netherlands. For that reason, it is useful to compare Dutch law with German and English law.

Chapter 2 explores both the concept of non-pecuniary contractual interest and the concept of non-pecuniary benefits in more detail. As everyone has

different needs and desires in life, the non-pecuniary contractual interests that parties may have in a contract can also vary widely. Despite this heterogeneity of non-pecuniary contractual interests, it is possible to draw some general conclusions about non-pecuniary contractual interests and non-pecuniary benefits (§ 2.1). First, it is explained that contractual rights should be distinguished from contractual interests. A contractual right merely tells us *what* a party is entitled to; for instance a flight to Spain and a stay in a hotel near the beach. Their contractual interest, on the other hand, is the reason *why* they bargained for this right. A party books a holiday, for example, in order to have an enjoyable time in Spain (§ 2.2). This thesis focuses on the non-pecuniary interests that parties may have in a contract. Sometimes the aim of a contract is not to acquire more wealth, but to obtain a non-pecuniary benefit. A breach of that contract may result in a loss of the non-pecuniary benefit that this party had hoped to obtain (§ 2.3). Economic literature helps us to calculate what such a missed non-pecuniary benefit is worth to a party. According to these authors, a non-pecuniary benefit is at least worth the expenditure that a party has incurred to obtain it. If the costs of obtaining a non-pecuniary benefit outweigh the subjective value that a party attaches to that benefit, they would never have incurred these expenses at all. The incurred expenses can be divided between the price paid to the other party to the contract and sums of money paid to third parties in order to obtain a non-pecuniary benefit. Moreover, in most cases it is safe to assume that the non-pecuniary benefit has a higher value for a party than the expenditure they must incur to obtain it. A party hopes to achieve a consumer surplus with the contract or, to put it differently, 'a non-pecuniary net profit'. This net profit is the difference between the costs necessary to obtain a non-pecuniary benefit and the costs a party is willing to incur for that benefit – in other words, their willingness to pay (§ 2.4).

2 *A non-pecuniary loss?*

The second part of the thesis explores the question whether a party is entitled to damages for non-pecuniary losses when they fail to obtain a non-pecuniary contractual benefit due to a breach of contract. As the loss of such a benefit does not make the innocent party financially worse off , they arguably suffer a non-pecuniary loss.

Chapter 3 explains that in Dutch law, an innocent party's options to claim damages for non-pecuniary losses are limited when they fail to obtain a non-pecuniary benefit due to a breach of contract. Damages for non-pecuniary losses can only be awarded when a statutory provision allows for such an award. The Dutch Civil Code only does so in a limited number of cases. Moreover, it is a firmly established principle in case law that an innocent party does not have a right to damages for non-pecuniary losses when they suffer 'more or less severe discomfort' as a result of a breach of contract. Losing a

non-pecuniary contractual benefit usually qualifies as such discomfort, meaning that a party cannot successfully claim damages for a non-pecuniary loss in such cases (§ 3.2). An exception to this general principle is the right to damages for the non-pecuniary loss of the enjoyment of a holiday. When a travel agency breaches its contractual obligation to arrange a package holiday, their client is entitled to damages for non-pecuniary losses (§ 3.3). Moreover, as a result of a more extensive interpretation of the Dutch Civil Code by the courts, an innocent party is also entitled to damages for non-pecuniary losses when their fundamental personal rights are infringed by the other party. It is not yet entirely clear what the scope of this relatively new right to damages for non-pecuniary losses is. However, recent case law shows that it gives the party who fails to obtain a non-pecuniary contractual benefit an opportunity to claim damages for non-pecuniary losses, but only when the breach of contract by the other party also constitutes an infringement of their personal rights (§ 3.4). Despite these recent developments in case law, damages for non-pecuniary losses remain an exception in Dutch law.

In *chapter 4,* it is explained that the options to successfully claim damages for non-pecuniary losses when a party fails to obtain a non-pecuniary benefit are equally, if not more, limited in German law. Traditionally, the innocent party is not entitled to damages for non-pecuniary losses resulting from a breach of contract. In recent literature, some authors have argued that an exception to this general principle should be made for contracts that have the aim to protect (*Schutzzweck*) the non-pecuniary contractual interests of the innocent party. This contractual goal can follow from the nature of a contract, as it is sometimes evidently clear that the innocent party aims to obtain a non-pecuniary benefit with the contract, for example when a consumer books a holiday through a travel agency. In other cases, it can be derived from statements of the innocent party during the negotiations, terms and other circumstances that the innocent party's aim with a contract is to obtain a non-pecuniary benefit. However, this proposed exception has not been accepted in German law to this day (§ 4.2). The German Civil Code only makes an exception for the non-pecuniary loss of pleasure of a holiday due to a breach of contract by a travel agency. In older case law, the disappointed tourist was entitled to damages for their wasted paid holiday leave, which was qualified by the courts as a pecuniary loss. Gradually, this entitlement transformed to become a right to damages for the non-pecuniary loss of a pleasurable holiday. Nowadays, this right is codified in the section on package holidays of the German Civil Code, but is applied more broadly by the courts (§ 4.3). Just after the turn of the millennium, the right to damages for non-pecuniary losses resulting from a breach of contract was broadened further in the German Civil Code. Currently, a party is entitled to damages for non-pecuniary losses resulting from a breach of contract when it results in an infringement of their body, health, freedom or sexuality. For innocent parties who fail to obtain a non-pecuniary benefit due to a breach of contract, this new right to damages forms

a modest improvement of their position, especially since the newly-enacted provision has been interpreted strictly in case law (§ 4.4). In Germany, damages for non-pecuniary losses remain an exception too (§ 4.5).

Chapter 5 is about the right to damages for non-pecuniary losses in English law. To this day, the general principle is that an innocent party is not entitled to damages for non-pecuniary losses when they claim damages for breach of contract (§ 5.2). However, two exceptions to this general rule have been accepted by the courts, both of which are interpreted relatively broadly. The oldest exception is that a party is entitled to damages for their non-pecuniary losses when a breach of contract results in physical inconvenience. Physical inconvenience is interpreted broadly. Nuisance can also qualify as such (§ 5.3). Since the 1970s, a new exception to the general rule has gradually developed in case law. An innocent party is also entitled to damages for non-pecuniary losses when the object of the contract is to provide them with a non-pecuniary benefit, such as pleasure, relaxation or peace of mind, and they fail to obtain that benefit due to a breach of contract by the other party. The origins of this exception lie in cases about spoiled holidays, but over the course of the years it has been applied more generally. Moreover, a party is also entitled to damages for non-pecuniary losses when obtaining a non-pecuniary benefit is an important object of the breached contract, even if it is not the sole object. Sometimes it follows from the nature of a contract that its object is to provide the innocent party with a non-pecuniary benefit. In other cases, it can be derived from statements, contractual provisions, and other circumstances that the innocent party aims to obtain a non-pecuniary benefit. Due to these two exceptions, an innocent party has ample possibilities to successfully claim damages for non-pecuniary losses when they fail to obtain a non-pecuniary benefit due to a breach of contract. According to a part of English literature, the two exceptions undermine the general rule to a great extent. Some authors even argue that English law should depart from it and accept a general right to damages for non-pecuniary losses resulting from a breach of contract (§ 5.4).

3 *Or a pecuniary loss?*

At first glance, English law seems to provide parties with more options than Dutch and German law to successfully claim damages for failing to obtain a non-pecuniary benefit as a result of a breach of contract. This first impression, however, is misleading. Dutch and German law also provide parties who fail to obtain a non-pecuniary benefit due to a breach of contract, with plenty of options to claim damages. In both legal systems, the concept of pecuniary losses has been interpreted so generously that failing to obtain a non-pecuniary benefit due to a breach of contract can qualify as a recoverable pecuniary loss. The third part of this thesis deals with this expanded interpretation of the concept of pecuniary losses.

Chapter 6 discusses how within Dutch law a broad interpretation of pecuniary losses has gradually become accepted. First, it became the dominant view in legal literature that the loss of a non-pecuniary benefit forms a pecuniary loss. In order to obtain a non-pecuniary benefit, for example the pleasure of a holiday or a contract, the innocent party usually has to incur expenses. In other words, non-pecuniary benefits have a market value. Losing such a benefit therefore results in a pecuniary loss, according to Dutch literature, as the innocent party loses something with an economic value (§ 6.2). Although their assets do not diminish due to the breach of contract by the other party, their loss should be qualified as a pecuniary one. After the enactment of the New Civil Code, the Supreme Court also accepted this broad interpretation. It decided that a missed non-pecuniary benefit qualifies as a pecuniary loss. The quantum of this loss should in general be assessed on the basis of the expenses that a party has incurred to obtain the benefit that they failed to obtain due to the breach of contract. The Supreme Court seems to have accepted the broad interpretation of the concept of pecuniary losses generally and without any substantive additional restrictions. In Dutch law, an innocent party who fails to obtain a non-pecuniary benefit due to a breach of contract by the other party, seems to have a general right to a sum of damages equal to the expenses they incurred to obtain that benefit (§ 6.4).

Chapter 7 describes the extensive debate in Germany about the concept of pecuniary losses. Since the 1960s, German courts began to accept in a piecemeal way that a missed non-pecuniary benefit may form a pecuniary loss for an innocent party. To this day, the courts have never fully accepted this interpretation of pecuniary losses (*Kommerzialiserungsgedanke*). However, the temporary loss of use of a good that is essential in daily life, such as a car or a house, is in some circumstances seen as a pecuniary loss. Damages are only awarded when additional requirements are fulfilled. First, it is required that the loss of use is a result of damage to the good itself, for example that a car is damaged due to a traffic accident. Secondly, it is required that the innocent party wanted and *could have* used the damaged good during the time it was being repaired (§ 7.2). In legal literature, another interpretation of the concept of pecuniary losses is defended. Some authors argue that the wasted expenditure incurred to obtain a non-pecuniary benefit that was lost due to a breach of contract, should qualify as a pecuniary loss. This view (*Frustationlehre)* has been consistently rejected by the courts (§ 7.3). The German legislature, however, did accept this view when it modernised the German Civil Code. It enacted a statutory provision that gives an innocent party a general right to damages for wasted expenditure when they fail to obtain a non-pecuniary benefit due to a breach of contract (§ 7.4).

Chapter 8 explains that there has not been such an extensive discussion about the interpretation of pecuniary losses in English law. Traditionally, wasted expenditure only plays a role in case law about lost profits. Over the last few decades, a new doctrine has emerged in English law. According to

this doctrine, an innocent party who cannot prove lost profits has the right to use an evidential presumption that their profits would have at least been equal to the expenses they incurred to make those profits. The onus of proof that their expenses would have exceeded their profits lies on the other party (§ 8.2). Recent case law and literature about this presumption of recoupment suggests that within English law, too, the idea is emerging that the expenditure an innocent party incurred to obtain a non-pecuniary benefit can be an indication of its value. It remains to be seen how this new idea will develop further (§ 8.3).

4 *Towards a general right of damages for the loss of a non-pecuniary contractual benefit*

In *chapter 9,* the possibilities to successfully claim damages for the loss of a non-pecuniary benefit in Dutch, German, and English law are compared. In some respects, the three legal systems are undeniably different. For example, English law provides innocent parties with much more possibilities to claim damages for non-pecuniary losses resulting from a breach of contract than Dutch and German law. In the Netherlands and Germany, on the other hand, a much broader interpretation is given to the concept of pecuniary losses. In these legal systems, the loss of a non-pecuniary benefit entitles an innocent party to damages for a pecuniary loss. Despite such differences, the three legal systems have much in common too. In all three legal systems, the right to damages for such losses has been gradually expanded since the nineteenth century. To this day, however, the innocent party is not entitled to full compensation for the loss of a non-pecuniary benefit in any these legal systems.

Chapter 10 answers the normative question that this development in Dutch law raises. There is a debate in legal literature whether this gradual expansion of the right to damages for the loss of a non-pecuniary benefit should be welcomed in Dutch law or not. This thesis defends that this development in Dutch law – that can be seen in German and English law as well – is desirable and should even go a step further. It is argued that Dutch law should accept a general right to damages for the loss of a non-pecuniary benefit, regardless of whether such a loss qualifies as a pecuniary or a non-pecuniary one (§ 10.1). In Dutch law, it is firmly established that non-pecuniary contractual interests are also protected within the law of obligations. An innocent party can, for example, claim specific performance of a contractual obligation that solely serves their non-pecuniary interests. Moreover, it is trite law that damages should offer full compensation for their losses. Full compensation is necessary to provide an adequate protection of the interests of an innocent party. From these two principles it follows that the loss of a non-pecuniary contractual benefit should be fully compensated as well. However, Dutch law does not offer full compensation for this loss. In case law, legal literature and parliamentary history, four main arguments can be found that may offer a justifica-

tion. It is argued that none of these arguments are convincing (§ 10.2). First, it has been argued in literature that it is impossible to offer compensation for a non-pecuniary loss, such as the loss of a non-pecuniary benefit. In this thesis, it is argued that it is far from impossible both to establish objectively whether an innocent party lost a non-pecuniary benefit and to assess the quantum of damages. Moreover, it is defended that even in cases where money is an inadequate means to redress a non-pecuniary loss, this does not necessarily mean that judges should refrain from awarding damages. Even when full redress may not be achieved with damages, an award of money may offer some solace (§ 10.3). Economic literature furthermore suggests that the argument that damages for non-pecuniary losses are inefficient is unsound. It argues that the answer to the question whether damages for non-pecuniary losses are efficient or not, ultimately depends on the kind of economic effect that a legal system strives for. Damages for non-pecuniary losses ensure that parties only break their contractual obligations when that is efficient, but may simultaneously lead to contract prices that are higher than the parties would have voluntarily bargained for (§ 10.4). In all three legal systems, there is a fear that a right to damages for the loss of a non-pecuniary benefit will open the floodgates. First, it is argued that the floodgate argument is not convincing. Second, it is suggested that the doctrine of *contractuele relativiteit* – known in Germany as the *Schutzzwecklehre* and bearing resemblance to the English doctrine of assumption of responsibility – may offer a useful tool to address the floodgate problem. According to this doctrine, a party is only entitled to damages for a loss when one of the aims of the contract is to protect them from suffering this loss (§ 10.5). Finally, it is argued that the other remedies for breach of contract do not offer sufficient protection to the non-pecuniary contractual interests of an innocent party. In Dutch law, a party has a general right to specific performance. However, sometimes fulfilling one's contractual obligations is simply no longer possible or cannot undo the loss of a non-pecuniary contractual benefit. In Dutch law, an innocent party can choose to terminate the contract, but that will only entitle them to a refund of the price that they had already paid to the party in breach. This refund does not offer compensation for their consumer surplus or expenses incurred elsewhere in pursuing the non-pecuniary benefit. In order to offer full compensation, this party should additionally be entitled to damages (§ 10.6).

In *Chapter 11*, it is therefore concluded that Dutch law should offer parties a general right to full compensation for the loss of a non-pecuniary benefit. It is necessary to change the Dutch Civil Code in order to achieve this.