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## Het algemene opschortingsrecht

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## SUMMARY

### THE GENERAL RIGHT OF SUSPENSION

#### I.

The general right of suspension (*het algemene opschortingsrecht*) regulated in Section 52 of Book 6 of the Dutch Civil Code (hereinafter referred to as 'DCC') is the subject of this doctoral thesis. What a right of suspension is can easily be explained with the help of some examples. Suppose, for example, the following everyday situation. A cyclist has instructed a bicycle mechanic to service his racing bike. After the job is done, the cyclist arrives at the bike shop to collect his bicycle. The bicycle mechanic charges a fee for the servicing. The cyclist does not pay but does require the bicycle mechanic to return his racing bike. What might then be a perhaps obvious response from the bicycle mechanic? "As long as you don't pay, your racing bike will stay here." Legally qualified, at that point the bicycle mechanic is exercising a right of suspension. He defers the fulfilment of his obligation to return the racing bike as long as the cyclist does not pay the bill for servicing that bicycle. The cyclist can get his bicycle back, but he will have to pay the bill first. Another example is the case where a contractor has caused damage to his customers' home while carrying out renovation work. The customer does show willingness to pay the contract price, but only after the contractor has repaired the damage or compensated him for it. That customer suspends its obligation to pay the contract price pending damage repair or compensation.

All of this is consistent with a primal sense of justice (*'oerrechtsgevoel'*). As long as one does not do what the other may demand of him, the other does not need to do what the one demands of him. At the same time, this does raise the question on the basis of which the bicycle maker and the customer may defer their respective obligations to return the racing bike and to pay the contract price. After all, the examples may at first glance also look like a situation in which the pot is calling the kettle black. The bicycle mechanic and the customer reproach the cyclist and the contractor for not fulfilling their obligations. The cyclist does not pay the costs of the maintenance service and the contractor neither repairs nor compensates the damage he caused. However, the bicycle mechanic and the customer do essentially the same thing in response: they too fail to honour the agreements made. The bicycle mechanic does not return the racing bike after completing the maintenance carried out and the customer does not pay the contract price. Why would this failure to perform by the bicycle maker and the customer be justified?

As the case changes, other questions about the general right of suspension automatically arise. These are explained using an example discussed in this doctoral thesis, which gradually changes or expands. A car is equipped with a tracking system. This system allows the car manufacturer to see the car's current gps location. For that tracking system, the owner of the car must pay a subscription price per month. The owner has not paid

the subscription fee. One day, the car is stolen. The owner asks the car manufacturer to let him know where his car is at that time. However, the car manufacturer is willing to activate the tracking system only after the subscription price has been paid.<sup>1</sup> Presumably, a majority will hold that the car manufacturer does not have to let it know where the stolen car is as long as the subscription price agreed for that purpose is not paid. To that extent, the example essentially amounts to the same thing as the examples discussed above about the repaired racing bicycle and the damaged house and here too, the question arises why the car manufacturer's failure to perform would be justified. However, may the car manufacturer suspend the performance of its obligation to activate the tracking system even if the owner has paid the subscription price but is in default of payment of an invoice from the car manufacturer for repairs carried out on the car? Or if the amount payable relates to repairs carried out by the car manufacturer on a different car of the owner than the stolen one?

Assuming that the car manufacturer can exercise his right of suspension, the question arises whether and, if so, to what extent exercising this right has any limitation. For example, does the relationship between the value of the stolen car and the amount of the arrears play a role in assessing this? And is it relevant how many days the payment period has passed? It seems defensible that the car manufacturer should not be allowed to suspend the performance of its obligation to activate the tracking system if only one monthly instalment has not been paid and that payment period has only passed a few days. Especially if this were to include the fact that the owner normally pays on time and with the activation of the tracking system, a valuable car can be traced. On the other hand, at its core, the case boils down to the same thing: the car manufacturer is suspending the fulfilment of its obligation to activate the tracking system, pending payment of the subscription price. So why should the car manufacturer not be allowed to use its right of suspension in this case? This could therefore also be considered differently. However, there seems to be less room for such considerations if there was still a child in the car at the time of the theft of the car, and thus tracing the car could also solve a child abduction case. Most likely, the car manufacturer would then not be allowed to suspend its activation obligation, not even if there would be a long overdue payment.

## II.

This doctoral thesis addresses questions as raised in part I of this summary. It aims to contribute to legal certainty about the answer to the central question in this doctoral thesis, which is when the right to suspend pursuant to Section 52 of Book 6 DCC exists and when this right may be exercised.

To answer this question, this doctoral thesis first examines the position that the general right of suspension occupies in the DCC.<sup>2</sup> This positioning deals successively with the history, legal basis, nature, character, purpose, scope and functions of the general right of suspension.<sup>3</sup> It also addresses the legal consequences of the authorised or unauthorised exercise of the general right of suspension, as well as the termination of the exercise of

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1 For this example, see § 1.1 and § 8.10.

2 See chapter 2.

3 See § 2.2-2.6.

that right.<sup>4</sup> With regard to the legal basis of the general right of suspension, this doctoral thesis concludes that it lies in the restrictive effect of the standards of reasonableness and fairness (*de beperkende werking van de maatstaven van redelijkheid en billijkheid*). Mutual obligations which by law, contract or equity should be performed at the same time are so connected that it is unacceptable by the standards of reasonableness and fairness for the other party to demand performance without offering performance by himself. When performance at the same time is required, the debtor of the other party who breaks or threatens to break this performance has, pursuant to Section 52, subsection 1, of Book 6 DCC the right to suspend the performance of his obligation until his other party has fulfilled its obligation.<sup>5</sup>

Subsequently, this doctoral thesis reviews the requirements for the right of suspension under Section 52, subsection 1, of Book 6 DCC.<sup>6</sup> One of these requirements is that there is sufficient connection between the mutual obligations to justify the suspension at hand (*voldoende samenhang tussen de verbintenissen over en weer om deze opschorting te rechtvaardigen*).<sup>7</sup> This so-called 'coherence criterion' is the central requirement of the general right of suspension. The distinction usually made within this coherence criterion between a requirement of 'sufficient connection' and a requirement 'to justify the suspension at hand' is contested in this doctoral thesis.<sup>8</sup> These 'elements' do not constitute independently assessable requirements. There are also practical objections to that distinction made, because an assessment standard for 'sufficient connection' is lacking, so that it is not clear on what basis the required connection can be determined, let alone whether it is sufficient.<sup>9</sup> The conclusion in this doctoral thesis is that the coherence criterion involves a test of reasonableness and fairness. In the words of Section 52, subsection 1, of Book 6 DCC, reasonableness and fairness determine the degree of connection between the mutual obligations, which must be sufficient to justify the suspension in the concrete case. When assessing the coherence criterion, the question is whether there is such a connection between the mutual obligations that the other party would act contrary to reasonableness and fairness by demanding performance without offering performance of its own obligation. With regard to the question whether the coherence criterion is met, it should be assessed to what extent a performance claim by the other party would be contrary to reasonableness and fairness, given the due claim its debtor has against it. This assessment depends on weighing all the facts and circumstances of the case, including the circumstances mentioned in Section 52, subsection 2, of Book 6 DCC.<sup>10</sup> Thus, sufficient connection between the mutual obligations to justify the suspension at hand is not an assessment measure or criterion to be assessed in itself, but rather a conclusion that follows from the application of the coherence criterion. Therefore, the assessment of the

4 See § 2.7 and § 2.8.

5 See § 2.4.

6 See chapter 3.

7 See § 3.7 en § 3.8.

8 For that interpretation of the coherence criterion, see § 3.7.2.

9 See further § 3.7.3.

10 See further chapter 4. That chapter discusses the circumstances mentioned in Section 52(2) of Book 6 DCC, being 'the same legal relationship' (*dezelfde rechtsverhouding*) and 'business that the parties have regularly done with each other' (*zaken die partijen regelmatig met elkaar hebben gedaan*) (§ 4.2-4.5) and other circumstances (§ 4.6). In § 4.7, a few case types are formulated in relation to the coherence criterion.

coherence criterion does not begin with the question whether that coherence between the mutual obligations exists but does end with the answer to that question.<sup>11</sup>

If the requirements of the general right of suspension are met, the debtor is entitled to suspend and has a right of suspension pursuant to Section 52, subsection 1, of Book 6 DCC. To trigger the legal effects of the general right of suspension, it is necessary for the debtor to exercise that right, by making this exercise known to his counterparty. This doctoral thesis therefore concludes that the debtor will have to communicate to his counterparty that he suspends the performance of his obligation, and this communication must have reached him. An express notice of suspension is not required if the counterparty understands or could understand why its debtor's performance is failing. Whether that is the case depends on the specific circumstances at hand, including particularly the answer to the question what the other party knew or should have understood at the time of the suspension, and what the debtor was entitled to assume at that time regarding that knowledge or understanding. Furthermore, the debtor is obliged to explain the claim he asserts against his counterparty, if necessary, because he derives his right of suspension from that claim and he has the duty of proof of that claim. Furthermore, he thereby enables his counterparty to examine the merits of his claim.<sup>12</sup>

Having answered when the right to suspend pursuant to Section 52, subsection 1, of Book 6 DCC exists and how that general right to suspend can be exercised, the question remains when this right may or may not be exercised. The exercise of the general right of suspension is subject to the restrictive effect of the standards of reasonableness and fairness. Under circumstances, it may be or may become unacceptable by these standards of reasonableness and fairness for the debtor to rely on a suspension of the performance of its obligation that is justified in itself. This doctoral thesis argues that this test of the exercise against reasonableness and fairness does not explicitly follow from the text in Section 52, subsection 1, of Book 6 DCC, but arises from the restrictive effect of the standards of reasonableness and fairness regulated in Sections 2(2) and 248(2) of Book 6 DCC. The assessment of whether the exercise of the general right of suspension is unacceptable by the standards of reasonableness and fairness (*naar maatstaven van redelijkheid en billijkheid onaanvaardbaar*) depends on the circumstances of the case. This basically involves weighing the interests of the parties involved in that exercise. Considering the circumstances of the case, the exercise of the general right of suspension must be effective and proportionate. By the standards of reasonableness and fairness, it may be unacceptable for the debtor to exercise its right of suspension pursuant to Section 52 of Book 6 DCC if there is a disproportionate relationship between the value of the mutual obligations or if the other party's interests are disproportionately harmed by such exercise. Reasons of expediency may justify that the debtor should refrain from delaying or further postponing the performance of its obligation or possibly opt for other legal measures that are less onerous for its counterparty. Furthermore, the debtor's failure to provide clarity as to what he intends to achieve by exercising the general right to suspension may lead to the conclusion that further exercise is unacceptable according to the standards of

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11 See § 3.7.4.

12 See further chapter 5.

reasonableness and fairness, if this lack of clarity prevents the effectiveness of such exercise. Nor can a debtor rely on a right of suspension if he has processed or waived that right.<sup>13</sup>

III.

Although it is generally accepted among legal authors that the legal basis of rights of suspension is reasonableness and fairness, objections to reasonableness and fairness as a basis of the general right of suspension have arisen in the literature. Among other things, legal scholars have objected that it would be more 'logical' to answer the question whether the debtor is acting reasonably and fairly by suspending, than to answer the question whether his counterparty is acting contrary to reasonableness and fairness by demanding performance. According to those who defend this perspective, the question is rather what the debtor is allowed to do, not what his counterparty should be allowed to do. This doctoral thesis argues that this perspective is based on a misconception. After all, the question is not what the counterparty would be allowed to do, but rather what he would *not* be allowed to do. The question is whether the counterparty may not demand performance because he does not offer performance of its obligation towards its debtor at the same time. Therefore, when assessing a case in which the debtor exercises a right of suspension, the focus should first be on that debtor's counterparty. If the conclusion would then be that the debtor is entitled to suspend and it has been established that he is exercising his right to suspend, the question arises as to what the debtor may do. At least, even then the question is rather what the debtor may *not* do. After all, the question is whether it is unacceptable by the standards of reasonableness and fairness that the debtor is exercising his right of suspension.

Focusing first on the debtor's counterparty and only then focusing on that debtor itself may also help steer away from another misunderstanding already discussed in the second part of this summary. That misunderstanding is that the coherence criterion would consist of a requirement of 'sufficient connection' and a requirement 'to justify the suspension at hand'. This latter 'requirement' is usually concerned with the debtor's position and is also referred to as a proportionality test. Here too, it seems that (already), when answering the question whether the requirements of the general right of suspension are met, the question what the debtor is entitled to do is assessed. However, the coherence criterion is – as mentioned above – a test of reasonableness and fairness, which is in line with the basis of the general right of suspension. The outcome of this test of reasonableness and fairness may be that there is sufficient connection between the mutual obligations to justify the suspension at hand, because the other party acts contrary to reasonableness and fairness by demanding performance without offering performance on its part. In that test, therefore, only the actions of the debtor's counterparty are central. The question whether it is unacceptable by the standards of reasonableness and fairness that the debtor is exercising his right to suspend performance – or, more or less in the words of the coherence criterion: the question whether it is justified for the debtor to suspend performance of his obligation – addressed afterwards. That question finds its basis not in Section 52, subsection 1, of Book 6 DCC or, more specifically, in the coherence criterion, but in Sections 2(2) and 248(2) of Book 6 DCC.

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<sup>13</sup> See further chapter 6, citing examples.

The general right of suspension finds its ground in the other party's acting contrary to reasonableness and fairness. It is also that act of the other party that determines whether the central requirement of the general right of suspension – the coherence criterion – has been met. Yet it could be said that the penultimate chapter of this doctoral thesis<sup>14</sup> also makes a case for that other party. That chapter discusses several procedural aspects of the general right of suspension that come into play or may come into play if a case in which a party exercises a right of suspension is brought before a court.<sup>15</sup> One such aspect is the dictum. Usually, a court that upholds a suspension defence (*opschortingsverweer*) by the debtor in whole or in part rejects the claim made by the counterparty of that debtor in whole or, if it concerns a divisible obligation, in part. However, a court may, in the case in which the judge honours the suspension defence in whole or in part, at the request of the other party with an interest in doing so, also issue an order for incremental performance (*veroordeling tot stapsgewijze nakoming*). In that case, the court will order the debtor to perform his obligation under the time provision of the termination of the right of suspension by satisfaction of his claim at the same time or security for such satisfaction by his counterparty. Such an order is in a sense advantageous to this counterparty. After all, from the debtor's perspective, it is conceivable that the debtor would benefit from a dismissal of the claim. Nevertheless, this doctoral thesis defends that an order for incremental performance does more justice to the positions of both parties in such a case in which a suspension defence is raised. Such an order for performance under time provision fits better with the basis and scope of the general right of suspension, as well as the intention of the suspension defence, than a rejection of the claim, because the essence is that the claim and obligation should be performed at the same time, that is in the same moment. This is also what the debtor's suspension defence seeks. In principle, the debtor does not want his claim to be rejected. After all, he is prepared to perform, but also demands performance from his counterparty.

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14 Before chapter 8, which contains the conclusions.

15 That chapter discusses the duty and burden of proof, ex officio application of the general right of suspension, whether or not the debtor should bring a claim, res judicata of a successful defence to suspension and the dictum. Strictly speaking, this chapter does not fall within the scope of the central question of this doctoral thesis, because in any case, the right of suspension is not based on procedural law or derived from a court's decision, but on the answer to the question whether it has been established that the requirements for a right of suspension have been met, which the court has then assessed.