Redelijkheid en billijkheid als gedragsnorm

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Summary

Reasonableness and fairness as a norm for conduct

As stated in the introduction of this book, in this research I have chosen to analyse three doctrines that are primarily related to contract law and in which the principle of reasonableness and fairness plays a prominent role. These three doctrines are related to the binding force of contracts (Chapter 2), the interpretation of contracts, especially commercial contracts (Chapter 3) and the doctrine of the so-called *imprévision* (Chapter 4). In Chapter 5 I analysed how the court applies the principle of reasonableness and fairness of its own motion. In the introduction to this book, I observed that these subjects could not be studied and discussed until the following threshold question is answered:

> *How should the norm of reasonableness and fairness be understood: as a norm for judicial decision-making or as a mandatory norm for the conduct of contractual parties?*

I discussed and answered this question in Chapter 1. Various authors hold the view that reasonableness and fairness is a 'fully open' or 'totally vague' norm for judicial decision-making if it justly resolves disputes in concrete cases. My view is that this view is untenable in light of the pivotal role played by reasonableness in our society as a norm for conduct. Reasonableness is not a concept exclusively reserved for the courts, but is pre-eminently a social praxis, indispensable for creating and preserving the community. The community cannot do without reasonableness. Nor can it do without imposing reasonableness obligations in the community. On this basis, each community member is obliged to behave reasonably, i.e. properly and carefully. It has been argued that, because society is also inherently a legal community, the social obligation to act with reasonableness has full effect in that legal community. In the Netherlands, this is reflected in the basic rule enshrined in article 6:2(1) of the Dutch Civil Code: every creditor and every debtor is obliged 'to act towards one another in accordance with the requirements of reasonableness and fairness.'

Next I argued that the principle of reasonableness and fairness stated in article 6:2 of the Dutch Civil Code, contrary to what is sometimes assumed, does not constitute a tautology, but is a conceptual dyad made up of two distinguishable terms, each having its own dimension in setting norms of conduct and each complementing the other. When answering the threshold question stated above, I subsequently took the position that the principle of reasonableness and fairness is primarily to be viewed as a mandatory norm of conduct aimed at the parties.

It is this norm of conduct that is also always applied by the courts. For this application alone, reasonableness and fairness may also be considered a norm for judicial decision-making. The application of this norm of conduct referred to is not a licence for the exercise of judicial discretion (*richterliches Ermessen*), but always implies the application of unwritten positive law. It is not the personal opinion of the courts that matters, but the mandatory obligation of the parties, rooted in positive law, to act reasonably and fair towards one another. In any given circumstances, this may lead to an expansion of the contractual agreement (under art. 6:248(1) of the Dutch Civil Code) or a limitation of the contractual agreement (under art. 6:248(2) of the Dutch Civil Code). This occurs automatically, by operation of law and without any judicial intervention. Therefore, it is not the courts that supplement or restrict the contract. In the case submitted to the court, the court's role is only to *ascertain* what the requirements of positive law require from the parties in the case concerned.

Having answered the threshold question above, the study and discussion then turned to the four topics stated above. The leitmotiv for this was this question: to what extent does the choice made in Chapter 1 require a change in prevailing views regarding the role of the courts and the parties in the relevant doctrines? The various chapters led to the conclusion that the answer to the threshold question inevitably required a shift in views.

1 Reasonableness and fairness as the basis for the binding force of contracts

The main subject of the second chapter of this book was the requirement for a contract to have a binding nature. This is a doctrine where dissensus traditionally dominates. Many have raised objections (with good reason) against the more traditional view on the reason why contracts are binding. In the Netherlands over the last few years, Nieuwenhuis, Hijma, Smits, among others, have made various attempts to develop new views on the binding force of contracts to meet these objections. It turned out, however, that essential aspects of the views of these three

authors were likewise subject to criticism, as a result of which the need (and the opportunity) arose to search for a new basis for contracts to have binding force. By again reflecting on this doctrine, while bearing in mind the character of the principle of reasonableness and fairness as a mandatory and societally-rooted norm for conduct, as established in Chapter 1, it became possible to develop an alternative view that is simple in nature, does not result in contradictions with the law, and explains the binding force of contract on a community basis. In essence, this view entails the binding force of contracts not being the result of any combination of will, declaration and faith. Through the legal norm of reasonableness and fairness, it is the *legal community* that imposes on parties the requirement for agreements to be binding. The requirement that agreements have binding force, after all, functions within the principle of reasonableness and fairness as a *generally accepted* legal principle (*pacta sunt servanda*) in the Netherlands through article 3:12 of the Dutch Civil Code. However, this requirement is also definitely a current judicial view (opinio iuris) in the Netherlands referred to in that article. The requirement that agreements have binding force is, in short, a generally accepted requirement of respectable and decent conduct, enshrined in the principle of reasonableness and fairness. Great weight is given to this requirement within the principle of reasonableness and fairness: 'after all, reasonableness and fairness first require that promises be kept and only very exceptionally allow changes in those promises...'.[1]

2 Interpretation of commercial contracts

Given the position stated in Chapter 1 that reasonableness and fairness is a mandatory norm of conduct, we have seen that the concept of an agreement having binding force has a new foundation. The same is true of the doctrine of contractual interpretation. Interpretation is quite often considered to be pre-eminently a judicial duty. It is generally accepted that the legal norm to be used for such interpretation is the principle of reasonableness and fairness. If this conceptual dyad is only or primarily regarded as a vague or open norm for judicial decision-making (as often seems to be the case), the judicial interpretation and the norms of reasonableness and fairness coincide, the consequence of this being that under the guise of reasonableness and fairness the courts can give the interpretations they 'reasonably' see fit. In this event, reasonableness may become a synonym for 'complete judicial discretion" (*freies richterliches Ermessen*) and a facade for 'arbitrariness and choice at will'.[2] This

1 Dutch Supreme Court, 20 February 1998, NJ 1998, 493 (Briljant Schreuders/ABP).
2 The term is taken from Eggens 1949, p. 202.

is not the case if the interpretation doctrine is approached from the perspective of the role of reasonableness and fairness as a norm of conduct, as was done in Chapter 3 (as a consequence of the choice made in Chapter 1). If this approach is taken, the focus of the interpretative role of the courts is shifted to the parties and room is made for the idea that the interpretation of agreements is not a matter reserved for the courts, but is mainly to be considered a duty of the parties themselves (and quite often one that is indispensable to the performance of the agreement). This duty to interpret must be performed by the parties - just as they have an obligation to perform the agreement itself - in accordance with article 6:2 of the Dutch Civil Code. This article requires contractual parties to act reasonably and fairly towards one another, which entails the parties also being obliged to take each other's legitimate interests into account when interpreting their agreement. In this process they are also required to abandon their personal preferences and arbitrariness and to attach conclusive significance to the circumstances of the concrete case, valued in accordance with what the norms of reasonableness and fairness demand. I have shown in Chapter 3 that construing the interpretation process from the parties' point of view in such a manner contributes to a better understanding of the way in which (commercial) contracts have to be interpreted and to a better understanding of leading case law of the Dutch Supreme Court on this subject. Particular attention was given in this respect to the well-known judgment in the *PontMeyer* case. It was found that a meaningful construction could not be given to this judgment unless in light of the character of reasonableness and fairness for setting a norm of conduct, in such manner that this judgment does not provide evidence of the diminution of reasonableness and fairness when commercial contracts are interpreted, but rather confirms that, even for this type of contract, the requirements of reasonableness and fairness dictate the interpretation of the agreement in the manner described above.

3 *Imprévision* and the requirements of reasonableness and fairness

The distinction between both views on reasonableness and fairness, outlined above, is also a factor in the issue of change of circumstances (*imprévision*), which was discussed in Chapter 4. This concept, known as 'hardship" in international trade, is related to circumstances that deeply encroach on the contractual relationship, that are not taken into account in the agreement and that make the unaltered maintenance of the agreement extremely onerous. In the traditional view of the *imprévision* doctrine, the focus is on the courts and their role. The *courts* intervene in the contractual relationship on the basis of reasonableness and fairness; the *courts* have

discretionary powers to modify or set aside a contract; the *courts* set conditions; the *courts* are to use their powers with restraint etc. I did not pursue this way of thinking in Chapter 4, but in accordance with the conclusion in Chapter 1, I based my analysis of the effect of reasonableness and fairness on the *imprévision* doctrine on the reasonableness and fairness aspects as a norm of conduct. Subsequently, I examined to what extent the traditional picture of article 6:258 of the Dutch Civil Code as a kind of 'norm of judicial review" (*Ermessensnorm*) resulting in the courts having broad discretionary powers required correction from a dogmatic point of view and whether the role and the conduct of *parties* in the light of the requirements of reasonableness and fairness they have to meet should not have to hold a more prominent place in the analysis of the *imprévision* doctrine. I answered this question in the affirmative: it was found that the principle of reasonableness and fairness in article 6:258 of the Dutch Civil Code should not so much be construed as a norm of judicial review, but rather as a form of expression of the norm of conduct of reasonableness and fairness within the meaning of article 6:2(1) of the Dutch Civil Code. Because of this norm of conduct of reasonableness and fairness, the parties are obliged -even when unforeseen circumstances occur - to act as reasonable persons towards one another and therefore to take each other's legitimate interests into account. In the unexpected event that the parties fail to meet the requirements of positive law in light of the change of circumstances, positive law unrelentingly does for the parties what they failed to do by themselves. This intervention may take the form of expansions of the contract (art. 6:248(1) of the Dutch Civil Code), or limitations (art. 6:248(2) of the Dutch Civil Code), or a combination of both.

In the event of unforeseen circumstances, the result of the application of positive law to the contractual relationship between the parties may in principle be determined (i.e. ascertained) by the courts, on request, in a *declaratory* judgment. Some *imprévision* cases are so complex, however, that according to the legislator they cannot be resolved except by means of a 'constitutive" judgment (i.e. a judgment creating, changing or cancelling a legal relationship). Also in these cases, it is the character of reasonableness and fairness for setting a norm of conduct, however, that is the decisive factor for the way in which the contract of the parties must be changed. According to the parliamentary history, the modification or setting aside referred to in the provisions on *imprévision* in article 6:258 of the Dutch Civil Code is not the result of a judicial opinion regarding reasonableness, but of the requirements of reasonableness and fairness to which *the parties* are subject. In the case to be submitted to the courts, the courts are only obliged to 'concretize' what reasonableness and fairness require from the parties in their relationship. In other words, even if a contract is amended or set aside pursuant to article 6:258 of the Dutch Civil

Code, this is not a judicial opinion regarding reasonableness, but the result of the norm of conduct set in article 6:2(1) of the Dutch Civil Code, which provides that creditors and debtors are obliged 'to act towards one another in accordance with the requirements of reasonableness and fairness.'

4 Application of reasonableness and fairness by the court of its own motion

The key subject in the second last chapter of this book was the application by the courts of reasonableness and fairness of their own motion. The main question in that chapter was whether the mandatory character of reasonableness and fairness as a norm of conduct (as established in Chapter 1) might entail the courts having to ascertain beyond the ambit of the legal dispute of the parties, as and when necessary, that reasonableness and fairness results in an amendment of any kind of the agreement. It was argued that an overall, affirmative answer to such a question cannot be given. With reference to the principle of due process - it was stated in Chapter 1 that this principle is the counterpart of reasonableness and fairness in procedural law - it was argued that although it is true that the principle of reasonableness and fairness is an indispensable norm of conduct in the legal community, and that this entails this conceptual dyad being considered mandatory, it does not yet imply that its enforcement *in court* would also always be a matter of general interest.

With reference to article 3:12 of the Dutch Civil Code, which functions as a link between individuals and the legal community, it was subsequently argued that the principle of reasonableness and fairness, depending on the circumstances of the case, sometimes (primarily) serves the interest of the parties themselves (in which case it is not a matter of public policy) and sometimes (to a significant extent) serves the interest of society as a whole (in which case it is a matter of public policy). If and when the principle of reasonableness and fairness is a matter of public policy (and is therefore applicable without regard to the ambit of the legal dispute) therefore depends on the circumstances of the case. If the principle is a matter of public policy, the courts apply, if necessary, the principle of reasonableness and fairness without regard to the ambit of the legal dispute. The courts of their own motion not applying unfair terms as defined in Directive 93/13/EEC of 5 April 1993 was given as an example of the courts acting of their own motion.

When the principle of reasonableness and fairness is not a matter of public policy in the given circumstances - which is the usual situation - the parties themselves have to actively assert their own rights. This also corresponds with the role of reasonableness in society. After all, reasonableness includes an obligation to account

to someone else for one's own conduct, when requested to do so. Civil actions are pre-eminently a place for doing this, a place where persons with legal rights as members of the 'community of reasonable persons' have to be responsible to each other for their statements and conduct and, when requested, to be held accountable for them towards one another (and towards the community). It was argued that the courts taking the initiative in this matter of their own motion (read: without being asked to do so) would in essence mean that the autonomy to which the parties in principle are bound (which duty is also in accordance with the requirements of reasonableness and fairness) is ignored, but would probably also undermine the norm-consciousness in respect of reasonableness and fairness: it is primarily the duty of the parties themselves as members of the community to again and again confirm and to instil the existence and the meaning of that norm to and in each other.

5 Epilogue

Society cannot do without reasonableness and the legal community cannot do without the principle of reasonableness and fairness, which is based on this social norm. In short, reasonableness is the ultimate community norm, simultaneously forming society and setting norms for society:

> 'Reasonableness *creates a community* and is *sanctioned* by the community and by the community only; it is impossible that reasonableness is incited by solipsistic needs and desires; reasonableness makes an appeal to a community consensus and finds its eventual legitimacy in and through the norm shown by the community of the subjects.'[3]

The obligation to exercise reasonableness that always exists between members of the community translates in law into the obligation for the individuals to be guided in their conduct by the requirements of reasonableness and fairness (art. 6:2(1) of the Dutch Civil Code). In general, this obligation entails the parties having to fulfil the promise they once gave, but may under special circumstances also lead to the contractual relationship being broken off, in whole or in part. Where the parties dispute the interpretation of their contract they also have to let themselves be guided by reasonableness and fairness and, as a result, by the obligation to take each other's legitimate interests seriously. If the contractual relationship is damaged due to unforeseen circumstances, the parties also have to act as reasonable people and to exercise fairness towards one another when looking for and finding a suitable

3 Parret 1989, p. 15.

solution. If they face each other in court, they also have to act reasonably and take each other's procedural interests seriously. A civil action, finally, is pre-eminently a place for giving account, a place where persons with legal rights as members of the 'community of reasonable persons' have to be responsible to each other for their statements and conduct and, when requested, to be held accountable for them towards one another (and towards the community). This process of rendering account should preferably, and primarily, be initiated by the parties themselves. It is primarily the duty of the parties themselves to call each other to account in civil actions for their reasonableness, where necessary, and in such manner to confirm and to instil the existence and meaning of that norm to and in each other.