11 Summary and recommendations

11.1 Introduction

As the primary remedy, the right to specific performance of a contractual obligation has acquired a special place in Dutch law. In principle, an obligor has the right to performance of the contractual obligation(s) that the obligee has contracted to perform. If the ancillary conditions are met, the obligor can furthermore claim the subsidiary remedies of damages and termination of the contract. This research has focused on where the boundaries of the right to specific performance lie, as well as how far these boundaries may need to be further defined or amended. The central research question is therefore:

*What are the boundaries to the obligor's right to specific performance according to current Dutch law and which recommendations can be formulated with respect to the clarification, expansion or narrowing of these boundaries?*

This research question cannot be answered in one sentence. One determines the boundaries of a state by examining the map. It is, therefore, necessary that one knows where the natural boundaries are, as well as the borders of neighbouring countries. This is no different in case of the boundaries of a legal institution. By gaining insight into the specific characteristics of the right to specific performance and distinguishing this legal institution from alternative and related legal institutions, one is able to produce a clear picture of the boundaries of this institution. Furthermore, one is better able to identify the areas where clarification or amendment is required.

Five sub-questions have been formulated in par. 1.2. The analysis in the previous chapters is intended to provide answers to these sub-questions. In this chapter, the answers to these sub-questions will be summarised, allowing an answer to be provided to the main research question. Moreover, in this concluding chapter emphasis will be placed on the normative section of the research question (namely, “which recommendations can be formulated to clarify, expand or narrow the boundaries of the right to specific performance?”). Therefore, less attention will be paid in this section to the results of the descriptive part of this research question (namely, “where are the boundaries to the obligor's right to performance according to current Dutch law?”). The description of the current legal situation served mainly as a means to reach the abovementioned recommendations. Par. 11.2 to par. 11.6 will be devoted to answering the five sub-questions, after which
11.2 **First sub-question: Positioning of the right to specific performance**

The first sub-question has been answered in Chapter 2. This research question was: *What is the position of the right to specific performance compared to the remedies of damages and termination in those jurisdictions researched and should specific performance be the primary remedy in a future Code of European contract law?*

Despite the starting point that an obligor in principle enjoys a right to specific performance of a contractual obligation according to Dutch law, the Dutch Civil Code does not contain any statutory basis for the obligor’s substantive law right to specific performance. The legislature believed it to be so self-evident that an obligor has a right to the specific performance of a contractual obligation that it did not see the need to create a legal provision. It has been argued in this research that an explicit statutory basis for the claim for a right to specific performance in Book 6, Dutch Civil Code would improve the coherence of the legal remedies. Furthermore, this would also provide a legal basis for the important *pacta sunt servanda* principle, as well as bringing Dutch law more in line with other continental European legal systems.

In this chapter, the law on the right to specific performance in The Netherlands, Germany, France, England, a number of international instruments, as well as a number of non-Western legal systems has been described. Furthermore, this chapter provides an overview of the most important arguments put forward in the legal-economic discussion from the point of view of efficiency both for and against the use of the right to specific performance as the primary remedial sanction. Finally, this chapter delves into the principle difference between the “civil law” and the “common law” systems in the field of contract law. In civil law systems, the right to specific performance is the primary remedy, whilst in common law systems damages come first. In academic writings, scholars have speculated as to the starting point that the European legislature should take in the design of any future European Civil Code. The answer to this question is made more difficult by virtue of the fact that scholars on both sides are unable to prove that one starting point is more just or efficient than the other. For any future rule on the right to specific performance at European level, it is argued that it is desirable to follow the civil law tradition, because most European countries already adhere to this solution and such a rule at the European level would not lead to a change for the majority of inhabitants of the European Union. Preference for the right to specific performance as the primary remedy also stems from the moral value it reflects in that people are obliged to keep their promises and, if necessary, will be ordered to do so by a judge. This idea corresponds to the legal intuition of citizens and could possibly also strengthen that feeling.
11.3 Second sub-question: Requirements

The second sub-question is dealt with in Chapter 3: Which requirements of claim must the obligor satisfy in order to be able to obtain an order for performance? An obligor who claims specific performance only needs to argue that the contract exists and that the contractual obligation flows from this contract. The obligor needs neither state that the opposing party has failed to perform, nor satisfy the more arduous requirement of a qualified non-performance which means a non-performance of an obligation which is due and, if the performance is still possible, that the debtor is placed in the position of *mora debitoris*. An obligor must state that performance of the debtor’s obligation resulting from the contract is due, or which specific interest he or she has in obtaining a declarative judgment for an obligation not yet due. Unlike damages and termination of the contract, failure to perform is not a requirement for specific performance. An obligor claiming specific performance will in practice send a formal notice of failure, even though he or she is not bound by the formal requirements of Article 6:82(1). If the obligor fails to communicate to the opposing party that he or she desires specific performance of the contract, the judge will not reject the claim for specific performance, but may order the obligor to pay costs if during the hearing the obligee agrees to specifically perform the obligation. A non-consumer buyer who claims replacement of faulty goods only needs to state that the seller has delivered non-conforming goods. A buyer who claims replacement is not required, according to Dutch law, to state that the non-conformity is serious enough to justify replacement of the goods (Article 7:21(1)(c) in combination with Article 7:17).

11.4 Third sub-question: Defences

11.4.1 Introduction

A large portion of the research concerns the defences an obligee can employ against a claim for specific performance. After all, a legal claim by the obligor for specific performance ceases the moment the obligee successfully raises a defence against the claim. Therefore, the third sub-question posed is: Which defences can the obligee raise to defend him or herself against a claim for specific performance?

This sub-question has been answered in Chapters 4 to 7. The statements upon which the obligee can rely as a defence to a claim for specific performance are as follows: the personal character of the contractual relationship (Chapter 4), *force majeure* (Chapter 5), the disproportionate disadvantage of specific performance, also known as relative impossibility (Chapter 6) and the partial or temporary impossibility of specific performance (Chapter 7). These chapters have also focused on the question of whether the boundaries of these defences with respect to the right to specific performance should be clarified, extended or restricted.
11.4.2 Defence: Personal character of the contractual relationship

Chapter 4 is devoted to contractual obligations for personal services. According to the current law, an obligee can defend against a claim for specific performance of a personal contractual obligation by referring to the “nature of the obligation” (Article 3:296(1)). It has been argued that the personal character of the contractual relationship as such does not justify the exclusion of an order for specific performance. It has furthermore been argued that the classic argument that an order for specific performance of a contractual relationship of a personal service would infringe upon the personal freedom of the obligee should be nuanced. The order itself does not infringe upon the freedom of the obligee, although the enforcement of the order may do so. Instead of the current defence, namely that the nature of the personal contractual obligation requires avoidance of the duty to specifically perform, it has been suggested to introduce a more balanced principle in the Dutch Civil Code. An obligee of a contractual relationship with a personal character should be able to defend against a claim for specific performance by stating that, due to a change in circumstances, compulsory specific performance deeply infringes upon his or her private life. Therefore, the judge should, in principle, order an obligee to specifically perform a contractual obligation for personal services. It is, however, in this author’s opinion, not possible to enforce such an order.

In this regard, a distinction can be drawn between two different types of contractual obligations for personal services, namely highly personal services and non-highly personal services. Contractual obligations for highly personal services impose a great burden on the creative, intellectual, physical or religious freedom of the obligee. Although contractual obligations for non-highly personal services need to be performed by the obligee, the obligee need not use as much of his or her unique talents to perform the obligations. An order to specifically perform a highly personal contractual obligation is not enforced by means of a fine. It is, in this author’s opinion, unjustifiable to financially stimulate an obligee to specifically perform a contractual obligation that infringes upon his or her fundamental freedom. Furthermore, a fine can eventually frustrate the intended outcome, because highly personal services can often only be performed in a setting of freedom. A judge who orders an obligee to specifically perform a highly personal service should, as long as this is claimed, also hold that the obligee is also liable to pay damages if he or she does not adhere to the order within a certain period of time. The additional value of an order for specific performance, which is replaced by an obligation to pay damages in case of non-adherence, is that it provides an extra incentive for the obligee to perform the contractual obligation. An order for specific performance of a contractual obligation for a non-highly personal service can be supplemented with a fine to add additional force to the judgment.
11.4.3 Defence: Force majeure

Chapter 5 deals with the meaning of admissibility and non-admissibility of the non-performance with regards to the right to specific performance. Whether the obligee can claim the defence of force majeure in avoiding an order for specific performance has been dealt with in par. 5.2. It has been concluded that the obligee can claim force majeure not only with respect to a claim for damages, but also in defending him or herself against a claim for specific performance. After the conditions that created the force majeure have ceased, the obligation to specifically perform rematerialises and the obligee is liable if he or she fails to perform these conditions. However, if, after the conditions creating the force majeure have passed, performance has become unreasonably disadvantageous to the obligee, the obligee is able to claim continued force majeure. A seller, who has delivered faulty goods, should either replace or repair the cause of the fault in the goods if this is still possible even if he or she is not the cause of the fault. If a seller is the cause of the fault for the delivery of non-conforming goods, but not the cause with respect to the fault not having been repaired or replaced, the seller is only liable to pay compensation at the moment that repair and/or replacement is once again possible and a formal letter of notice has been sent that allows him an additional, reasonable period of time for performance of that obligation.

Chapter 5 deals with the question whether the obligee can defend against a claim for specific performance with the statement that the intentional breach of contract is efficient according to legal-economic standards. The legal-economic theory of “efficient breach” departs from the position that intentional breach needs to be stimulated, as long as it has a positively efficient effect. According to the theory of efficient breach, the primary remedy of specific performance is undesirable, because the obligor can force the obligee to specifically perform regardless of whether this would be efficient. According to the followers of the theory of efficient breach, damages should be the primary remedy. If damages are the primary remedy, the obligee can choose to perform, or breach the contract and pay damages. The theory of the efficient breach has been challenged by various legal-economists. As well as arguing on the basis of legal-economic theory, they state that the primary remedy of damages is no more efficient than specific performance. The theory of efficient breach is also challenged by social scientists. They are of the opinion that the theory of efficient breach wrongly departs from the position that human behaviour is (only) driven by rational thought instead of (also) by psychological factors. Furthermore, the legal-economic theory has been criticised by ethicists, who state that the theory of efficient breach ignores the fact that the intentional infringement of agreements is reprehensible.

After examining the pros and cons of the plethora of arguments for the theory of efficient breach, it has been concluded that the law on specific performance in Dutch law should not introduce the efficient breach theory. The obligee should not be able to defend against a claim for specific performance by using the statement that the intentional non-performance is efficient. In reaching this conclusion, it must be noted that empirical data are absent with regard to the stated inefficiency of specific performance. Secondly, the criticism that has been expressed from var-
ious disciplines with respect to the theory of efficient breach does not add to the credibility of these claims. Finally, this legal-economic theory lacks conviction to be introduced in substantive Dutch law, because it departs from an over-simplified model-based approach to reality that does not do justice to multifaceted factual and legal reality.

11.4.4 Defence: Relative impossibility

An obligee can defend a claim of specific performance if the obligee cannot reasonably be expected to incur the costs of specific performance. Current law provides the obligee with different open norms with which he or she can defend a claim of specific performance, such as good faith, relative impossibility and the so-called ‘MultiVastgoed’ norm. These can be considered as variations of the good faith principle that rules Dutch contract law. In essence, these norms can be reduced to the same thing, namely an obligor does not need to perform a contractual obligation if the consequences of performance would be disproportionately large in comparison to the advantage for the obligor. The central question is therefore, when is specific performance so disadvantageous to the obligee that he or she can be removed from his or her duty to specifically perform?

It is difficult to answer this question on the basis of these open norms. In order to solve this issue, a balancing instrument has been proposed in par. 6.3, the so-called 130% guideline, in order to clarify the boundary of the right to specific performance. The standard of specific performance flows from the principle of pacta sunt servanda. The standard of specific performance is protected by the rule that the obligee is only released from his or her duty to specifically perform if the costs of specific performance are higher than 130% of the obligor’s objectified interest. This percentage cut-off point and the comparative measuring stick of the obligor’s objectified interest allow the measuring stick of reasonableness, upon which the open norms are based, to be made concrete. The choice of a cut-off point of 130% is based on German case law in the field of the law of damages. The percentage is an evidential presumption. A number of different points are important in order to determine the obligor’s objectified interest, such as the market value of the performance and the presumed scope of the replacement damages. The objectifying role of the 130% guideline is balanced by two exception categories, which provide for the necessary flexibility in the equation. Firstly, the exception of the inefficient specific performance. If the costs of specific performance are lower than 130% of the obligor’s objectified interest, the obligee should still be able to succeed in defending a claim against specific performance if performance would be inefficient. Specific performance is inefficient if the chance is predictably high that the obligee will not be able to perform the obligation. Inefficient specific performance is also apparent in cases where the failure to perform only leads to a minimal drop in value, although the costs of repair are high. The second exception to the 130% guideline is the absence of a reasonable alternative for specific performance. Despite the fact that the costs of specific performance are higher than 130% of the obligor’s objectified interest, the obligee may still be required to specifically perform if there is no reasonable alternative. The nature of the obli-
gation to be performed can, for example, require that the obligor can only realise his or her contractual aim by means of specific performance. Restrictions in the law of damages can also lead to a situation whereby damages are not an adequate alternative for specific performance. In determining the adequacy of an alternative for specific performance, the extent of the obligor's fault is also relevant to a certain degree.

The 130% guideline coupled with these two exceptions can contribute to a greater predictability of judicial decisions. Furthermore, this balancing instrument provides a conceptual framework for further refinement of the notion of "relative impossibility". A statutory provision in Book 6, Dutch Civil Code that offers a concrete balancing framework for the clarification of the notion of relative impossibility is to be recommended.

The 130% guideline is proposed as a ground to restrict the right to specific performance in general contract law. In sales law and in contracting work, the right to specific performance takes on another role, because other than by simple non-performance, the right to specific performance with respect to faulty performance manifests itself in two forms, namely the right to repair and the right to replacement. A fault in the obligation performed can be resolved either by repairing the object or the work, or by replacing the obligation performed. The boundaries of the right to repair and replacement were the main focus of par. 6.4. When can a seller or constructor defend him or herself against a claim for repair or replacement with the statement that the costs of these actions would be disproportionately high? In answering this question, current law does not provide clear norms. It has been argued that the seller and the constructor should be able to make a claim on the basis of the 130% guideline. With respect to sales law, it has further been argued that an extra defence should be possible, namely the so-called 20% guideline. If the form of specific performance claimed, for example, replacement, would cost 20% more than the alternative form of specific performance, the seller should in principle be able to defend himself against the claim. Although the buyer retains the choice as regards the manner in which the fault in the obligation to be performed is to be repaired, both forms of specific performance lead to the buyer receiving a performance in accordance with the contract and are to a certain extent equivalent. The 20% guideline protects, on the one hand, the buyer's right to choose and, on the other hand, prevents the seller from unnecessarily high costs in repairing the fault. Since with respect to construction-work, it is not the client party, but the constructor who has the choice whether to proceed via repair or replacement, the 20% guideline is not applicable in construction law.

Finally, the answers have been provided in par. 6.4 to a variety of practical problems, which can arise in the exercise of one's right to repair or replacement.

11.4.5 Defence: partial or temporary impossibility

The question whether the obligee can defend him or herself against a claim for specific performance with the statement that performance is partially or temporarily impossible has been dealt with in Chapter 7. Par. 7.2 deals with those situations in which specific performance is partially impossible; in these cases, the
obligor can still claim specific performance of the part of the obligation that is still possible and the contract can, in principle, be terminated or converted into expectation damages for that part of the obligation that has become impossible. The consequences of the partial non-performance can, however, be so radical for the obligor that partial impossibility must be treated as if it were complete impossibility. In this case, the obligor loses his or her right to specific performance and the obligee loses his or her right to perform. An obligee, who wishes to perform the part of the obligation that is still possible, has an interest in ensuring that he or she is able to perform, and that this right is not extinguished by paring the situation of partial impossibility with that of complete impossibility. In determining whether the partial impossibility can be pared with complete impossibility, the judge should use an objectified standard instead of the subjective interest of the obligor. This in order to prevent that the judge too quickly comes to the paring of the legal consequences of partial impossibility with the grave legal consequences of complete impossibility. Only if the performance is technically or legally inseparable, should partial impossibility justify the consequences of complete impossibility.

Whether the obligee can defend a claim of specific performance with the statement that performance is temporarily impossible was dealt with in par. 7.3. Furthermore, this section has dealt with the general meaning of the terms “temporary” and “permanent” impossibility in the arsenal of remedies, especially with respect to the concept of *mora debitoris*. The main rule under the concept of *mora debitoris* is that the creditor draws the debtor's attention to the obligation that is to be performed, and that he allows him an additional, reasonable period of time for performance of that obligation by notice in writing under Article 6:82(1). The temporary impossibility illustrates, on the one hand, similarities to a delay in the performance of an obligation, but is, on the other, related to permanent impossibility. Article 6:265(2), which declares that the concept of the *mora debitoris* requirement with respect to termination does not apply in temporary impossibility situations, leads in this author's opinion to inconsistency with respect to the *mora debitoris* regulation in the field of damages. It has been argued that both for expectation damages and termination the temporary impossibility should be maintained as a *mora debitoris* requirement. Only if it is known beforehand that a demand notice is useless, may a notice of failure not be required, and will the debtor be placed in the position of *mora debitoris* automatically. The statutory exception with respect to the *mora debitoris* requirement with respect to termination in cases of temporary impossibility (Article 6:265(2)) is caused by the unnecessary combination of the question whether the cause of fault can be attributed to the obligee and the *mora debitoris* requirement. The so called “slimmed down version of the notice of failure” (Article 6:82(2)) does not have any added value with respect to expectation damages or termination. This notice of failure without allowing the obligee an additional, reasonable period of time for performance is useful with respect to a claim for delay damages, because it prevents an obligee from being surprised by a claim for delay damages. On the basis of Article 6:85, an obligor only has the right to claim damages caused as a result of delay if the obligee is in a state of *mora debitoris*. This means that permanent impossibility does not pro-
vide the obligor with a right to damages for delay of the performance, because *mora debitoris* is excluded in cases of permanent impossibility. It is this author's opinion that the obligor should also have a right to damages for delay in cases of permanent impossibility, even though in that case the obligee cannot have been placed in the position of *mora debitoris*.

Contrary to what the parliamentary records seems to suggest, it is not clear why in cases of permanent impossibility a right to expectation damages is automatically created by operation of law. If specific performance has become permanently impossible, the legal claim to specific performance has indeed expired, but the obligor should still inform the obligee if he or she prefers expectation damages or termination of the contract. Permanent impossibility leads to the definitive cessation of the procedural right to a legal claim for specific performance and to the exclusion of the requirement of *mora debitoris*. Temporary impossibility does not have these drastic consequences. In exceptional circumstances, the factual circumstances of temporary impossibility can be so radical that the consequences of permanent impossibility need to be attached. A Dutch judge currently approaches these cases cautiously, and correctly so. Non-performance of a long-term contract leads, in this author's opinion, to partial permanent impossibility. For the period in which specific performance is excluded, the obligor can partially convert or terminate without bothering about the *mora debitoris* requirement. For the termination or expectation damages for the future, the *mora debitoris* requirement should in this author's opinion in principle apply, unless it has been proven that the partial permanent impossibility should be equalised with complete permanent impossibility.

11.5 Fourth sub-question: Judicial competence

The fourth sub-question has been dealt with Chapter 8, namely: *Which role should the judge play in determining the admissibility of a claim for specific performance?* Broad judicial competence, as in the ‘common law’ system, to reject a claim for specific performance on policy grounds, forms a potential restriction on the right to specific performance. In the scope of answering the fourth sub-question, research has been conducted as to whether the Dutch judge has an *ex officio* discretionary competency to reject claims for specific performance, or whether the Dutch judge should have such a competency.

It has been determined that the competency of the judge to *ex officio* apply good faith clause (Article 6:248(2)) does not contain the competency to apply the “Multi Vastgoed” norm *ex officio*. The assessment competency of the judge is, therefore, restricted with respect to this aspect. It has been argued that the scope of the judicial assessment competency should be enlarged with regard to one point. The Dutch judge would be better able to deliver case-by-case work if, as is the case in France, the judge would be assigned the discretionary competency to impose a *delai de grâce* to suspend the specific performance obligation of the obligee if he or she determines there to be good grounds for such an action.
It has been argued in this research that the judge should be obliged *ex officio* to reject the specific performance obligation in cases of absolute impossibility, because the legal claim has automatically failed by operation of law. The rejection ground of absolute impossibility is not that the obligor has insufficient interest in his or her claim (Article 3:303), but that he or she is not able to succeed in the evidential burden as regards the existence of an enforceable contractual obligation. The notion of absolute impossibility in Dutch law should be further explained utilising the German notion of *Unmöglichkeit* and its different *Fallgruppen*. One of the subcategories of absolute impossibility is legal impossibility.

### 11.6 Fifth sub-question: Specific performance and related legal institutions

In determining the boundaries of the law on specific performance, the boundaries of comparable legal institutions need to be examined and determined. This is the topic of the last sub-question, which has been dealt with in Chapter 9: *How can the law on specific performance be positioned as regards other similar legal institutions?*

By comparing these legal institutions to the right to specific performance, similarities and differences are observed. This comparative analysis furthermore provides insight into the arguments that lay at the foundation of all these legal institutions namely the phenomenon that an obligor, who is confronted with an obligee who does not (completely) perform his or her contractual obligation, can enforce a right *in natura* with regard to the obligee or a third person instead of claiming monetary damages.

In par. 9.2, the relationship of the right to specific performance to the right to damages *in natura* has been examined. *Mora debitoris* is in principle a requirement for damages, but not for specific performance. The impossibility to perform on the other hand is only a defence against specific performance, but not against a claim for damages.

It is this author’s opinion that the judge is not granted a discretionary competence to reject damages *in natura* if he or she believes another remedy to be more suitable. The judge is, however, able to take into account the obligor’s infringement of the obligation to mitigate his or her damages (Article 6:101). An infringement of the obligation to mitigate the damages occurs if the obligor has refused to accept an obligee’s offer to compensate the damages *in natura*, even though the offer was adequate in the judge’s opinion. It has been argued that the obligor in the scope of his or her claim for specific performance can in principle claim replacement, if the obligee cannot deliver or repair the agreed specific goods. By means of interpretation of the contract, it needs to be determined whether the performance of a specified obligation is replaceable by an alternative. Hereby, the judge should determine whether the replacement performance of an obligation is of an equal sort and value as the obligation upon which the parties agreed. If this is the case, then the obligor can claim replacement of the specific goods and the obligee can free him or herself of the obligation by offering an alternative act. The
obligor is confined in his or her choice of monetary damages or damages in

Par. 9.3 deals with the question how the law on specific performance relates to

Firstly, judicial approval. This legal institution provides the obligor with the

Secondly, the statutory provisions have been dealt with that provide the oblig-

Thirdly, the question was raised whether an obligor has a right to claim dam-

Finally, reference has been made to the obligation of the creditor to mitigate

11.6 Sub-question 5: Related legal institutions

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apply with respect to a buyer claiming specific performance in commercial (sales) contracts. In accordance with the PECL and the UNIDROIT principles, it has further been argued that professional buyers should be under an obligation to execute cover transactions if certain conditions are satisfied. Before the establishment of an obligation on the buyer to limit his or her damages, the buyer must have placed the seller in a state of *mora debitoris*, and he or she must be able to easily obtain a cover transaction on the market. Infringement of the obligation to execute a cover transaction, does not infringe the right to specific performance of the professional buyer. The failure of covering with higher damages as a result should in this author's opinion lead to an obligation for the buyer to compensate the seller for the damages suffered.

### 11.7 Recommendations

An overview of the most important recommendations from this research will be provided in this section. These recommendations can be divided into four categories, whereby the first three categories refer to recommendations relevant for the central research question. The first category consists of recommendations that aim to clarify the boundaries of the right to specific performance. The second category consists of recommendations aimed at narrowing the boundaries of the right to specific performance as currently drawn by the law. These recommendations therefore contain a restriction of the obligor’s right to specific performance. The third category contains suggestions to extend the boundaries of the right to specific performance as regards certain points. The last category consists of proposals that are somewhat further removed from the central research question and refer to the legal institutions connected to specific performance and the consistency of the law of remedies.

It is obviously not always possible to draw sharp distinctions between the boundaries of these categories. Some recommendations could be placed in more than one category. Such recommendations have been placed in the category that most suits the sort of recommendation at hand. Where necessary, further sub-classification in each category has been made between recommendations directed at the legislature and that directed at practitioners (lawyers and judges).

#### 11.7.1 Clarification of the boundaries of the right to specific performance

**Recommendations for the legislature**

* The inclusion of a statutory provision in Book 6, Dutch Civil Code that provides an obligor with a substantive right to specific performance (par. 2.2).
* The European legislature should take the standard of the “civil law” as the starting point with regard to the development of a rule for European contract law (par. 2.5).
* The inclusion in Book 6, Dutch Civil Code of a evidential presumption of relative impossibility, that should the costs incurred through specific perfor-
mance be greater than 130% of the objectified interest of the obligor, the obligee should, in principle, be released from his or her obligation to specifically perform (par. 6.3).

* The inclusion in Book 7, Dutch Civil Code of a provision whereby the seller is provided with the competency to refuse the form of specific performance requested by the buyer, if the costs of performance are 20% higher than the costs of alternative methods of performance (par. 6.4.2).

Recommendations for practitioners

* The claim for specific performance of an obligor who has failed to send a formal notice or informal reminder for performance should not be rejected. The obligor should instead be ordered to pay the procedural costs if during the hearing the obligee states that he or she is prepared to perform (par. 3.3.4.4).

* According to the current law, it is sufficient that a buyer, who claims replacement because the goods received do not satisfy the contractual terms, simply state that the goods are faulty; the buyer should not be burdened with the requirements of claim that non-conformity constitutes a fundamental breach (par. 3.3.5).

* In assessing whether partial impossibility can be equalized with total impossibility, the judge should depart from an objectified standard of contract interpretation (par. 7.2.3).

* The current law that, the judge should not reject a claim for specific performance due to the possible enforcement problems, should not be changed (par. 8.2.6).

* With the assistance of an objectified contract interpretation method, it should be determined whether the delivery of replacement goods can be regarded as performance of a specific obligation (par. 9.2.3.3).

11.7.2 Narrowing the boundaries of the right to specific performance

Recommendations for the legislature

* The inclusion of a statutory provision in Book 6, Dutch Civil Code that provides the obligee with a defence to a claim of specific performance of a contractual obligation for the performance of a personal service if performance of that obligation would infringe upon his or her private life (par. 4.5).

* The analogous application of the duty of care lay down in Article 7:21(1)(c) to the claim of replacement with respect to consumer sales (par. 6.4.3).

* The inclusion in Book 6, Dutch Civil of a provision that allows the judge a discretionary competency to determine that the obligee may specifically perform the contractual obligations at a later moment than originally agreed (par. 8.2.2).
Recommendations for practitioners

* The judge should reject a claim for specific performance if the debtor’s obligation resulting from that contract is not (yet) due, and the obligor fails to state what his or her specific interest is in an order for specific performance (par. 3.3.3).
* The obligee can successfully defend a claim of specific performance in cases of force majeure. If the conditions causing the force majeure have ceased, the claim for specific performance should in principle be granted (par. 5.2).
* If the buyer has twice requested repair or replacement without success, the buyer should in principle be able to claim expectation damages without letter of formal notice or terminate the contract (par. 6.4.5).
* If specific performance is absolutely impossible, the judge should reject the claim for specific performance, ex officio (par. 8.2.4).
* A professional buyer who wrongly fails to conduct a covering transaction, retains his or her right to specific performance, but should compensate the damage that the seller thereby incurs (par. 9.3.5).

11.7.3 Expansion of the boundaries of the right to specific performance

Recommendations for practitioners

* The judge can order an obligee to specifically perform a highly personal contractual obligation, and if claimed, attach a conditional order for the payment of damages, but cannot impose a fine (par. 4.3.4).
* The judge should in principle grant a claim for the specific performance of a non-highly personal contractual obligation for personal service and the judge can, if claimed, attach a fine to the order (par. 4.4).
* The obligee’s defence that non-performance would be more efficient that specific performance, because a greater societal advantage would be achieved, cannot according to Dutch law (and correctly so) lead to the rejection of the claim for specific performance (par. 5.3).
* A consumer who claims replacement is not obliged to pay compensation for the enjoyed use of the replaced goods (par. 6.4.3).
* The judge may not apply the Multi Vastgoed norm ex officio (par. 8.2.3).

11.7.4 Other recommendations

Recommendations for the legislature

* The mora debitoris requirement should be separated from the elements of default (par. 7.3.4).
* The rule (Article 6:252(2)) that for the termination in cases of temporary impossibility no mora debitoris is required, should be scrapped (par. 7.3.4).
* Article 6:85 should be amended so that the right to compensation in an action for delay is not limited to the cases in which the obligee is in a state of mora
debitoris, but also covers the delay damage that occurs when performance is impossible (par. 7.3.7).
* The inclusion in Book 7, Dutch Civil Code of a statutory basis for the client party to hire a third party, at the cost of the contractor, to remove a fault in a delivered structure, after he or she has allowed the constructor by written notice to repair the defect, in vain (par. 9.3.3).

Recommendations for practitioners

* If specific performance remains impossible, the obligor should communicate to the obligee whether he or she wishes expectation damages or termination of the contract (par. 7.3.3).
* Temporary non-performance of a contractual obligation from a long-term contract leads for the period of no-performance to a partial permanent impossibility. The *mora debitoris* requirement should, in principle, apply with regards the termination or the claim for expectation damages of the contract for the future (par. 7.3.8.4).
* The obligor’s refusal of the obligee’s offer to compensate the damages in *natu-*
  *ra, can entail an infringement of the obligor’s obligation to mitigate one’s dam-
  *ages (Article 6:101) (par. 9.2.2.4).
* The judge does not possess a wider assessment competency with regards the decision on a claimed judicial approval then with regards the assessment of a claim for specific performance (par. 9.3.2.3).
* The judge should, in principle, reject a claim for judicial approval if the obli-
  *gor has failed to send the opposing party a formal notice in writing that allows the obligee an additional, reasonable period of time for performance of that obligation (par. 9.3.2.4).
* The obligee should not be liable for the costs he or she has saved as a result of a third party having repaired the fault in the performance, if the obligor had not informed the obligee by means of a letter of formal notice of the fault and provided the obligee the possibility to repair it him or herself (par. 9.3.4).