

# Precontractual liability, Netherlands\*

## 1. Introduction

Like most civil law systems, the law of The Netherlands on precontractual dealings was influenced by two major contributions by scholars of European standing: Rudolf von Jhering, introducing the concept of *culpa in contrahendo* in 1861, and Raymond Saleilles, developing the role of the principle of good faith and fair dealing in precontractual relations, in 1907. Over the years, the French influence became dominant, eventually leading to the development of by Dutch courts a doctrine of precontractual liability which seems to be more far-reaching than the law in the neighbouring countries. Under Dutch law a refusal to negotiate may give rise to an action for reliance interests, and even expectation interests. Furthermore, the refusing party may be held to an obligation to continue negotiations in good faith. The leading cases date from the last decade, extending principles handed down by the courts in the fifties and sixties as regards the conduct of parties in the precontractual stage.

Therefore, the contribution of Dutch law to the still underdeveloped field of precontractual dealings appears to be worth while to be reported. In doing so, the author will pay attention to the following issues: the legal basis of precontractual obligations and duties, their contents and scope, remedies for infringement of such obligations, agreements regarding the precontractual relation, and the role of previous contracts.

## 2. The legal foundation of precontractual duties and obligations: the battle of norms

Thinking of the precontractual legal scene, a preliminary question is: where did it all end, in a contract or not?<sup>1</sup> The answer to that question is of great importance for our search for the foundation of legal rules of conduct in the precontractual setting. If the agreement to a contract has been reached by the parties, it is commonly accepted in a Civil Code system, as the Dutch law is, to regard the principle of good faith, ruling the contractual relation between parties, as extended to the precontractual relation as well. The view on this issue, however, is clouded by the use of contractual actions by the party seeking relief for damages out of contract,

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\* In: E.H. Hondius (Ed.), *Netherlands Reports to the XIIIth congress International Academy of Comparative Law, Montreal, Canada, 18-24 august 1990*, Kluwer Law: Deventer 1991, p. 225-237.

<sup>1</sup> For a survey of Dutch law on precontractual dealings, and its historic roots, see Asser-Hartkamp II, *Verbindenissenrecht*, nos. 156-167, 8th edn., Zwolle, 1989; H.C.F. Schoordijk, *Onderhandelen te goeder trouw*, Deventer, 1984; J.M. van Dunné, 'Verbindenissenrecht in ontwikkeling'. Supplement 1986, pp. 1-36, Deventer, 1986; *Contractenrecht II-D* (Blei Weissmann); A.R. Bloembergen and W.M. Kleijn, Eds., Deventer, 1989 (suppl. no. 146, loose-leaf).

which occurred as a consequence of statements or acts of the other party during negotiations. The doctrine of mistake, for instance, traditionally based on the *consensus ad idem* concept of the will theory, has been transformed by the courts into *misrepresentation*, as it is known in English law. In a famous case of 1957, de [226] *Hoge Raad*, the Dutch Supreme Court, held that parties in negotiation take part in a 'legal relation ruled by the principle of good faith'; as a consequence, parties have to take into account the 'justified interests of the other party'. Elaborating this theme, the court came to the formulation of a 'duty of care', namely the duty for the buyer to investigate the facts of the subject of contract.<sup>2</sup> A few years later, the court accepted a similar duty for the seller to disclose material facts to the buyer in the course of negotiations. The case law developed on this basis, is of extreme importance for the development of precontractual liability in general.

This leads us to the second situation, where no contract was concluded between the parties. Here lies the real battlefield, when the question is posed which set of norms is governing the precontractual situation. Basically, the choice is between tort and the related duty of care towards other persons, and the principle of good faith derived from the law of contract. But there are other competitors as well: contract itself, as agreed between parties by implication from the circumstances of the case. Furthermore, restitution is also advocated as a legal source for action by the prejudiced party. In some jurisdictions, by-passes are made via the doctrines of mistake, unconscionable bargains, abuse of law and the like. Here, and in the sphere of remedies, the influence of Von Jhering is still felt. Due to the fact that at the time of his famous study, 1861, the law of tort was still *in statu nascendi*, and most conspicuously, based on statutory norms, his proposed construction of an implied preliminary agreement (*Zielvertrag*, later *Vorvertrag*) whereby parties were committed to *diligentia in contrahendo*, in fact was a solution *faute de mieux*. This preoccupation with contract, leading to the use of the action of mistake in this context, is still visible in modern German law. In other civil law systems, that of France for instance, from the turn of the century onwards the use of the law of tort proved more attractive, provided, however, with the contractual norms through the formula of 'conformément à l'équité et à la bonne foi'.<sup>3</sup> This latter approach, the legacy [227] of Saleilles, was gradually taken over by scholars in The Netherlands, which was eventually reflected in case law.

Until 1982, the predominant view on the foundation of precontractual li-

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<sup>2</sup> Hoge Raad 15 Nov. 1957 *NJ* 1958, 67, note LEHR, *Baris v. Riezenkamp*. For the development of case law on mistake/misrepresentation, see J.M. van Dunné, *Verbintenissenrecht in ontwikkeling*, pp. 149-169, Deventer, 1985.

<sup>3</sup> For the influence of German and French law on Dutch law in this century, see Van Dunné, op. cit. (n. 1), at pp. 20; 33. The state of comparative law on this point is poor in the Netherlands; little or no attention is given to present French law (Asser-Hartkamp, Schoordijk), and German law is ill-treated (Asser-Hartkamp), compare Van Dunné, op. cit. (n.1).

The leading case in French law is *Ets. Vilber-Lourmat v. Ets. Gerteis*, Cass. com. 20 March 1972, *JCP* 1972 II, 17543, note J. Schmidt. The infringement of 'les règles de la bonne foi dans les relations commerciales' is considered a 'responsabilité délictuelle' by the Cour de Cassation. Cf. J. Ghestin, *Traité de droit civil II*, no. 228, 1988; J. Schmidt, *Négotiation et conclusion de contrats*, 1982, no. 208. In German law precontractual liability is dealt with in the context of mistake, par. 122 BGB, combined with par. 276 BGB, duties of care, see K. Larenz, *Schuldrecht I*, par. 9 I, 1982; Esser/Schmidt, *Schuldrecht I* par 29 II, 1984.

ability was tort; this was changed by the leading case of *Plas v. Valburg* of that year, in which the principle of good faith was applied in this field by the Dutch Supreme Court. The decision meant support for authors adhering to that principle as the source of a general obligation of fair dealing in the precontractual stage. As a result, the question is still open.<sup>4</sup> In the legislative process the view was expressed that depending on the circumstances of the case, either a tort action or an action based on good faith may lie according to present law.<sup>5</sup> The issue, it must be noted, is of a rather academic nature, since it is generally admitted that under modern Dutch law of tort and contract, the outcome of the dogmatic choice is irrelevant for the remedies looked for by the prejudiced party. In tort, specific performance may be granted as to the compliance with duties of care. Remaining differences were further erased by the acceptance of compensation of expectation damages by the courts in the case of precontractual liability. What remains, therefore, is a matter of taste. A preference for tort is sometimes found at the bar, perhaps due to the popularity of that action in general for bread-and-butter-lawyers, or to a subconscious influence of the old *consensus ad idem* doctrine related to good faith and contract.

In the view of the author, results in this matter are of more importance than dogmatic foundations. For this approach support may be found in recent decisions of The Swiss Supreme Court.<sup>6</sup> In the Netherlands, the development of this part of the law was completely left to the courts. An influential factor in this respect was, that the German doctrine of *culpa in contrahendo* and its off-spring never formed a substantial part of the Dutch legal tradition. An effort of the legislation some years ago to draft a section on precontractual liability in the proposed New Civil Code, met with resistance in circles of practitioners and academics and was withdrawn by parliament. The commission concerned expressed its preference for leaving the matter open for further judicial development.<sup>7</sup>

A final remark on the use of restitution as a basis for the recovery of expenses made in the period preceding the breaking-off of negotiations. The Dutch Supreme Court has rejected such claims in a construction case in 1969, which was strongly criticized by scholarly writers. The risk of non-completion [228] of the negotiations was imposed on the constructor, which started the work only in the hope and expectation that his offer would be accepted by the employer.<sup>8</sup> The unjust enrichment of the latter was considered irrelevant by the court. It is doubtful whether this decision has any value as precedent in the light of the breathtaking developments in the case law of the eighties on precontractual liability. Also, the action based on unjust enrichment (restitution) seems better founded in contemporary law.

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<sup>4</sup> The case has drawn the attention of many legal authors, see the literature cited in n. 1. *Plas v. Valburg* will be discussed *infra*, para. 3.

<sup>5</sup> Compare Asser-Hartkamp, p. 147, also stressing the irrelevance of a choice between the two actions from a practical point of view.

<sup>6</sup> Van Dunné, *op. cit.* (n. 1), p. 31; the Swiss law discussed there is derived from Th. Bühler-Reimann, 'Zum Problem der "culpa in contrahendo"', SJZ 1979, p. 337, p. 361, *et seq.*

<sup>7</sup> For a critical analysis of the draft-article 6.5.2.8a New Civil Code, see Van Dunné, *op. cit.* (n. 1), p. 34, and in general Asser-Hartkamp, pp. 142; 147.

<sup>8</sup> Hoge Raad 18 April 1969, NJ 336, note GJS, *Municipality of Katwijk v. De Vroom*, compare Van Dunné, *op. cit.* (n. 1), p. 34, with further literature on the subject.

### 3. Precontractual duties and obligations

As discussed before, besides the general obligation of good faith and fair dealing, the courts introduced specific duties in the field of mistake/misrepresentation over the last decades, imposed on the negotiating parties: the duty to investigate and the duty to disclose. Generally speaking, these duties are no obligations in the strict sense: no fulfilment of those duties can be obtained in court. Their infringement does have consequences in law though, e.g. with regard to the action of misrepresentation, leading to the contract being declared void or to the award of damages. In German law such duties are known under the name of *Obliegenheiten*.

Outside the realm of contractual actions, however, duties and, sometimes, obligations abound. In practice, these obligations are usually based on the conclusion of preliminary agreements by the parties (*see infra*, sub 5), for instance a duty not to disclose confidential information obtained during negotiations, or to refrain from negotiating with third parties, etcetera. In several fields laws and by-laws exist whereby obligations of that kind are established. A good example, in construction law, are the Uniform Rules for Tendering (UAR), drafted for government contracts.<sup>9</sup> There are several rules or 'social codes' in a range of fields, like corporate take-overs, unfair competition, unfair advertising, description of goods, etcetera. Some codes consist of a complicated set of rules, in combination with a section on dispute resolution, by a specific court, board of arbitration, or committee. In some fields a sophisticated system of case law came about, by which the rules of conduct in the bargaining process are refined (e.g. take-overs).<sup>10</sup> In some situations, usually where a public interest is involved, one finds an [229] obligation, by statute or licence, to contract with any person interested. Compulsory contracting, in German: *Kontrahierungszwang*, is not restricted to ancient public professions like that of the notary public, but covers public services in general, so familiar in the welfare state: transport, delivery of water, gas and electricity, and other basics in western society.<sup>11</sup>

If we return to the general aspects of precontractual dealings, there is one duty which deserves special attention, namely the duty to negotiate, and to conduct the negotiations in a fair and reasonable way. Von Jhering's *diligentia in contrahendo* in a modern guise. In the opposite formulation: is there a moment in the negotiating process where a party loses its freedom to break-off further negotiations? Or may it do so at the price of compensating the other party's expenses, or

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<sup>9</sup> UAR, Uniform Aanbestedingsreglement (1986, 2nd edn.); on duties and obligations in the tendering stage, compare J.J. Goudsmit, 'Reglementen in het precontractuele stadium', *NJB* 1974, p. 229, p. 231. In present law the rules of tendering are also subject to EEC-law, which is changing the landscape of international construction industry at the moment.

<sup>10</sup> The best example perhaps is the Code on corporate take-overs, 'Fusie-code'; cases are heard by a special committee of the SER (Social Economic Council). Its members are nominated by the industry, the unions and the Crown. The case law of this Committee is intricate and extensive, and is published in quarterly editions. For an overview of different social codes and further literature, *see* Van Dunné, *op. cit.* (n. 1), p. 15.

<sup>11</sup> Compare J.J. Nagelkerke, *Contractweigerings in het Franse en Nederlandse recht*, thesis Amsterdam (VU), 1973, p. 119; F. Bydlinski, 'Kontrahierungszwang und Anwendung allgemeinen Zivilrechts', *JZ* 1980, p. 378; 'Contractenrecht VIII' (Spier), no. 25, suppl. 1989.

even losses? Here we come to the heart of the matter, at least to the part which attracted most of the attention and energy in legal discourse, in and outside the courtrooms. The use of the metaphor of the 'heart' here, is not too bad after all. Emotions are running high in this context and have to do with basic concepts: freedom on the one hand, and restriction of that freedom by rule of law, on the other hand. 'Freedom to negotiate' as opposed to 'fair dealing'.<sup>12</sup> The search for the well-known one-armed lawyer, who cannot say: 'but on the other hand', clearly is of commercial interest here. The cases in this field serve as an illustration of this point. A lost contract by implication means: lost profit. The other side of it is that it takes a falcon an average of 15 dives to catch one mouse. It is all in the game, but the game may be played a little too rough, and that is where the law comes in.

This rather impressionist sketch of the matter serves the argument I would like to put forward, that the issue is one of margins. It has to do with drawing lines where the discretion of the parties to withdraw from the negotiations by free will, ends. By its very nature the subject is vague and elusive, which is reflected in the language used by courts and legal scholars, irrespective of the time or jurisdiction concerned. In the findings of the law, decisive elements will be, first and foremost, the circumstances of the case, and more in particular the justified reliance created by acts of the party breaking-off the negotiations. Factors in the weighing of interests suggested by legal authors here are *inter alia* the measure of reliance created, the extent of expenses made by that party in the course of preparing the contract, the loss of opportunities, the validity of the reasons for breaking-off the negotiations, and whether that reason could have been brought up at an earlier stage. Factors which are known or could have been known to the [230] other party, the defecting party.<sup>13</sup> An illustrative case is the old case of a cantonal court of a small town. A farmer had sent a message to the local horsebutcher that his horse had broken its leg. After a two hour walk the butcher arrived at the farm, only to hear that the horse was sold the day before to his colleague from a neighbouring town. The butcher was awarded damages in tort, in this 1893 decision.

In our time, cases tend to be more complicated since the 'pourparlers' take more time as a consequence of the complexity and sophistication of modern bargaining and contracting. The elapse of time often is a hazardous element in the negotiating process: it may bring a change of circumstances during that period, or a change of mind, or there may just be somebody else who happens to come along with a better proposal, and a profit easily made. Not unlike contractual relations, or, one is tempted to add, any relations. Such is life. The leading cases are good examples of this phenomenon.

In *Plas v. Valburg* (1982), a construction firm tendered for the building of a municipal swimming pool in the small town of Valburg. Its proposal came out best - there was no official tendering - and the mayor and his aldermen agreed to the plans, which were within the budget available. Their decision still had to get

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<sup>12</sup> Compare for the general aspects of this question, as 'polar regimes': E. Allen Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations', 87 *Col. Law Rev.*, p. 217 p. 221 (1987).

<sup>13</sup> Leading Dutch authors on this topic are B.M. Telders (1937), L.D. Pels Rijcken (1958) and H. Drion (1967), followed by present-day writers like Schoordijk and Hartkamp. Telders, who broke the ground, was strongly influenced by Saleilles. For a survey, see Van Dunné, *op. cit.* (n. 1), p. 22.

approval from the city council, when a member of the council took the initiative for an alternative tender by another company, at a lower price. The latter plan was thereupon accepted by the city council, and Plas was set aside. His claim for damages has led to a landmark decision from the Dutch Supreme Court. The *Hoge Raad* made a distinction between three stages in the negotiating process of parties:

1. *initial stage*: parties are free to break-off negotiations, without any obligation to compensate the other party;
2. *continuing stage*: a party may be free to break-off negotiations, however, under the obligation to compensate the other party for expenses incurred;
3. *final stage*: a party is not allowed to break-off the negotiations, which would be against good faith; violation of this obligation gives rise to compensation of the other party's expenses and also, if deemed appropriate, the profits that would have been made by that party (*lucrum cessans*).<sup>14</sup>

The last stage is characterized by the court as the situation where both parties could reasonably assume that the negotiations would result in 'a contract of some kind'. A reliance of that nature is protected by the law through the principle of good faith, the court held. The subject of remedies will be dealt with below (sub 4). Incidentally, the second stage distinguished [231] here by the court, is a familiar one in Dutch law of tort, originally in cases where the liability of government institutions was concerned. A tortious act may be accepted by court in the light of general or personal interests involved, on condition that damages of the prejudiced party will be compensated by the tortfeasor. The dogmatic foundation of this liability is still subject to academic discussion, but the doctrine is commonly applied by the courts, with a long tradition in the field of nuisance.<sup>15</sup>

In the year 1983, the Supreme Court was called upon to decide the related question, whether a party unwilling to continue negotiations may be under a legal obligation to do so, and eventually, may be forced to negotiate by the court. After a denial in a 1981 corporate take-over case, with the 'advocate-general' dissenting, the *Hoge Raad* now held that the fact that parties are still divided as to the concrete results of the clauses of the preliminary agreement, should be no objection to the mutual obligation of good faith to co-operate in the finalizing of the arrangements agreed upon before. Also, specific performance of such obligations may be granted by the court with the use of a recognizance.<sup>16</sup> In this case an association of local tenants had negotiated new contract provisions with their common landlord, Koot BV, thereby adjusting the rent in view of the necessary maintenance of the apartments. Parties agreed on the general formula and commencing date, but negotiations fell short of fixation of the prices per room. The reason for breaking-off by the landlord was that to his opinion the outcome of calculations

<sup>14</sup> Hoge Raad 18 June 1982, *NJ* 1983, 723, note CJHB, *Plas v. Municipality of Valburg*; for a discussion of this landslide case and the abundant literature, see Van Dunné, op. cit. (n. 1), p. 23. The case was reported by Farnsworth, op. cit., p. 242, n. 94.

<sup>15</sup> One of the leading cases here is *Voorste Stream VII*, *NJ* 1953, 642 (in a chain of nuisance cases, starting in 1915), compare Brunner in his note in *NJ* on *Plas v. Valburg*, and Van Schilfgaarde, note AA 1984, p. 762.

<sup>16</sup> Hoge Raad 11 March 1983, *NJ* 585, note PAS, *Huurdersver. Koot BV v. Koot BV*. For a discussion of this case and related cases, see Van Dunné, op. cit. p. 28, where the interpretation of the case by Schoordijk and Asser-Hartkamp is criticized.

did not lead to a reasonable rent.

It must be noted though, that in this case the precontractual obligation was supported by a preliminary agreement. Interestingly enough, the commercial reason the landlord had for his refusal to negotiate was found insufficient by the court.<sup>17</sup>

The influence of prior agreement to the essential elements of the new contract seems to be of great importance here. A comparable approach followed by the courts is the establishment of a binding contract, which is based on the agreement of the parties to the main parts of the contract and sufficient certainty that the filling in of the gaps in a reasonable way is within the scope of further negotiations. In a leading case, *Polak v. Zwolsman*, of 1968, the *Hoge Raad* held that the decision concerning the accomplishment of a contract depends on the following factors: the intention of the parties, as inferred from the significance of matters agreed to or not, the intention to continue negotiations and the further circumstances of the case. If the [232] agreement still shows gaps, it is crucial that the court is in a position to establish the obligations not arranged for by the parties, on the basis of the parties' intentions and if necessary, statutory norms, in particular the Articles 1374 (3:37, 6:2, 6:248, 6:258) and 1375 (6:248) Civil Code (the sections on good faith and fair dealing).<sup>18</sup> It should be borne in mind that construction of contracts, and legal acts in general, in Dutch law is on the basis of the principle of good faith, therefore, a 'normative interpretation'. Perhaps not paramount in the above case, in later cases any doubt in that respect is taken away. In a row of cases in the seventies and eighties the Dutch Supreme Court explicitly adhered to construction of contract in good faith, rejecting claims solely based on the literal meaning of contract provisions.<sup>19</sup> In this context, it should be stressed that in the case of a break-off of negotiations, the court may be willing to accept that according to standards of good faith and fair dealing, the 'point of no return' has been reached, with the conclusion of a contract, a final contract with some gaps, as a result.

Returning to the notion of the duty to negotiate, the Court of Appeal Amsterdam in a recent case ruled that the refusing party should continue negotiations

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<sup>17</sup> This is the more remarkable in the light of the common view that economic reasons for breaking off negotiations are acceptable. Compare Saleilles' statement in 1907: the refusal to negotiate should be justified 'par un intérêt de caractère économique, qui ne soit pas de pure préférence personnelle' (cited by Telders, p. 462).

<sup>18</sup> Hoge Raad 14 June 1966, *NJ* 331, *Polak v. Zwolsman*, discussed by Schoordijk, op. cit., p. 92; Van Dunné, op. cit. (n. 1), p. 19. Here the real estate company of Zwolsman was interested in hiring the futurologist Fred Polak. The deal went off and after winning the case some years later, the company, at one time owning half the seaside resort of Scheveningen, went into bankruptcy. Perhaps the futurologist might have been of help after all.

<sup>19</sup> A triptych of cases here is *Municipality Bunde v. Erckens* (*NJ* 1977, 241), *Ram v. Matser* (*NJ* 1978, 125) and *Haviltex* (*NJ* 1981, 635), confirmed in recent cases, whereby a 'normative interpretation' of contract is accepted. Construction of contract, as a consequence, is a legal issue before the Supreme Court, and not a question of fact, as was the opinion of many authors, among which Hartkamp. His treatise is still not adjusted to the present law, cf. Asser-Hartkamp, no. 284. Compare also Brunner, note *NJ* 1978, 98. In the Dutch legal system, questions of fact cannot be decided by the Supreme Court (cf. French law).

leading to a contract, under a recogni of Hfl. 200,000.<sup>20</sup> The case concerned the movie-rights of a book, *The Seer*, and the writer of the filmscript was in negotiations with the widow of the author of the book, Vestdijk. Also in this case, we find a preliminary agreement, whereby an option was given to the scriptwriter. The refusal to finalize the contract provisions on the side of Mrs. Vestdijk, who was assisted by her publisher, was considered unjustified by the court.

In the same year, 1987, another case was presented to the *Hoge Raad*, this time a corporate take-over, and the court consolidated its 1982 decision.<sup>21</sup>

[233] In *VSH v. Shell*, the court ruled that parties in the negotiating process are under the obligation to take into account the ‘justified interests’ of the other party; as a consequence, the freedom to break off negotiations may be barred on the ground of justified reliance on the conclusion of the contract on the side of the other party or in consideration of other circumstances of the case. In such instances the break-off would be ‘not justified - i.e. unacceptable’ the court stated in a formulation taken from the draft-article of the New Civil Code, which was later withdrawn. This formulation was criticized by some authors, including the present author, and raises several questions, such as the relation between ‘justified reliance’, and ‘the other circumstances’. The discussion of this issue is outside the scope of this paper; suffice it to say that the court, later in its decision, demonstrated the necessity to combine the justified reliance and the other circumstances.<sup>22</sup>

The core of the decision, however, is the statement that an action for damages would only lie ‘if it is plausible that continuation of the negotiations would have resulted in a joint venture of *any kind*’ (emphasis added). This wording is the rephrasing of the Appeal Court’s decision by the Supreme Court, with its approval. In its own formulation, the court, referring to ‘a certain contract’ claimed to be not concluded between parties, is using the words ‘such a contract’. A discussion of the merits of this case will take us too far; it may be submitted that the Supreme Court’s standards, if well applied by the Appeal Court to the case at hand, could have led to a different decision. In fact, parties had drifted away from the original construction of a 60% bid on shares, and had, in the interest of both parties, agreed upon another form of joint venture, which needed some further elaboration. Therefore, a final agreement on ‘a joint venture of *any kind*’ seemed plausible, and was relied upon on fair grounds by the VSH, a small company. The Shell company at a later stage changed its mind, and eventually VSH (actually, its daughter) was bought out by a daughter-company of Shell, at a much lower price - the damages claimed by VSH amounted to Hfl. 3.4 million.<sup>23</sup>

<sup>20</sup> Appeal Court Amsterdam 7 May 1987, *NJ* 1988, 430, *Du Mee v. mrs Vestdijk and others*. Mr Vestdijk was a famous writer, once nominated for the Nobel prize for literature, who married his housekeeper in his final years; there are many conflicts concerning the literary legacy of Vestdijk, defended fiercely by his widow.

<sup>21</sup> Hoge Raad 23 October 1987, *NJ* 1988, 1017, note CJHB, *VSH v. Shell*, also discussed by Hartkamp, op. cit., pp. 142; 144. For the apparent authority/agency aspects of this case, cf. Van Dunné, ‘Nemo dat quod non habet. Vertegenwoordigingsaspecten van het afbreken van fusie-onderhandelingen’, in: *Tot vermaak van Slagter, Slagterbundel*, p. 65, Deventer, 1988.

<sup>22</sup> Compare the literature cited in n. 7.

<sup>23</sup> For details and a critical analysis, see Brunner in his *NJ* note, and Van Dunné, cited in n. 21. The rules on precontractual dealings and on agency were not well applied by the Court of Appeal; apparently the factual aspects prevented the Supreme Court from

#### 4. Remedies in case of precontractual liability

The recovery of damages caused by unfair conduct of the other party during the bargaining process, consists of a range of measures, depending on the action taken by the claiming party, the main division used before, whether a contract was the fruit of the negotiations - a regular one or an implied contract - is of course important for the remedies available. Here, the distinction introduced by Von Jhering in 1861, and still generally accepted in [234] most jurisdictions today, comes in: 'reliance interest' (*Vertrauensinteresse*) as opposed to 'expectation interest' (*Erfüllungsinteresse*). In the more popular formulation it is known as: 'negative contract interest' and 'positive contract interest' respectively. The first form of recovery is directed at putting the injured party in the position where it would have been, had the misrepresentation and the like not been made. The second is based on the position had the other party performed its obligations, ergo, it includes profits expected.

This handy distinction has the dangers of that kind of devices, it oversimplifies. In the field of precontractual dealings, the distinction is not of much help, in any event. Thus, one may find a court willing to award reliance interests *and* damages for lost opportunities. The latter category is not easy to be distinguished from expectation interests. It is therefore not too surprising to find the recovery of expectation interests sometimes accepted in German and Swiss law, as it is in Dutch law.<sup>24</sup> Reference is made here to the Dutch case law discussed in the above paragraph.

There are still some questions left unanswered, though. One of these is, what to do in the situation where it is hard to make an assessment of the chance of conclusion of the intended contract? It is suggested by some authors, that a reasonable chance of the constitution of a contract could be assessed. A precedent in this context may be a 1981 decision of the Dutch Supreme Court, concerning a non-concluded contract with the municipality of Heesch, where the lost chance on a contract was assessed by the court *ex aequo et bono*.<sup>25</sup> In such situations the certainty of the realization of the contract is no condition to the assessment. The use of the word 'plausible' in describing the possible conclusion of the contract by the *Hoge Raad* in the *Shell* case, also is an indication that no certainty is required in this respect.

#### 5. Preliminary agreements

It is common for parties engaged in precontractual dealings to look for certainty, if possible in the shape of a contract, but if that is still out of reach, one will settle for a lesser certainty in an effort to hold the other party by the coat-tails. Again, it

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correcting the lower court's decision.

<sup>24</sup> Cf. Larenz I par. 9 I sub 3, referring to BGHZ 49, 77; W. Fikentscher, *Schuldrecht*, par. 20 sub 5, 1979, referring to case law of the Reichsgericht. For Swiss law, see Bühler-Reimann, op. cit., p. 365. The German law, however, is far from clear; most authors accept compensation for reliance interests only, e.g. D. Medicus, *Allg. Teil BGB*, no. 635, 1985, citing Flume.

<sup>25</sup> Hoge Raad 15 May 1981, *NJ* 1982, 85, note CJHB, *Municipality of Heesch v. Reijs*. The point of assessment *ex aequo et bono* was stressed by Brunner, in his note under the *Shell* case, and preferred to the approach used by the Supreme Court in the latter case.

is Von Jhering who proposed an instrument to that end, the *pactum de contrahendo*, introduced into Dutch law in a 1906 thesis. Since then, a dozen or more varieties of a precontractual agreement were developed in legal practice, under different names, but often with roughly the same contents. There is little consistency, in practice and legal [235] theory as well, in this range of preliminary agreements as to the contents and legal effects.<sup>26</sup> To bring some order in this field, the present author introduced the distinction between agreements regarding the *procedure* of negotiations and those directed at the *contents* of the negotiations conducted thusfar.<sup>27</sup> The first category is designed for the structuring of future negotiations, with the latter, parties intend to put down the results of the negotiations at the time of day, which may even lead to an outline of the contract bargained for. The terminology suggested here is ‘procedural’ versus ‘material agreements’. This distinction has much in common with Farnsworth’s dichotomy of ‘agreements to negotiate’ and ‘agreements with open terms’.<sup>28</sup>

A standard remark here is, that these types of agreement tend to overlap: if both effects are wanted by the parties, an agreement of a hybrid nature will result. The judge may be charged with the difficult task of deciding, from hindsight, what parties reasonably intended with their agreement. Needless to say that here much is left to the discretion of the court. Therefore, in the construction of the preliminary agreement the preference of the court for contract or tort plays an important role. As discussed in para. 3 *supra*, the Dutch courts are prepared to go to considerable lengths to construe a contract with open terms, basically a binding, final contract, if that seems justified under the circumstances of the case. It is fair to say, that the existence of a preliminary agreement of some sort, is a stepping-stone to contract. As the case law discussed illustrates, the court sometimes balks at the establishment of a final, albeit somewhat open, contract, and puts the parties under the obligation to continue their negotiations in good faith, to do their homework themselves. In case of failure, caused by unfair dealings of a party, the remedy of expectation interests (profits out of the contract) awarded by Dutch courts, is an indication of the close connection between the two paths in finding the law in precontractual dealings: contract and tort. So much for the part of legal theory in this context, in the following survey the most common preliminary agreements in Dutch legal practice are described.<sup>29</sup>

#### a. Procedural agreements

In this category we find preliminary agreements under the name of ‘agreement in principle’, ‘contract in principle’, ‘letter of intent’, and the like. The intention of the parties basically is to establish an obligation to negotiate or [236] to continue negotiations. It may be a summary agreement, just stating an intention, signed by

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<sup>26</sup> See for preliminary agreements: J. Goudekot, *Afspraken tot het sluiten van overeenkomsten*, thesis Amsterdam 1906; W. van Schendel, ‘Enkele opmerkingen over “voorovereenkomsten”, i.h.b. in de bouw’, *Bouwrecht* 1981, p. 153; *Contractenrecht II* (Blei Weissmann), no. 374 et seq. (1987).

<sup>27</sup> Van Dunné, op. cit. (n. 1), pp. 10-13.

<sup>28</sup> Farnsworth, op. cit., pp. 249 et seq.

<sup>29</sup> The following survey, published before (*see* n. 27), is a reduction of a wide range of precontractual agreements as described by Blei Weissmann and Van Schendel (*see* n. 26). The distinctions used by these writers are, in the opinion of the present author, too subtle to be workable in practice.

both parties (letter of intent), or have a more elaborated form, fixing the state of the dealings thusfar, or even containing parts of a draft-contract. As a consequence, parties are under the obligation to continue negotiations in good faith, while additional duties may be added by the parties or implied by law, such as: to observe secrecy in confidential matters, to refrain from dealings with third parties, to take proposals from the other party seriously, that is, to reject these on reasonable grounds only, to give the other side the opportunity for a counter proposal and sufficient time for the preparation thereof.<sup>30</sup> In this connection reference is made to our discussion of these obligations in para. 3 *supra*.

Another type of procedural agreement, on a sliding scale really, is the agreement to contract (*pactum de contrahendo*, *Vorvertrag*); here we have the contract to enter into a contract. The only difference with the foregoing agreements is, that the obligations and duties imposed on the parties are of a contractual nature, under the rule of the principle of good faith. In the case of the former agreements, the foundation of those duties and obligations must be looked for in tort, or in a general obligation of good faith and fair dealing. As indicated before, the court may establish a preliminary contract implied in law, which makes the boundaries between these varieties of agreements even more fluent.

#### **b. Material agreements**

The contours of contract are visible in different shades in this category. In Dutch practice we find: 1. 'trunk contracts'; 2. 'provisional' or 'tentative contracts'; 3. 'basic contracts' or 'frame contracts'. More sophisticated distinctions made by some Dutch authors are thought to lead to mere scholasticism by the present author. The subdivision in these three types of precontracts suffices to shed some light on this section of precontractual dealings.

The 'trunk contract' is, in essence, the ultimate contract but needs finalizing on some points, gaps still to be filled by the parties. Sometimes the 'trunk' consists of a model contract, e.g. the UAV (*Uniform Administrative Conditions*, 1989, 2nd edn) in the construction business, while parties have the option to alter some standard clauses to their wishes.

In the case of 'provisional' or 'tentative contracts' final agreement between parties has almost been reached, but needs some further bargaining. If the term 'draft contract' is used, the only element lacking may be the approval of the parties, usually the principals of the persons engaged in the dealings (or the parent company, board of directors, etc.). These contracts are almost identical in form, the name is just a matter of emphasis.

[237] Finally, the 'basic' or 'frame contracts'; here we have the use of a contract which only serves to lay down the general conditions of contract, containing norms and rules of procedure for further specification, to the needs of the parties. As indicated by the word 'frame', sometimes only a rough outline of a contract is agreed to by the parties, usually a model designed by one of the parties or a branch organization. A well-known example in Dutch practice is the contract used for construction contracts in the Delta Works, in Zeeland, one of the biggest sea

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<sup>30</sup> See for these obligations Van Schendel. *op. cit.* p. 159, and for the agreements discussed, Schoordijk, *op. cit.* p. 96; B. Wessels, *Gentlemen's agreements*, p. 41, Arnhem, 1984; W.S.M. Schut, *Letter of intent*, Zwolle, 1986; see *Blei Weissmann*, no. 751, for further, abundant literature.

defence works in the world.<sup>31</sup>

The model for the contract bargained for may be a general one, used in that specific branch or trade, it also may be a previous contract between parties, in need of some additions or changes. Sometimes contracts with third parties are involved, which may lead to an interdependence of contracts, restricting the scope of bargaining of the party in question. In the building industry for instance, the contract of the main contractor with the employer will cast its shade on his contracts with sub-contractors, or *vice versa*. Clauses on warranties, delay, liquidated damages, etc. will be interrelated to a considerable extent. Such groups of contracts can be found in other fields too; the bargaining process will be complicated by existing contractual ties of the parties. The adaptation of different standard clauses, or rather their combination, is a common problem when these echelons of contract meet. It is not exceptional for parties to overlook these complications, thus creating a legal puzzle when conflicts arise.

A comparable situation exists when parties to a contract are confronted with hardships in the execution of a long-term contract, and a solution is sought in adaptation of the contract through renegotiation. Many of the issues discussed here will be met in the field of contractual revision, which may be called 'renegotiating in the shadow of law'. Since this topic was dealt with in the 1986 IACL conference in Sydney-Melbourne, reference is made to the paper on Dutch law, incidentally written by the present author.<sup>32</sup>

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<sup>31</sup> See J.J. Goudsmit, 'Het raamcontract en de Oosterscheldewerken', *Bouwrecht* 1987, p. 553.

<sup>32</sup> Van Dunné, 'Contractual revision of contracts in Dutch law', in : *Netherlands Reports to the Twelfth International Congress of Comparative Law*, Sydney-Melbourne 1986, P.H.M. Gerfer, E.H. Hondius and G.J.W. Steenhoff, Eds., pp. 75-96, Asser Institute, The Hague, 1986.

By the same author: 'Adaptation of Contracts in Cases of Hardship', in: *The complex Long-Term Contract*, F. Nicklisch, Ed., pp. 413-442, Heidelberg, 1987, *Technologie und Recht*, Band 8.