Summary

Introduction

Over the past few decades, Dutch scholarship has dealt with several categories relating to the overarching theme of 'third parties and contract'. However, whereas many scholars focus on the question as to what extent a non-contracting party can derive rights from a contract, the reversed question – does a third party have to take into account another's contract – has received far less attention. This research aims to map and clarify the way Dutch law deals with third-party interference with contractual relations, and to offer directions regarding the future handling of such cases. Furthermore, it intends to contribute to the ongoing discussion on the European harmonisation of private law by indicating the necessary elements of a harmonised liability rule regarding interference with contractual relations, developed upon the common core found in the European legal systems surveyed for the purpose of the study.

Aims, research questions, and methodology

The aim of this research is twofold. Firstly, it seeks to clarify the rationale and the scope of liability in Dutch law regarding interference with other parties' contractual relations, and to fill possible gaps, also by looking at solutions presented in German, French, English, and US law. Secondly, the study aims at assessing the possibilities for and desirability of a European rule for tortious interference with contract on the basis of the common core. Using insights from the comparative law analysis, it examines whether the 'common core' of the chosen EU jurisdictions – the Netherlands, Germany, France, and England – can function as a basis for harmonisation. This dual aim translates into the following questions:

1. What are the rationale and the scope of Dutch liability for interference with a contractual relation?
2. Is there a common core within the analysed EU jurisdictions, and, if so, to what extent is it appropriate to function as the basis for a harmonisation rule on the EU level?

The research focuses on cases in which the defendant (third party) 1) actively induced the counterparty of the claimant to breach his contract, whether or not by using unlawful means; 2) facilitated or cooperated in a breach of contract; and 3) took advantage of a previous breach of contract. Situations in which the defendant made performance physically impossible or more difficult − for instance, by destroying the goods that were to be delivered to the claimant − fall outside the scope of this study.

In answering the two questions, the functional method of comparative law is used. In accordance with this method, the research focuses on legal rules or principles in other jurisdictions that have the same function or one similar to the Dutch rule on liability for interfering with a contractual relation. The choice of European jurisdictions, in addition to the Netherlands, is made primarily on the basis of representing major legal traditions, in which German law represents the German legal tradition, French law represents the Roman legal tradition, and English law represents the common law tradition. The choice of a second common law jurisdiction – the United States – is justified by the fact that the amount of case law on tortious interference with contract greatly exceeds the number of judgements in all other jurisdictions. American case law and the Restatement (Second) of Torts constitute a rich source of information, since they demonstrate a plethora of problems that can arise, along with a wide range of possible solutions. Moreover, these jurisdictions also account for different approaches or solutions. The English approach can be described as more restrictive, whereas French and Dutch law are relatively generous in imposing liability. Germany, the only jurisdiction that regulates unfair competition in detail, and the United States occupy a middle position.

Results of the comparative analysis

The Dutch, German, French, English, and American liability rules regarding interference with another's contractual relation all exhibit a number of important similarities. Each of the jurisdictions acknowledges that contractual relations enjoy a certain degree of protection against third-party interference, and that the liability of the third party is in tort, not in contract. Furthermore, there is agreement on the wrongfulness of inducing a breach of contract and of interference by unlawful means. Another important similarity concerns the requirement pertaining to knowledge: a third party cannot be held liable for interfering with a contract that he did not know or ought not to have known. The similarities can be partly explained by the reception of law. However, a more important explanation seems to be that – especially regarding similarities between jurisdictions in mainland Europe – the liability has developed in response to similar economic changes.

As well as resemblances, however, there are important differences between the jurisdictions analysed. For one thing, the scope of the defendant's liability varies. English law is the most hesitant to impose liability for interfering with another's contractual relation, and can – from the perspective of the third party – be classified as liberal. Compared to the other jurisdictions, French law accepts a relatively broad protection of contracts by explicitly recognising the opposability of a contract against a third party who has knowledge of it. This means that every time a third party knowingly facilitates or assists in a breach – for example, by accepting an offer – he can be held liable in tort. For this reason, French law is classified as 'moralistic'. However, French law adopts a relatively strict knowledge criterion – similar to English law – requiring actual knowledge. Under Dutch and German law as well as several US state laws, it is sufficient that the third party in the given circumstances 'should have known' − termed 'constructive knowledge' − of the existence of a contract.

Dutch law can also be characterised as moralistic, but for different reasons than those relating to French law. Of all the jurisdictions examined, Dutch law is most willing to take into account the specific interests in question. For instance, Dutch courts explicitly attach significance to the severity of the harm caused to the claimant. The courts also acknowledge that economic and safety interests can influence the decision as to whether the defendant's act should be regarded as wrongful. Moreover, Dutch law traditionally awards extensive protection of vertical arrangements between firms − for instance, resale price maintenance (RPM) and selective distribution − by recognising that taking advantage of a breach of a vertical agreement can lead to liability, even when the breach took place at an earlier stage in the supply chain.

This study argues that German and US law both occupy a middle position. Initially, the German approach was moralistic and comparable to the Dutch approach. However, since the 1980s, German unfair competition law has become increasingly liberalised. German case law shows that judges are less willing than before to qualify interference with contract as unfair competitive behaviour, especially with regard to vertical arrangements. Although the American tort of interference with contract is rooted in English law, the US (Restatement) approach is less liberal. Not only the nature of conduct but other circumstances as well, such as individual or societal interests and motives, are acknowledged as factors in determining whether the interference with contract is improper. Although both US state law and German law accept that the interests of individuals or the society in general can be weighed and balanced in arriving at a judgement, their role is more modest than in Dutch law. US state courts usually focus on the nature of conduct and motives as the primary factors, and German courts have a similar approach. Furthermore, the strict interpretation in US case law of some of the tort's elements – especially intent and causation – results in a more limited scope of liability compared to Dutch and French law. However, of all the

jurisdictions examined, the US courts are the most willing to impose liability for interfering with a prospective contractual relation, often using conditions similar to the tort of interference with a contract.

The dissimilarities between the approaches adopted in the various jurisdictions – from more moralistic to more liberal – can be explained in more than one way. England especially, but Germany and the US as well, seems to attach a greater weight to the freedom of action and freedom of competition than do the Netherlands and France. The explanation for the specific liberal nature of English law can be construed on the fact that it does not recognise a general concept of unfair competition, and that English courts traditionally adopt an abstentionist approach in this field. Finally, it is submitted that differences in the appraisal of vertical agreements – RPM in particular – between continental European and English and American law in the 1920s and 1930s have contributed at least partly to the deviations found between these jurisdictions.

Another noteworthy difference between the European jurisdictions on the one hand and that of the US on the other hand concerns the third-party requirement. In the four European jurisdictions examined, the question of whether the defendant qualifies as a third party to the contract plays a relatively small part in case law. Yet, in a large number of US cases, courts check explicitly as to whether the third-party requirement is fulfilled. The main reason for this seems to lie in the difference between tort and contract remedies in US law, in particular with regard to the availability of punitive damages and higher compensatory damages in tort cases. Because of these differences, the claimant has an incentive to sue the defendant in tort rather than in contract. To prevent claimants from using the tort of interference with contract in order to avoid the remedial limitations set by contract law, US courts verify whether the defendant is a third party or is to be considered a party to the contract. Since in none of the European jurisdictions examined this type of tort gives rise to punitive damages, and in most countries the differences between contract and tort damages are limited, the claimant will usually have no reason to sue on the basis of tort if he can also sue in contract. Not only the importance but also the understanding of the notion 'third party' differs amongst the European jurisdictions and the US, especially when the defendant and the party in breach are closely connected companies: for example, parent and subsidiary. In general, US courts are more willing to adopt a fairly autonomous interpretation, developed within the doctrine of tortious interference, whereas Dutch courts for instance stick to established principles and concepts of company law.

A final significant difference concerns the importance of the tort as a cause of action in litigation. Whereas in European jurisdictions the tort of interference with contract has a relatively modest role as a basis for liability, in the US this is a cause of action for a large number of legal proceedings. The reason for this difference does not seem to lie within the scope of liability – as is argued

by some scholars. Diverging procedural laws – especially concerning the placement and distribution of the burden of proof – are more likely to be of importance, as well as deviations regarding the available remedies, also at the precontractual stage. Lastly, there is no doubt that the American litigation culture affects the number of claims filed, but it remains unclear as to what extent this explains the differences between the US and European jurisdictions.

Evaluation and recommendations

Scope and rationale of Dutch liability rule

This research argues that the open approach as adopted by the Dutch courts, in which the specific circumstances of the case are decisive, should be considered favourable. Using this approach, the courts can take into account both the interest of the claimant in the performance of his contract and the interest of the defendant in exercising his freedom of action and/or freedom of competition – interests that in essence should be considered equally important – as well as potential societal or economic interests. Both French and English law apply comparatively 'hard and fast rules' in the area of tortious interference with contract, and have the advantage of more legal certainty. However, this comes at the expense of individual justice and flexibility, and both approaches run the risk of overprotecting the claimant's interests (French law) or the defendant's interests (English law).

The main downside of the current Dutch approach is that Dutch case law provides little guidance as to the circumstances − and their weight − that can justify liability for interfering with another's contract. For this reason, it is suggested to apply a multifactor test – following the example of the American Restatement (Second) of Torts – that lists the possible factors that affect the court's judgement in terms of whether an interference with contract should be considered wrongful. The relevance of the factors is identified by analysing Dutch as well as foreign case law, and by examining arguments that are put forward in the literature.

Of considerable importance is the extent to which the defendant has influenced the decision on the part of the claimant's counterparty not to perform his contractual obligation. It is submitted that weighing the degree of influence – for instance, whether the defendant took the initiative or simply contributed passively to the breach – is justified on the basis of society's interest in commercial stability and contractual integrity. In principle, this interest does not outweigh the defendant's interest in freedom of action or free competition, and therefore does not justify considering all interferences with a contract to be wrongful. However, imposing a duty on third parties to refrain from actively and intentionally contributing to a breach of contract should not be considered a large

burden. Accordingly, this duty should be considered an acceptable limitation of the defendant's liberty to act.

In addition to the degree of influence, it is submitted that importance should be attached to the way the defendant influenced the decision not to perform, which is also in accordance with principles of unfair competition and contract law. The freedom to make an informed decision does not end at the time the contract is concluded. A party also makes choices after conclusion of the contract, such as whether to carry out his contractual duties, or to lawfully terminate the contract. These decisions should also be informed and taken freely. In the event that a contracting party decides under the influence of misrepresentations or duress, it is not only the party that is victimised but also the counter party, who sees the contractual relation being disrupted.

Furthermore, this research argues that courts should take into account the nature of the interests involved. The fact that the performance of a contract involves an extraordinary individual interest or a social or economic interest is a valid reason to provide additional protection to this contract, and to consider an interference with this contract wrongful. By analysing not only the interest in the performance but also in the concluding of a contract and in the continuation of a contractual relation, this research introduces a novel approach to the Dutch liability arising from interference with contractual relations. These interests also enjoy a certain amount of protection, albeit less than interests arising out of already concluded and enforceable contracts. In addition, the interest the defendant intended to promote by interfering with the contract can be relevant to determine whether his conduct is wrongful. For instance, the fact that the defendant was acting for the protection of an overriding individual or public interest can constitute an argument not to judge his conduct as wrongful.

The defendant's motive – such as ill will or spite – is another relevant factor in determining whether the interference is wrongful. However, since motives are generally difficult to prove in practice, this factor is of limited importance. In certain cases, however, the defendant's motive can be deduced from his behaviour.

In deciding whether the interference is wrongful, the courts should also consider the relations between the parties. The existence of a special relationship – such as one that involves special trust or a citizen-state relation – can be a reason to increase the third party's duty of care. The factor of remoteness or proximity is relevant in cases in which the defendant did not deal with the claimant's counterparty, but is indirectly involved in the breach. In general, his conduct is less likely to be considered wrongful than if it interfered directly. Finally, the frequency and systematic nature of the defendant's conduct may play a role. Behaviour that in itself is not considered wrongful – such as taking advantage of a breach of contract – can become wrongful if it is pursued repeatedly.

In addition to mapping the relevant factors, this study also provides guidelines for balancing the involved interests. It argues that, as a general rule, the greater the individual or general interest in the performance of the contract, the less the relevance of the means used and the extent to which the defendant influenced the decision to breach. Hence, the fact that a special interest is attached to the performance can constitute sufficient ground to judge conduct wrongful that in itself is permissible – such as accepting an offer. Furthermore, in the event that the defendant has used unlawful means – e.g. misrepresentations or duress – the nature of the claimant's interest becomes less relevant. In such cases, the interference can be considered wrongful even if the interest involved does not arise from an enforceable contract, but merely concerns a prospective contractual relationship. Moreover, some factors may also affect other elements that are relevant for establishing liability: namely, the knowledge criterion, the principle of relativity, the rules of evidence, and the concurrence of claims. For instance, case law shows that a special relationship between the parties can influence the way the knowledge criterion has to be interpreted. It is also submitted that the use of unlawful means can lead to a partial reversal of the burden of proof.

The approach introduced in this research not only reflects and clarifies the current Dutch law but also provides direction for the future. For this reason, a broad perspective has been chosen, which includes not only third-party involvement in a breach of contract but also third party participation in a lawful termination of a contract and interference with a prospective contract. This wider perspective should be seen in the context of the generality of Dutch tort law, which does not have to confine itself to third-party involvement in a breach of contract, but also relates to other interfaces of contract law and tort law. The above can be summarised in the following rule:

> In answering the question as to whether a third party is liable in tort against another for his involvement in the non-performance of a contract or the lawful termination of a contract or the interference with a prospective contractual relation, which he knew or should have known, all circumstances should be taken into consideration. Factors particularly relevant are:
> 1. The extent to which the third party influenced the decision of another's (prospective) contracting party;
> 2. The way in which the third party influenced the decision of another's (prospective) contracting party;
> 3. The interest interfered with;
> 4. The interest sought to be advanced by the third party;
> 5. The third party's motive;
> 6. The relationships between the parties;
> 7. The proximity/remoteness of the involvement;
> 8. The frequency and systematic nature of the involvement.

Prospects of European harmonisation based on the common core

The question of the prospects of harmonisation of liability for interfering with another's contractual relationship on the basis of the common core can be divided into the following sub-questions: What is the scope of the common core (understood in this study as the greatest common denominator)? How does this detected common core relate to the provisions of the Draft Common Frame of Reference (DCFR) regarding tortious interference with contract? Is harmonisation based on the common core feasible and desirable?

Based on an analysis of cases of third-party interference with contract, this study argues that the common core – situations in which all jurisdictions accept liability – consists of two components: 1) inducing a breach of contract, and 2) intentional interference with contractual or pre-contractual relations using unlawful means. This means that the common core virtually coincides with English law, which out of the four European jurisdictions examined applies the most restrictive criteria. Based on the comparison between the common core and the relevant articles of the DCFR, it is ascertained that while the two have clear commonalities, some discrepancies exist as well. It is submitted that Article VI. – 2:211 DCFR, which states that losses arising from inducement not to perform an obligation, comes very close to the common core identified in the comparative analysis. The criteria for wrongfulness, relativity, damage, causality, and available remedies laid down in the article and accompanying commentary echo the English approach. Nevertheless, the second component of the common core – intentional interference with contractual and pre-contractual relations by using unlawful means – is not as such recognised in the DCFR. These types of cases could be grouped under Article VI. 2:208 that states that loss upon unlawful impairment of business is legally relevant damage. However, since this article does not require *intent*, it exceeds the boundaries of the common core. Furthermore, the DCFR does not contain a uniform definition of 'unlawful means'; the explanatory commentary states that in part it is up to the national laws to determine this issue.

The next question to be answered concerns the feasibility and desirability of harmonising the law regarding tortious interference with contractual relations on the basis of the common core. This research argues that full harmonisation of this topic is not realistic in the short and the medium term. Unlike creating a European contract law, the formation of a general uniform European tort law does not have high priority for the European legislator. Moreover, evidence of bottom-up harmonisation − for example, soft law influence on court decisions − is lacking. This does not mean, however, that the chance of harmonisation should be ruled out completely. A significant number of member states, including the Netherlands, consider unfair competition to be part of tort law. Various unfair competition rules have been the object of harmonisation through the di-

rectives on unfair commercial practices towards consumers, and on misleading and comparative advertising. In addition, the European legislator has now taken concrete steps to align the rules on unfair business-to-business commercial practices, albeit only in vertical relations. The European interest in harmonisation of unfair competition rules can be explained on the basis of its concern regarding the creation of a level playing field, with rules that apply equally to all competitors in the internal market. It can therefore be concluded that harmonisation of liability arising from interference with contractual relations in business relations is desirable and – given the previous fruitful initiatives of the European legislator in the area of unfair competition – also realistic.

Given that 1) a common core can be identified, and 2) harmonisation at least in business relations can be deemed realistic, the question arises as to whether harmonisation on the basis of the common core is desirable and feasible. At first glance, the answer appears to be negative. When the common core is identified on the basis of cases for which all jurisdictions examined accept liability, it is of limited size. A harmonised rule based on this common core is expected to meet resistance from jurisdictions that accept broader liability, such as the Netherlands and France. In addition to the political unfeasibility, the desirability can also be questioned. The comparative analysis shows that there can be valid reasons to award more far-reaching protection to contracts against third-party interference, especially when special societal or economic interests are at stake.

The aforementioned does not imply that the common core is an inappropriate basis for harmonisation. However, a broader understanding of the common core concept is needed. It is submitted that general notions and principles within the European territory regarding unfair competition should be taken into account, in addition to the concrete situations of interference with contractual relations for which all jurisdictions accept liability. The contents of these principles and notions can be determined by looking at the already existing European unfair competition rules. As has been claimed in the literature, these rules are based on two pillars: 1) the principle of free and informed choice of market participants, and 2) the internal market's interest in effective competition. By including these principles, it is argued that the common core can serve as a basis for a European harmonised rule. Ideally, this rule should contain three elements. The first element concerns the inducement of a breach of contract as part of the common core − interpreted in the strict sense − of Dutch, German, French, and English law. It is submitted that this element is reflected adequately in Article VI. – 2:211 DCFR. The second element regards the general principle of free choice, and corresponds strongly to the provisions of the directive on unfair commercial practices. The focus in this is on influencing the economic behaviour of market participants, such as consumers but also professional customers, and its effects on interests of competitors. If a third party interferes with the free

choice of his competitor's existing or potential client to conclude, perform, or continue a contract, it makes sense to allow this competitor to challenge this unfair commercial behaviour. After all, the competitor has a direct interest, since the third party's conduct affects his contractual relations. The third element regards the principle of effective competition, concentrating on market power and on market conditions. On the one hand, direct or indirect interference with a competitor's contractual relations should not lead to reduced competition. On the other hand, if European or national competition law recognises that certain market power, obtained by concluding contracts, contributes to economic or technological development, this can justify additional protection for the concerned contracts against third-party interference.