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Efficient Breach of Contract

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From an economic view, in many cases, a breach of contract is more beneficial than contract performance. It is called efficient breach of contract. This article tries to indentify the type of contract breach, then leads to provide a significant analysis of criteria of efficient breach. Legal rules of damages recovery have an important role to determine an efficient breach. The writing therefore focuses on a relationship between the efficient breach of contract and damages recovery, as well as disgorgement, specific performance and morality with empirical evidences of corresponding provisions of Vietnamese law.

Keyword: efficient breach, expectation damages, disgorgement, specific performance

Introduction

In practice, violations of the law in general and breach of contract in particular are common behaviors, and are often viewed negatively and condemned. Subjects who violate the law, breach the contract are also therefore forced to bear sanctions that the severity depends on the level of danger to society and the extent of the damage caused by the violation.

Is the rule of law always good and does it always ensure justice? Perhaps it is not always, because a rule of law no matter how good it is at the time of issuance, it may become irrelevant when society changes. The terms of the contract agreed by the parties or by law do not always predict all future situations when the contract is made and do not exclude that the case would be better for parties, for the state or society if one party breaches the contract.

From an economic view, when the subject performs any action, it means that they aim to their benefits, so breach of the contract should be considered, measured by means of efficiency. From a legal perspective, breach of contract is always considered in reciprocal relationship with responsibility due to breach of contract, especially with specific performance and damages. We believe that, in relation to efficient breach of contract, the view of law and economics about specific performance and damages is also different from the law view.

In this article, we initially mention the following issues: i) what is efficient breach of contract; ii) analysis of the relationship between efficient breach of contract and damage compensation; iii) efficient breach and the

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request of the offending party to waive the profit from breach of contract; iv) efficient breach and specific performance and; v) morality and efficient breach.

Identify Efficient Breach

Contractual breach means the failure of a party to perform, to fully or properly perform its obligations according to the agreement between the involved parties or the provisions of this law[1]. Often, breach of contract causes negative consequences. However, there are also cases (which can be said to be the exception) that the breach of contract not only do not cause negative consequences but also benefits or minimizes the damage to the parties overall. In legal science, these violations are considered to be efficient breach of contract (efficient breach).

Efficient breach: "An intentional breach of contract and payment of damages by a party who would incur greater economic loss by performing under the contract"[2]. Thus, this violation is the intentional act of the breaching party. This breach of contract is considered effective because it helps the seller avoids a greater loss than the loss they incur when they perform the contract and of course these losses are considered only from an angle are economic losses. The economic benefit is compared between the gain that the seller will receive when he breaches the contract with the benefit that he will get if the contract is executed or it is also the difference between the amount compensation when they breach the contract with the damages they will incur if the contract is performed. Efficient breach of contract is also mentioned in the case if the breach is more profitable than when they have to perform the contract, but the benefit of the buyer is not less than when the contract is performed.

Efficient breach is not just a legal act or opinion of one or some people but it is a theory. Efficient breach theory is defined in the Black's Law Dictionary: "The view that a party should be allowed to breach a contract and pay damages, if doing so would be more economically efficient than performing under the contract"[3]. The view of efficient breach of contract was first introduced by Robert Birmingham in his 1970 article, *Breach of Contract, Damage Measures, and Economic Efficiency*, in which: Resignation to the performance of the committed party's contractual obligation should be encouraged if the breach makes him more benefit and ensures the other party in the contract also benefits, exactly what they believe is achieved if the violating party fulfills its contractual obligations (Brimingham, 1970).

One of the basic theory bases of efficient breach is the Pareto improvement. If a change from State A to State B makes at least one person better off and nobody worse off, the change is a Pareto improvement (Coleman, 1980, p. 226). This is considered to be the case when the seller gets more benefits if they breach the contract and the buyer is not damaged or the benefit is not changed (meaning no less more in the case of the seller performing the contract).

This situation can be explained with an example: A spent $1 to make a unit. The contract is signed between A and B, whereby A will sell B 100 units for $2 per unit. Thus, A will earn $100 profit from selling 100 units to B, while using 100 units to manufacture other goods, B will gain $50. Thus the total benefit of A and B is $150. Suppose after signing a contract with B, A receives an offer from C for $3 per unit. The efficient

[1] Clause 12 Article 3, Vietnam Commercial Law, 2005. Retrieved from https://moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=18140

[2] Black's Law Dictionary (8th ed., 2004), p. 564.

[3] Black's Law Dictionary (8th ed., 2004), p. 1563.

breach theory states that A should breach the contract with B and sell it to C at the suggested price[4]. At that time, A will earn $150 profit ($300 price—$100 production costs—$50 damages) higher than $100 earned from selling to B ($200 price—$100 USD production costs). This choice of A is considered an effective breach of contract because it not only brings benefits to A, but also does not affect the benefits of B: A with $150 profit from selling 100 units to C; B is paid $50 by A; and the value of the product has been enhanced. If the product belongs to B, it is only assessed at $1, but when it belongs to C, the product is worth up to $3.

Therefore, according to the efficient breach theory, when the seller's profits exceed the amount of damages of the buyer, the breach of contract should be allowed or encouraged, provided that the buyer is fully compensated and deserved for the benefits they expect that is lost. After receiving the compensation, the position of the buyer's interests has no difference compared to the position of benefits that they will get if the contract is performed (Posner, 1986, p. 107). Such breach of contract is considered a Pareto improvement (Posner, 1986, p. 57). From an economic view, A's case of breach of contract brings economic efficiency because the resources have been distributed to bring higher efficiency. Not only that, the breach of contract of A also makes social welfare significantly increase.

Another case in which a breach of contract can be considered effective is that if a party performs the contract, they will suffer greater losses than the compensation they have to pay to the other party when they breaking the contract. At that time, the economic problem was posed when the seller faces with two choices to implement or not to perform the contract. If the contract is implemented, the damage will be very great and if not perform the contract, the seller will have to compensate for the damage to the buyer. If the damage caused by the implementation is greater than the level of compensation, the seller's choice of breach of the contract should also be considered a case of an efficient breach because, from an economic perspective, this breach has avoiding a greater economic loss to the seller but at the same time does not reduce the position of the buyer party's benefits compared to the situation when the contract is performed. Moreover, broadly understanding, when the seller party avoids a greater economic loss, instead, the compensation for breach of contract also means that this breach avoids a greater economic loss for the society.

We believe that it is also considered to be an efficient breach if a party's breach will make the object of the contract being used more effectively and the material benefits of the other party are not lesser. For example, A leases 500 square meters of land from B to build a factory with a term of 10 years and can renew it if A needs it. The contract was signed at the time when B's land was in the suburb. After five years from the time of signing the contract, the land of B belongs to the inner city, and is very suitable for banking activities, moreover the bank is ready to lease for many times higher than the rent of A. So B breaches the contract with A and agrees to compensate A with enough money for A to move away. This can also be considered an efficient breach of contract.

From an economic perspective, contracts are seen as a tool to allocate resources. Indeed, contracts are tools that enable allocative efficiency to be achieved when moving goods to higher value places, where goods are used more effectively and ensure that each step in the allocation process is a Pareto improvement, so no one will lose benefits. An efficient breach is a unilateral action of Pareto improvement. In a sale contract if the seller's breach can generate a higher profit by selling the goods to a third party and no loss to the buyer, no

[4] The basic efficient breach theory is being analyzed on the assumption of zero transaction costs. Within the scope of this article, we only stop at analyzing the contents of simple theory, complex analysis of transaction costs related to efficient breach will be presented in one another time.

good economic reason can be found for condemning the breach (Fredman, 1989). In other words, according to the Law and Economics, there is no right or wrong when breaching the contract but only efficient or inefficient. It is possible to share with this view, because in fact there is no true or false, only reasonable or irrational, and the effectiveness is one of the arguments to prove whether certain behavior is reasonable or not.

However, in legal science there are still many different views on situations in which breach of contract can be considered efficient and can be admitted.

Efficient Breach and Damage Compensation

Under our understandings, in order to determine whether the breach of the contract is effective, it is necessary to set a review of the provisions of the law to demonstrate the damages that need to be compensated due to the breach of contract.

Given on the provisions of the laws of most countries and in accordance with the provisions of the Vietnam Commercial Law in 2005[5], when a party breaches a contract, the aggrieved party has the right to claim: i) actual damage; ii) due benefits. Likewise, the law of Vietnam but the certain 2015 Civil Code has other regulations on this issue, such as material damage under the provisions of Article 361.2 involves: i) actual material losses, including assets losses, reasonable expenses to prevent, limit and overcome damages and; ii) actual income either lost or reduced.

Under the consideration from both theory and practice, the determination of actual damage—loss of assets, reasonable expenses to prevent, limit and overcome damages creates serious questions. About this type of damage there are several understandings: First, the aggrieved party has relied on the promise of the breaching party in order to give values to the breaching party. And in case the failures of the breaching party to fulfill its promise, the Court has its requirement on the breaching party to return the value received from the aggrieved party. This benefit may be called recovery benefits (restitution interest). This benefit corresponds to the compensation for damage meaning to restore the condition of the aggrieved party as good as when the contract has not been signed (restitution damages) (Fuller & Perdue, Jr., 1936, p. 52); second, the aggrieved party has relied on the promise of the breaching party in order to change its conditions, i.e., some acts have been done and some costs have been spent by the aggrieved party. For example, a buyer party which relied on a car sales contract has spent the cost of building a garage, or trusting a real estate contract with the seller party that the buyer has missed the opportunity to enter into the other valuable contracts. This benefit of the aggrieved party again need to be compensated by the breaching party (reliance interest). This benefit corresponds to the compensation for damage that the aggrieved party has acquired because of its regards that the contract is certain (reliance damages) (Fuller & Perdue, Jr., p. 52).

The crucial issue in whether to acknowledge an efficient breach of contract is that, in addition to the actual damage, an amount of compensation should be paid by the offending party for the due benefit of the aggrieved party under the 2005 Commercial Law or for the income which is practically lost or reduced according to Article 361.2 Civil Code 2015.

Furthermore in our understanding, the determination of the expected profit or the loss of profit is another complication, however it is still simpler than the determination of the actual loss or reduction in income. Because when mentions expected damage or loss of profit which means the expectation of the aggrieved party

[5] Article 302 Vietnam Commercial Law, 2005. Retrieved from https://moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=18140

with the profits from the adaptation of the contract. This can be interpreted as expected profits associated with contracts. Indeed, when entering into contracts, the parties regularly set expectations for themselves, which is the value of the expectations that the contract has created or in other words the possible acquired values that is expected by the aggrieved party when entering the contract (expectation interest). This benefit corresponds to the compensation for damage and places the aggrieved party in a as favorable as possible position in case the offending party breach the contract (expectation damages) (Fuller & Perdue, Jr., p. 52).

Compensation for expected damages, or loss of profit (expectation damages) is considered to be an incentive to encourage efficient breach and the requirement is that this compensation should not be less or more than those profits that aggrieved party has expected to receive (expected profits). In case the compensation is higher, it might diminish the encouragement of offending party, otherwise the efficient breach is no longer effective whereas the interests of the aggrieved party are reduced. At the same time, the expected damage compensation principle further generated the product distribution to places with higher values. Assume that A agrees to sell a machine to B which worths 110,000 USD according to B for only 100,000 USD, and B expects the interest of 10,000 USD. Before the delivery, C initiates the issue with A to buy the machine for 109,000 USD. A is tempted to breach the contract with B yet prefers not to be responsible for the damage from the expected profits of B. Because of that expected compensation, C is incapable of convince the two parties violate the contract, unless C persuades A by buying the machine with a price higher than $110,000. Therefore, it can be defined that the expected value of the machine for B is higher than that of C. Thus, the principle of compensation for expected damage ensures that the machine is sold at the highest value (Macneil, 1982, p. 949).

Additionally, whether damage caused by “lost or reduced actual income” is a loss of profits (expected damage). Assume that this is considered to be a loss of profit, then the provisions of Vietnamese law are consistent with the way of determining the losses mentioned above. Hence, the efficient breach of contract is certainly available in Vietnamese law. Because of the economists’ point of view, as well as the lawmaker’—the principle of compensation is given to place the aggrieved party in the positive position they expected as the contract was executed rather than to prevent violation (Farber, 1980, p. 1443). To be more specific in respect to the principle of compensation for expected damages, the parties fairly have an incentive to violate supposing that the profit from the breach exceeds the damage of the aggrieved party—the damage needs to be compensated by the offending party. However, lost or reduced actual income could be interpreted to include losses: i) is expected profit (loss of profit) and; ii) are damages that have irrelevant or indirect relationship with the contractual breach of the other party, for example, because the seller does not deliver the goods to the buyer, the buyer fails to fulfill the delivery obligation to the partner, and the consequence is that there are a number of buyers’ customers who abandon buyers and the buyers’ income from there is significantly reduced. In other words, the income is reduced due to declining reputation. In case this type of damage is compensated in even, then there is non-existence of efficient breach of contract. For further understanding, because Article 361 of the 2015 Civil Code additionally provides for compensation for torts, hence the compensation for losses caused by “lost or reduced income” applies perhaps to tort primarily.

In our point of view, efficient breach might only be caused when or either the damage needs to be compensated for in a causal relationship with a breach of contract, or the parties in certain contract manage to predict the damage caused by breach of contract. Undoubtedly, the determination of “lost or reduced actual income” must be based on this principle. This means that the damage compensation could not exceed the loss

and the amount of loss that the aggrieved party has anticipated or capable of anticipating at the time of signing the contract as a possible incident by breach of contract[6].

Efficient Breach and Disgorgement

In the Common Law system, there is a kind of responsibility when breaching the contract is the disgorgement—forced to pay back money that parties have made in an illegal way. The disgorgement is defined in the Black's Law dictionary (p. 1410): "The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion". For British law, the responsibility to give up the profits arising from this violation comes from the case of Judicial General v. Blake[7]. Accordingly, George Blake is a member of the intelligence agency of the British government who had a contract with the government about not being allowed to disclose any information related to his intelligence work. However, eventually George Blake breached the contract by published a book related to his intelligence activities and the British government sought to collect all the profits that George Blake obtained from this book publishing. The Court issued a decision on the recovery of all profits from this violation. In *The Disgorgement Interest in Contract Law*, Melvin A. Einsenberg once again discussed thoroughly the existence of a method of confiscating all the profits due to this violation within the private law system. Thus solely mentions the three profits of aggrieved party under protection which including: (i) recovery profit (restitution interest), (ii) trust profits (reliance interest), (iii) expected profit (expectation interest)[8] is insufficient, though needs further involvement of the profits that the offending party must give up due to the promise' violation (disgorgement interest) (Einsenberg, 2006, p. 559).

Although the Common Law system recognizes and applies a measure that requires the recovery of all the profits of the seller from the violation[9], however, the Court rarely prioritizes the selection yet usually applies in cases of violations related to authorization and ownership (Siems, 2003). For violations related to authorization, the authorized person has created personal interests from the use of the property, information, position obtained through authorization, hence the recovery of this profit is perfectly reasonable even though the authorizing party suffers no damage (Einsenberg, 2006, p. 563). Likewise, concerning the issue of ownership, it is conceivable if the ownership of the property has been transferred to the buyer before the seller commits a breach, the measure of compensation for reimbursement of profits is applied. Because selling a property that is not owned by the seller is a violation of the law. When the ownership transference between the seller and the buyer has been completed, the illegal sale of the buyer in addition violates the law of tortious act legal liability (Tort Law) (Qi, 2007). The act of selling goods owned by others is considered an act of appropriating property and it is necessary to return the entire profits from the sale of such property.

Compensation by giving up the profits earned by violations (disgorgement remedy) exists in the Common Law, yet the application of this measure is infrequently. This can be explained by giving up the profits due to the violation as well as the method of enforcing the contract properly are the secondary choices compare to the expected profit is the first priority. And moreover in some cases abandoning the profits of disgorgement and

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[6] Article 74 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), 1980, Vienna.

[7] Attorney General v. Blake and Another [2000] UKHL 45; [2000] 4 All ER 385, Retrieved from http://www.bailii.org/uk/cases/UKHL/2000/45.html

[8] The US Restatement (second) of Contract, Section 344, 1981.

[9] Disgorgement is shown in US law in Section 16B of the Securities Exchange Act of 1934. Retrieved from https://www.nyse.com/publicdocs/nyse/regulation/nyse/sea34.pdf

expected damages (expectation damage) became equivalent because after the seller returned the expected compensation, there is no longer available profit to be returned in addition. It is possible that the profit reimbursement still arises however unavailable in the case of an efficient breach. Disgorgement is unnecessary when in term goods are either one of liked goods or not scarce in the market, causes a higher than market price is a negative option of the second buyer for the seller. At this point, the profits obtained by the sale to the third party of the seller is the difference between the market price and the selling price to the buyer. However, this difference equivalently is a measure of expected damage of buyers. For this reason, after the completion of the expected compensation, there is no more profits to be recovered from the seller. Suppose the goods are a special item or a third party offers the seller a price higher than the market price, then the buyer has scored greater advantageous to demand the Court to recover the interests of the seller instead of the request of expected damage compensation. Nonetheless, it is an uneasy task to apply a request to give up the profits of the seller due to breach of contract because the determination of the total profits of the sellers needs to be done by the buyers is yet another difficult question, not only it is more than just contract price difference but also this measure becomes unnecessary on condition that the buyer requires to comply with the contract.

There are provisions found to be similar with the disgorgement in the law of the Russian Federation. According to the provisions of Point 2, Clause 2, Article 15 of the Russian Federation, the aggrieved party not only has the right to claim compensation for the expected damage but also has the right to demand that the offending party transfer all the income that the offending party obtained from breach of contract[10]. If such regulations are rigid, efficient breach of contract is no longer a bothersome question. Despite that, the practical events shows the reality that opportunities are different between each individuals. The seller breaches the contract with the logics of apparently higher sale price for another buyer, yet not the same conditions ought to be bestowed on the buyer which leads to the same extra profits, such as the seller to deserve a corresponding profit when request for the transfer of all the profits gained from the seller by breach of contract. It described that the request for confiscation of this profit of the offending party does not stem from the loss of the aggrieved party, but from the profits of offending party itself. It is unreasonable and absurd in our understanding for profit claims which are inherently non-existent, even granted that position of aggrieved party. Eventually it seems that this is going against the inherent moral values.

Efficient Breach and Specific Performance

Under the contract law, when the seller breaches the contractual obligations, the buyer may use measures to ensure their interests, including the enforcement of performing contractual obligations by the offending party. The exemption of performing contractual obligations of the offending party is reside in the decisions of the aggrieved party. In case the offending party has its unilateral action without the consent of the aggrieved party, specific performance is directed from the Court. The rendering, as nearly as practicable, of a promised performance through a judgment or decree; specif., a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved (Black’s Law Dictionary, p. 4379). There is an opinion that this measure protects the contractual relationship and supports the parties achieve the targeted profits when entering into a contract (Dai, 2001, p. 137). Perhaps those who follow this point of view believe that the purpose of

[10] Статья 15 ГК РФ. Возмещение убытков. https://www.zakonrf.info/gk/15/

signing a sale contract is that the seller sells the goods and receives the money, while the buyer buys the goods in need.

Indeed, for countries following the continental European legal system, it is imperative to continue to comply with the contract. In the case of a violation, including a serious violation, the sanction for enforcing the contract is still valid and the contract is still available. Because of being affected by the Civil Law system, this spirit is still clearly reflected in the Vietnamese contract law. According to the provisions of Clause 2, Article 356 of the 2015 Civil Code, in case the obligation to deliver the same object is fail to accomplished, the aggrieved party may request the offending party to deliver another same object; further cases when there is no alternative same object, then the value of the object is the alternative payment. The above provisions as our understanding are described in two ways: First, the offending party must comply with the obligation of delivering the same object whenever there are still same objects available and use value of the object as the alternative payment when and only there is no other same object; second, the choices rest on the aggrieved party, either to request the offending party to fulfill the object delivery obligation, or to request the offending party to compensate the value of the object. Or as stipulated in Clause 1, Article 358 of the Civil Code 2015, in cases where the obligor fails to perform a task that is mandatory, the obligee may request the obligor to continue to perform or carry out the work by itself or hand over to a third party to perform such work and request the party who is obliged to compensate those reasonable expenses damages. Thus according to the above provisions, the enforcement of obligations is again considered a priority measure.

As a result, according to Vietnamese law, particularly with the approaches in Clause 2 of Article 356 and Clause 1 of Article 358 of the Civil Code 2015, efficient breach is almost inconceivably acknowledged.

Next, unlike other countries in the Civil Law, damage compensation with countries under the Common Law is the preferred measure of choice. And simply when compensation is an inappropriate measure, then the measure of forcing to comply with the contract shall be applied. However, nowadays' opinions propose that the difference between the Common Law and the Civil Law on the enforcement of contractual obligations is merely theoretical yet dismishingly on practical events (Lando & Rose, 2004). This means that the courts of the countries that currently implementing the Common Law, such as the US, Canada and Australia, have no obligation to compose their judgments that force the offending party to fulfill the contractual obligations. In many cases, the law of the countries followed the civil law system still prioritizes the adoption of compensation measures rather than enforcing the contract performance on account of the issues relate to transaction costs[11]. In between, the 1980 Convention (CISG) on international sales contracts selects a considerable harmonious solution. With Article 46 stipulates that the buyer has the right to require the seller to perform the obligation, though Article 28 stipulates that the Court is not bound to make a judgment for the proper implementation of the obligation unless the Court is able to comply with its own law for similar sales contracts.

It can be said that the enforcement of performing the contractual obligation of the offending party normally increases transaction costs. Such expenses may include:

First, the cost to certainly determine the defendant's obligations. Assume that the measure for enforcing the obligation is applied, this measure must usually be done exactly with what has been agreed in the contract. This become costly for the Court because in some cases it is necessary to determine what the defendant's exact

[11] In *On the Enforcement of Specs in Civil Law Countries*, authors proved that in fact courts of Denmark, Germany and France all prioritized the application of more compensation measures than specific performance, because the cost of enforcement for enforcing their obligations is too expensive.

obligation is. On the other hand, with compensation is the measure of choice, the cost of determining the amount of damage is evenly set out, however it seems that this cost is less than the cost to list exactly the obligations because the plaintiff is in obligation to justify the damage which is claiming.

Second, the costs associated with enforcement. Assume that the defendant fails to comply with the judgment of the Court, then come the enforcement, however the enforcement of the damage compensation is usually relatively simple and cost less than the enforcement of obligations because the defendant's properties are possibly confiscated to secure the obligation to compensation in case of necessity. Meanwhile it is not easy and expensive to get information on how much the defendant's obligations have been implemented.

Third, the measure of enforcing the obligation is likely incurring the costs of subsequent lawsuits when the relationship between the parties has become no longer positive and the defendant is obliged to accomplish a painful task. And normally, the effect is never satisfied while working on an unwanted task, which creates a loop of subsequent lawsuits when the plaintiff concludes that the defendant's obligations is again failing in performance.

Fourthly, it is imperative to comply with the contractual obligations when the violations bring about efficiency actually means the waste in the use of wealth and time. The acceptance of the term "efficient breach of contract" and the application of compensation for damages instead of the enforcement of the contract is resulting in time and wealth being used more effectively for society.

From the above analysis and arguments, our conclusion is drawn out that efficient breach is a reasonable coexist with the damage compensation rules, yet incompatibles with the enforcement of contract rules (Qi, 2007).

Efficient Breach and Morality

The moral aspect is frequently mentioned alongside with economic aspect whenever the discussion of behaviors relate to efficient breach of contract aroused, especially individuals against the promotion of this so-called behaviors. Indeed, comparing to other doctrines and with the obvious truth that the supportings and the objections consistently co-exist, efficient breach shares the same fate as besides advocates, objections is inevitable. The public shares concerns about the moral factor of efficient breach of contract (Sidhu, 2006, p. 61), such as arguments that efficient breach is morally incomplete when the offender intentionally breaks the contract promise (Rigoni, 2016). In particular, a contractual commitment has created a moral obligation binding on the parties who composes the promise to fulfill that promise, not just an obligation to perform only when that performance is effective. In the same point of view, Gregory Klass stated that a violation, whether it is effective, is still a violation and it is an injustice, an insult to the law encouraged this wrong in business (Klass, 2014).

Our understanding points out that breach of contract in many cases and in principle is an immorality and disapproval pattern, however, there are available cases that the performance of the contract is considered to be unwise if not to say mindless. In case the circumstances in the contract implementation process are foreseen by the parties at the time of contract signing, the violation encouragement is a false option. There are exceptions, however, that the situation at the time of contract implementation has a fundamental change which is unpredictable by the parties. In that context, the implementation of the contract is causing serious damage to the parties than just let it to be voided. In this case, it is impossible to consider the non-performance of the contract, unable to fulfill the promise of an ethical violation yet otherwise.

In the article "English Contract Law and the Efficient Breach Theory: Can They Co-exist?", author Tareq Al-Tawil stated that the theory of efficient breach reduced the effectiveness of the contract system because: (i) There are going to be numbers of lawsuits and related costs because the compromise to breach the contract; (ii) the reduction of the power of trust in contracts, because contractual contracts play an important role in ethical standards (Al-Tawil, 2015).

Once again, our understanding point out that the moment the efficient breach of contract is adopted into the law, the effectiveness of the contract system will not only remain the same but also being improved to another level. Because this adoption is changing the contract to be more flexible and adjustable. This is reflected in the law recognizing the principle of Stantibus Rebus Sic[12] in the implementation of the contract next to the Pacta Sunt Servanda principle. Or, for example, the laws of many countries allow the Court to intervene in adjusting the penalty for breach the contract or the expected damage compensation according to the request of the concerned parties in case there is evidence that the existing damage is completely greater than either the penalty or the compensation levels previously agreed by the parties[13].

Furthermore, it is found to be difficult to agree with the explanation that the adoption of the efficient breach of contract into the law generates numbers of lawsuits and related costs because of the compromise to breach the contract. To be frankly, the moment the law has adopted the efficient breach, the possibility of disputes leading to litigation is unlikely. Because in prior of breaching the contract, the offending party needs to calculate whether its violation is an efficient breach and the determination of that event tickles the aggrieved party to find out about this violation. And obviously, without exception that the moment the aggrieved party learns that the efficient breach is recognized by law, it is abnormal to find a legal resolution.

In general, from the against the efficient breach theory' point of view, it is understandable that the promotion of breach the contract, whether it is called efficient breach, still result in that the Pacta Sunt Servanda principle is broken. This concluded that from a moral perspective, there is no exception or permission of the breach of contract obligations from one of the parties for whatsoever reasons. On the contrary with the supported theory' point of view, the efficient breach is acknowledged as the exception of the Pacta Sunt Servanda principle.

Following Richard A. Posner's (1990) point of view: "No party will sign a contract unless one side thinks they will get better results"[14], for that reason there is a possibility at another time their profits might be increased, and there is no reason how to stop them from changing their minds for the higher profit. So whether or not there is an efficient breach of contract theory, it is in our opinion that the promiser still violates the contract to acquire a greater profit and even in our profound opinion, the efficient breach theory genuinely contributes in reducing costs and increasing benefits for society. Especially for the Common Law when the school of natural law developed with renowned statements, such as the one of John Stuart Mill: The only freedom worthy of its name is to pursue our own interests in our own way, as long as we do not try to take away the interests of others, or hinder their efforts to get that interest (Mill, 1995), thus the choice of efficient breach for a better results is understandable. In the end, not only from an economic perspective, but also from

[12] This principle is shown in Article 420 of Vietnamese Civil Code 201. Retrieved from https://moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=18147

[13] Статья 333 ГК РФ. Уменьшение неустойки (действующая редакция). Retrieved from https://www.zakonrf.info/gk/333/; https://www.legifrance.gouv.fr/affichCode.do;jsessionid=D252DB0AE6EC86C94E293C36C6EF9F30.tplgfr25s_1?idSectionTA=LEGISCTA000006150246&cidTexte=LEGITEXT000006070721&dateTexte=20090131

[14] Posner, R. A. (1990). The problems of jurisprudence. Cambridge, MA: Harvard University Press.

the perspective of freedom, the efficient breach of contract indeed is a behavior that worthy to be encouraging.

Judge Oliver Wendell Holmes, a strong advocate of efficient breach theory, stated: The obligation to keep a contract by law is nothing but you have to pay compensation if you don't keep it right (Holmes, 1897), and at the same time affirmed that the contract law simply is the compensation for the breach of contract without further punishment on any ethical violations. The function of damage compensation especially under the Common Law is to compensate rather than to punish (Katz, 1987). Thereby the reason for a party's breach in the contractual relationship is unimportant. As Posner stated: Contract law does not really care about the intentions of the parties, the remedy is the same even if violations are considered "ethical violations" (1999, p. 208)[15]. The consensus between Posner and Holmes is mutually found to assume that the legal responsibility to keep the promise is merely to predict that unless keeping it properly or the compensation is mandatory for any damage related to the compromises.

In our understanding, the efficient breach is not only deliver economic benefits but also moral issues. In common thinking, an ethical behavior is obviously a behavior which either brings no harm or creates no loss for others, thus a morality behavior in contrast is the one brings happiness and joyfulness to others. Efficient breach of contract satisfies both of the above requirements. When the aggrieved party knows that the breach of the contract certainly causes no damage, and the expected profits when entering the contract is still secured, whether they prevent the violation or force the other party to performing the contract is considered a lack of goodwill. That behavior has only one explanation by psychology that the selfishness of wanted to be the solely pinnacle. At the same time, when the breach of contract is effective, the total profits of the parties is greater than when the contract is implemented and so the social benefits are, which contributes to the happiness for others. Therefore, it is considered as a well-intentioned behavior assume that the acceptance of the aggrieved party with this violation and that is moral.

Should the Law Adopt the Efficient Breach of Contract?

When there is an efficient breach of the contract, the aggrieved party is given two options: i) to accept the other party's breach; ii) to force the performance of the contract to offending party. Either choice provides the aggrieved party with the same profits. As the rational side, the aggrieved party shall accept the other party in breach of the contract, because the expected profits is still being received while nothing needs to be done. However, not always the aggrieved party makes that choice. It is in common that people are not always acting rationally, yet in many cases their behavior is dominated by emotions. Normally the aggrieved party is not comfortable with the offending party, especially when this violation still gives the aggrieved party the expected profits, though brought the offending party a greater profits compare to the implementation of the contract. This emotion is vital that causes the aggrieved party to compel the offending party to comply with the contract.

Another fundamental reason for the unacceptable of the efficient breach of contract is the renowned characteristic of humanity that no one has the right to get higher profits, especially that profit is obtained through a violation. Human nature is inherently selfish, human behavior is inherently seeking for one's own benefit. Thomas Hobbes argues that each one of behaviors we show, whether it is kind or altruistic, is actually

[15] Posner, R. A. (1999). *The Problematics of Moral and Legal Theory*. Cambridge, MA: The Belknap Press of Harvard University Press.

for the sake of self-profit (Hobbes, 1651, p. 79). Because of those selfish and jealous natures of the human that the aggrieved party finds it is hard to bear with the thought that the other party has breached the contract yet gaining higher profits. Therefore, it is resolved into one solution for these circumstances, which is the aggrieved party exploits the enforcement toward the offending party to comply with the contractual obligations. Apparently, as analyzed above, the mechanism of enforcing the contract is not an incentive for efficient breach because it hinders this effective violation. At that time, considering the economic perspective, the forced implementation of the right obligations manages to preserve the benefits of the aggrieved party, however the benefits of the offending party, as well as the total social benefits is being reduced compared to the acceptance of efficient breach. This is when legal intervention is necessary because of these circumstances. This is also entirely consistent with the natural law ideology: The natural right of a human being is the right to do what is beneficial to himself, not to harm the interests of others. From John Locke's point of view, this non-aggression of life, health, freedom and property is the limit of natural law on human's natural rights (Wacks, 2006). The violation toward the contract of the sellers is to bring higher benefits to themselves and at the same time there is no reduction on the benefit of the buyer when the benefits, even the expected benefits of the buyer are adequately compensated. It should be awarded that whether the contract is performed is insignificant, as long as the expected benefits still recoverable, thus there is no need for legislation. For that reason, in some cases, from both an economic perspective and an ethical perspective, the law recognizes that efficient breach to enhance the benefits of the parties, as well as the total social benefits are necessary.

The law of Vietnam, particularly the Civil Code 2015, seems to have admitted the efficient breach of contract when allowing a party to cancel the contract, unilaterally terminate the contract and compensate the damages. Under the provisions of Clause 5, Article 427 and Article 428 of the Civil Code 2015, in case the cancellation of the contract or the unilateral termination of the contract without the breach of the other party, the party canceling the contract or unilaterally terminating the contract is determined as the party violates its obligations and therefore needs to perform its civil liability due to failure to comply with its obligations under this code and other relevant laws.

However, correspond with the above provisions, the Civil Code 2015 additionally stipulates that, when there is a violation of one party, the law still grants the aggrieved party the right to request the offending party to fulfill its obligations. According to the provisions of Clause 2, Article 356 of the 2015 Civil Code, in case the obligation to deliver the same object is fail to accomplished, the aggrieved party may request the offending party to deliver another same object; further cases when there is no alternative same object, then the value of the object is the alternative payment. It can be acknowledged that, with the above provisions, Vietnamese law seems to give the aggrieved party first of all the right to demand the fulfillment of the obligation to deliver the object. And as long as the obligation to deliver the object is fail to accomplished, then another measure shall be applied—to pay for the value of the object. These regulations almost sound like there is no recognition of efficient breach according to the approach of this article.

Conclusions

The theory of efficient breach of contract is considered one of the advanced perspectives on breach of contract resides in law school of economics (Cooter & Ulen, 1988, p. 290). The valuation of the implementation of the contract obligations by the parties is still taken seriously, yet there are acceptable exceptions when breach of the contract brings economic efficiency to the parties and causes no damage to other

third parties. Recognizing an efficient breach of contract is compatible with not only ethical principles but also economic benefits—is the greatest purpose of contract establishment. Therefore, to prevent the seller from taking orders from other buyers, is to waste the sellers' capacities and resources, as well as no additional benefit is brought to the original buyer from the capacity and resources have been wasted.

From the above analysis, our understanding drew out: i) Efficient breach of contract only exists when the law limits the damage that the offending party obliged to compensate is not higher than the actual loss and the loss of profit of the aggrieved party in case the implementation of the contract; ii) Vietnamese Civil Code 2015 should have separate provisions on compensation for damages caused by efficient breach of contract (should not be included in Tort law); iii) Clause 2 Article 356 Civil Code 2015 should be abolished.

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