



The doctrine of efficient breach of contract and implications for Vietnamese law in the market economy context

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Abstract

The doctrine of “efficient breach of contract” is a significant contribution of Law and Economics, shifting the traditional approach that views contract breach through a moral-legal lens. According to this doctrine, a breach is not always negative; in certain cases, it can generate a net social benefit if the breaching party fully compensates the aggrieved party while still securing a greater value from a new opportunity. This article analyzes the origins and practical values of the doctrine, while distinguishing between efficient breach and ordinary breach based on their nature, purpose, and market impact. On that basis, the research examines cases of efficient breach categorized by the subjects and objects involved, as well as the types of benefits derived from the breach. When compared with Vietnamese law, the article identifies inadequacies such as regarding specific performance as the central remedy and the lack of economic criteria in evaluating breaches. Finally, the article proposes several recommendations for the controlled application of this doctrine in Vietnam.

Keywords: Efficient breach, specific performance, expectation damages

Introduction

Efficient breach of contract is a novel topic in the Vietnamese legal system, as it approaches breach behavior from the perspective of economic efficiency rather than solely relying on traditional moral-legal norms. Stemming from the debates surrounding this doctrine, the article proposes a new perspective: that a breach, under certain conditions, can be considered reasonable if it creates a net benefit for the parties and enhances resource allocation efficiency in society. On this foundation, the article analyzes typical cases of efficient breach and assesses the feasibility of adopting this doctrine within the framework of Vietnamese law, particularly concerning the regime of expectation damages. Finally, the article offers several implications to orient legal improvements in the context of a market economy, thereby building a more balanced regulatory mechanism between the binding nature of contracts and the objective of economic efficiency.

Materials and Methods

This research utilizes a qualitative doctrinal methodology, deeply rooted in the analytical paradigm of Law and Economics. The investigative framework is designed to evaluate the intersection between traditional contractual sanctity and the modern requirement for economic efficiency within the shifting context of Vietnam's market economy. The research materials comprise a comprehensive normative and jurisprudential corpus. Domestically, the study scrutinizes the core pillars of the Vietnamese legal system, specifically the Civil Code 2015 and the Commercial Law 2005^{[1], [2]}, supplemented by a review of contemporary judicial decisions and policy-oriented legal documents. Internationally, the research draws upon the established legal tradition of the United States - specifically the Restatement (Second) of Contracts and the Uniform Commercial Code (UCC) - alongside landmark case law. Furthermore, the study incorporates international soft-law

instruments, including the CISG, the UNIDROIT Principles, and the PECL, to provide global benchmarking standards. Methodologically, the study employs statutory analysis and systematic interpretation to deconstruct the current legal mechanisms of breach, specific performance, and penalties under Vietnamese law. This is complemented by a Law and Economics analytical method, which assesses breach behavior through the lenses of expectation interests, Pareto optimality, and optimal resource allocation. Finally, a comparative legal analysis is utilized to contrast the domestic framework with international best practice (best practices), facilitating the formulation of strategic recommendations to enhance both the stability and efficiency of Vietnam's contractual regime.

The Doctrine of Efficient Breach of Contract

1. Origin and Nature of Efficient Breach

It can be observed that most acts of contract breach stem from the breaching party's calculation of interests when they apply measures beneficial to themselves. However, when mentioning the calculation of interests in an efficient breach, one must consider the interests of the parties involved and the total social welfare.

Firstly, one of the theoretical foundations and origins of efficient breach is Utilitarianism, notably represented by Jeremy Bentham and the liberal thought of John Stuart Mill. The core idea is that the highest moral principle is to maximize happiness; a morally right action is one that produces the greatest good. Happiness here can be understood to include interests, specifically economic interests. It is often argued from a utilitarian perspective that one should maximize the collective interest—that is, considering the interests of others as much as one's own. Like Bentham, John Stuart Mill regarded utility as the ultimate goal of all moral issues, but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. Specifically, he expressed the view of

respecting liberty: the freedom of each individual must be directed toward utility, and people must be free to do what they want, provided it does not harm others. This demonstrates that efficient breach, in its formation and development, carries the spirit of utilitarianism and liberal thought.

Within the scope of this research, Efficient Breach is defined as: "An intentional breach and payment of damages by a party when they would suffer a greater economic loss if the contract were performed." Consequently, regarding the nature of efficient breach, this type of breach is not negative; rather, when breaching, the breaching party has considered the interests of both parties to the contract, bringing efficiency to the parties - particularly where the net benefit to the breaching party is significantly larger than the benefit they could achieve by performing the original contract, and even for the total social welfare. Thus, efficient breach does not adversely affect the rights of the aggrieved party but simultaneously increases the benefit of the breaching party and optimizes social welfare.

If utilitarianism and liberal thought serve as the philosophical foundation, the direct formation of the efficient breach doctrine in modern legal science is linked to the emergence and development of the Economic Analysis of Law school. In his classic article "The Path of the Law" (1897), Justice Oliver Wendell Holmes Jr. proposed a revolutionary perspective, separating moral elements from legal obligations in contracts: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it - and nothing else." This view "demoralized" the binding nature of promises, transforming the contract into an economic choice: the obligor has the right to choose between performing the act or paying compensation, depending on which option is more beneficial. This is the theoretical premise that allows breach behavior to be considered from the perspective of efficiency rather than merely as a moral wrong.

2. Practical Value of Efficient Breach

It can be said that efficient breach is a relatively new legal issue regarding breach behavior, but viewed from an economic perspective - specifically, the economic efficiency of the breach. In essence, underlying an efficient breach is the calculation of interests by the breaching party as they consider options that yield a net benefit, namely: (1) benefit for the breaching party; (2) benefit for the aggrieved party; and (3) total welfare for society. This can be seen through several cases of efficiency resulting from contract breach:

First, the "efficiency" of the contract is demonstrated and evaluated by the breaching party avoiding a greater economic loss compared to the initial loss incurred if they performed the contract. In many cases, after the contract is signed, objective fluctuations cause performance costs to rise, far exceeding the value received by the other party. Simultaneously, it ensures the aggrieved party does not suffer additional loss, while releasing the breaching party from a meaningless financial burden. From this, it is affirmed that a contract breach is efficient when it prevents the waste of resources and creates a greater net economic benefit.

Second, the breach may stem from the opportunistic behavior of the parties. Opportunistic behavior refers to actions seeking personal gain. This is observed in cases where the breaching party, by breaching the contract, will

receive a larger benefit than the benefit they would have when performing the contract. This gain can be enjoyed when the breaching party enters a new contract with a third party who offers a higher price than the original contract. This discrepancy creates a significant opportunity cost if the first party chooses to continue the contract with the second party. In such instances, if the profit from the new contract is large enough to exceed the total cost of performing the old contract and the compensation payable to the aggrieved party, the breach becomes reasonable and efficient. Thus, it can be understood that when faced with a choice to obtain higher economic benefits for themselves, the opportunistic behavior of the parties will lead them toward a contract breach.

Along with that, efficient breach brings business flexibility, allowing enterprises to apply flexibility to respond quickly to market fluctuations. Instead of being forced to suffer losses to fulfill contractual obligations, they can perform an efficient breach to minimize compensation costs and ensure the interests of both parties involved in the contract.

3. Distinguishing Between Efficient Breach and Ordinary Breach of Contract

In practice, acts of contract breach are common and are usually viewed negatively and condemned. Such breaches stem from various causes, including economic interests. Therefore, distinguishing between ordinary breach and efficient breach is necessary to clarify the following points:

First, the legal nature of the breach: From the perspective of an ordinary breach, it is an act of non-performance, or incomplete or improper performance of obligations as agreed between the parties. It is inherently negative, representing a failure to ensure the fulfillment of contractual obligations. Such an act gives rise to liability for damages, penalties, and other remedies prescribed by law, implying that the breaching party gains no benefit or incurs costs lower than the compensation paid to the aggrieved party. Conversely, the primary and most important nature of an efficient breach is a rational economic decision aimed at maximizing the interests of the parties and the total social welfare. The act is not negative; instead, the breaching party proactively commits the breach after calculating the interests of both contracting parties. A breach is only considered "efficient" when discontinuing the contract reduces a greater loss or creates a higher economic value than the compliance option. The breaching party is willing to pay compensation to ensure the aggrieved party is not in a worse position than their initial expectation. This further affirms the distinct legal nature of an efficient breach compared to an ordinary breach by treating the interests of both contracting parties as an economic problem.

Second, the purpose of the breaching party: In an ordinary contract, the breach may stem from various factors, including intentionally causing disadvantage to the aggrieved party, non-performance for personal gain, or breach due to a lack of prudence during the performance process. This breach causes economic losses to the parties as well as the overall social interest, because an ordinary breach, when it occurs, is not accompanied by an alternative opportunity that provides benefits to offset the losses incurred. However, an efficient breach is viewed from a different perspective; the breach is not negative but, on the

contrary, brings efficiency to the parties and even to society. Consequently, it can leverage more profitable business opportunities and contribute to shifting resources toward increased efficiency. Naturally, the efficiency being discussed is in economic terms, as efficient breach is an issue of Law and Economics.

Third, the perspective of moral-legal values: An ordinary breach is viewed as a negative act because it goes against the fundamental principles of contract law: good faith and respect for commitments. The breaching party evades obligations without regard for the consequences for the partner, thereby eroding trust and the certainty of transactions. In contrast, the efficient breach doctrine argues that not every breach is morally wrong, provided that the breaching party pays full compensation to secure the reasonable expectations of the aggrieved party. This approach values the optimization of economic interests over absolute compliance with committed obligations, which remains a subject of debate in legal contexts that view contracts as a moral standard for keeping promises. The opposition between “economic efficiency” and the “moral value of proper performance” creates the fundamental theoretical boundary between these two types of breach.

Cases of Efficient Breach

In this section, the research group approaches cases of efficient breach by examining them from two main perspectives: classification based on the object or subject who benefits, and classification based on the form of benefit obtained from the efficient breach.

Classification Based on Beneficiaries

First is a breach that only brings private benefits to the breaching party (Individual Efficiency): This is a case where the sole reason a party does not perform the contract is to protect their material interests, which is also the most basic case of this doctrine. In this model, the obligor (Party A) decides not to fulfill the contract commitment with the obligee (Party B) upon realizing that the profit obtained from the breach - after deducting full compensation for Party B - is still greater than the profit obtained from performing the contract. That is, the aggrieved party is compensated so that their legal and legitimate rights and interests are not harmed, while the remaining additional benefit (if any) is not compensated by the breaching party. Although from an economic theory standpoint, this case perfectly satisfies Pareto Efficiency and Kaldor-Hicks Efficiency, it often faces opposition because it demonstrates "opportunism" and a clear disregard for the *Pacta Sunt Servanda* principle.

Accordingly, the classic precedent illustrating this type of breach is the case of *Peevyhouse v. Garland Coal & Mining Co.* (1962) [14]. Essentially, the Garland Company leased land from the Peevyhouses for coal mining and committed to restoring the land surface after mining but intentionally failed to do so. When resolving the dispute in court, experts estimated that Garland would have to spend up to \$29,000 (for labor, machinery, fuel, etc.) to perform the restoration, but the market value of the farm was expected to increase by only about \$300. Faced with this massive discrepancy and economic waste, the Oklahoma State Supreme Court accepted Garland's argument - only ordering \$300 in damages for the decrease in the land's value.

However, Justice Irwin issued a dissenting opinion, arguing that Garland admitted they were fully aware this was a committed obligation but intentionally failed to perform it. This behavior is completely contrary to the principles of good faith and diligence in contract law. Furthermore, for the Peevyhouses, the value of restoring the farm might carry a subjective value (emotional, aesthetic, sentimental, etc.) that cannot be monetized. By applying an objective economic measure, the Court directly stripped away the “subjective value for which the plaintiff wished to be compensated” and modified the parties' agreement by excluding Garland's liability.

Second is a breach that creates collective benefits for many other stakeholders (Social Efficiency): Unlike individual benefits, social efficient breach focuses on shifting economic resources to where they have the highest value of use. In this case, Party A's breach not only benefits Party A and secures Party B's interests through compensation but also creates added value for a third party (Party C) or other subjects in society. A typical example is taking a resource (such as capital, machinery, or labor) from an inefficient project to move it to another project that is more necessary and creates more value. In this scenario, the beneficiaries include the breaching party (who earns better profit), the aggrieved party (who is fully compensated), and the economic activity (as resources are used in the right place at the right time). This was also clearly manifested in the *Peevyhouse v. Garland Coal & Mining Co.* case, as the Garland Company could save a massive amount of material interest to apply toward savings or investing in other projects, paying employees, and so on. This is the form of breach supported by economists because it helps society avoid waste and use resources in the smartest way possible.

Classification based on the form of economic benefit derived from the breach

Breach aimed at shifting goods and services to a higher-valuing party This form of breach typically occurs when goods or services are scarce. The essence here is the competition between an existing buyer and a new buyer. When a new buyer needs the item more urgently and is willing to pay a significantly higher price than the existing buyer, the seller's decision to break the old contract to sell to the new one creates greater value for society.

The U.S. case of *Copylease Corp. of America v. Memorex Corp.* (1975) [20] serves as an illustration of this logic. In a dispute concerning Memorex's cessation of toner supply, the Court weighed specific performance against damages based on the “uniqueness” of the goods. The ruling affirmed the principle that specific performance is an exception, applicable only when the buyer proves the impossibility of finding an alternative source in the market. The Court reasoned that if the goods are replaceable, damages are the optimal remedy, thereby indirectly allowing the seller to breach the contract to redirect business resources more efficiently. This perspective vividly illustrates the mechanism of efficient breach: the law only intervenes with specific performance when the goods are monopolistic or absolutely scarce. Encouraging breach in this case is essentially a market self-adjustment mechanism to rectify the sub-optimal resource allocation of the original contract. Breach aimed at preventing economic waste due to excessive performance costs This type of breach focuses on

the cost-benefit analysis of the performance itself. A contract breach is considered efficient when the cost to fulfill the contractual obligation is unreasonably high compared to the actual benefit received by the other party. If performance continues, a futile “economic waste” would occur.

The most typical precedent for this case is *Jacob & Youngs, Inc. v. Kent* (1921) ^[4]. In this case, the plaintiff built a villa for the defendant, Kent, but inadvertently used Cohoes brand pipes instead of the Reading brand specified in the contract. Kent refused to pay the remaining balance, demanding the contractor tear down the walls to replace all the pipes with the correct brand. The cost for this was substantial, while the increase in the house's value after the replacement would be negligible (or even zero). The Court refused to rigidly enforce specific performance, holding that forcing the contractor to bear a massive cost for a defect that did not affect the substantial value was unfair and wasteful. Instead, the damages were calculated based on the difference in value of the house.

Breach for the purpose of renegotiation or contract conversion Breach of contract in this context acts as an “economic tool” to respond to unforeseen risks, forcing the parties to re-evaluate the feasibility of the transaction. When an fluctuation occurs that causes performance costs to skyrocket to an irrational level, the disadvantaged party may choose to breach rather than accept a massive loss. This behavior creates pressure that forces the other party to negotiate a new balance of interests

The case of *Mineral Park Land Co. v. Howard* (1916) ^[10] in California is a prime example of this thinking. In this matter, the defendant contracted to extract all the gravel from the plaintiff's land to build a bridge at a fixed unit price. After extracting half, the defendant stopped performance because they discovered the remaining gravel was below the water level. Although extraction was technically possible, the cost of using dredgers and drying the gravel would be 10 to 12 times higher than the usual cost. The California Supreme Court accepted the defendant's cessation of performance, reasoning: “A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.” From the perspective of efficient breach, the defendant's decision to stop extraction was optimal, preventing the waste of materials and labor on an activity with disproportionate costs. This breach released the parties from an inefficient contract, opening the opportunity to terminate the transaction or renegotiate a new price that truly reflected the reality of underwater extraction costs.

Breach due to a fundamental change in circumstances leading to the frustration of purpose

Finally, efficient breach includes cases where performance remains physically possible, but the economic purpose of the contract has completely vanished due to a fundamental change in circumstances.

The classic precedent is the English case of *Krell v. Henry* (1903) ^[3]: The defendant rented an apartment from the plaintiff for the sole purpose of viewing the coronation procession of King Edward VII. However, the King fell ill, and the procession was canceled. The defendant refused to pay the remaining rent. The Court ruled that the coronation event was the “foundation of the contract,” and its failure to

occur frustrated the purpose of the transaction; therefore, the defendant was excused from the obligation to pay. Under the lens of efficient breach, the defendant's decision not to perform the obligation was optimal. If the defendant were still forced to pay, their financial resources would be wasted on a meaningless service. Allowing cancellation or breach in this case helps those resources be redirected toward other more meaningful consumption or investment purposes.

In summary, through the analysis of cases and comparison with precedents, efficient breach of contract is not a monolithic concept but a system of diverse economic scenarios. The common thread among these cases is the prioritization of practical efficiency and overall economic value over rigid and formalistic compliance with the literal wording of the contract. This serves as an important theoretical basis for considering the selective adoption of this doctrine into Vietnamese law.

Current state of Vietnamese Law regulating Efficient Breach of Contract

Vietnam does not currently recognize “efficient breach of contract” as an independent legal doctrine. However, in judicial practice, several existing regulations indicate that the law has partially approached the logic of Law and Economics, albeit with many remaining barriers.

Legal regulations related to efficient breach of contract Regarding the principle of compensation based on “expectation damages.”:

It was not until the Civil Code (CC) 2015 ^[11] that Vietnamese contract law basically unified the philosophy of the compensation remedy as expectation damages, aiming to place the aggrieved party in the exact position they would have enjoyed had the contract been properly performed. Article 419 of the CC 2015 records that damages due to breach of contract include “the value of benefits that the aggrieved party would have enjoyed from the contract.” This principle is nearly identical to the approach in U.S. contract law - where the efficient breach doctrine is closely tied to the expectation damages mechanism. The core idea is that the law does not necessarily have to force the breaching party to perform the contract; it only needs to compensate the aggrieved party such that they reach an economic state equivalent to the contract's performance. The recognition of this mechanism is an important step forward, as it opens the possibility for parties to “calculate” between continuing contract performance or breaching - similar to the principle of efficient breach. When damages are predictable and fully compensated, the obligor can choose the economically optimal option while still ensuring fairness for the other party.

Regarding the mechanism of “specific performance.”

The focus of contract remedies in Vietnam is specific performance, regulated in Articles 297-299 of the Commercial Law (CL) and Articles 351-360 of the CC. This is considered the central and prioritized remedy, reflecting a legislative mindset that views contracts as mandatory bonds with high coercive value to ensure transaction certainty and minimize risk for the obligee: “...in Vietnamese law, the design of this provision in the CC 2015 ^[9] seems to follow the direction that the principle of applying specific performance is absolute, without any exceptions.” Within this framework, Vietnamese law does not establish

economic criteria to refuse the application of specific performance - such as when the cost of performance becomes excessive compared to the benefit, or when the aggrieved party can achieve substitute compensation by finding an alternative source of supply. These criteria are recognized in modern legal instruments like the UNIDROIT Principles (Article 7.2.2) or PECL (Article 9:102) but are entirely absent from the Vietnamese legal system. The law does not allow for the choice of damages in lieu of specific performance simply because the compensation is sufficient to cover the loss or because the compensation option brings higher efficiency to total social welfare. This design creates a significant legal gap for the efficient breach doctrine, as businesses lack a legal mechanism to “buy the right to breach” in cases where abandoning the contract brings greater economic value to both parties. In other words, the Vietnamese legal system prioritizes maximum coercion and the preservation of commitments but has not yet accounted for economic efficiency factors and the optimal allocation of resources among market subjects.

Regarding the non-recognition of “penalty clauses” exceeding reasonable limits: In the CC and CL, Vietnamese law does not use the term “penalty clause” as do Common Law countries. However, in substance, clauses that are “deterrent” or “punitive” in nature are restricted. The maximum penalty level of 8% of the value of the breached obligation in the CL is the clearest expression of this mindset. From the perspective of the efficient breach doctrine, limiting penalty clauses is appropriate, as excessively high penalty clauses can prevent efficient breach, forcing businesses to perform the contract even when breaching with compensation would create greater social value.

Regarding case law and judicial practice: Although the Vietnamese case law system remains limited, some recent precedents and judgments show that courts are beginning to pay attention to the principles of risk allocation and reasonable economic benefit between parties. However, no case has directly recognized the “efficiency” of a contract breach. Court decisions are still primarily based on traditional thinking, emphasizing the obligation to perform the contract and calculating damages based on actual evidence. In summary, Vietnamese law has some foundations compatible with the efficient breach doctrine but has not yet formed a complete mechanism to allow this doctrine to truly operate.

Legal barriers to the application of efficient breach of contract

First, an excessive focus on specific performance: In judicial practice, Vietnamese courts often prioritize specific performance, considering it the primary resolution for disputes: “...based on the provisions of the CC 2015, CL 2005, and the principle in Clause 2, Article 3 of the CC 2015, Vietnam prioritizes the application of measures to continue contract performance over damages.” This contradicts the spirit of efficient breach - where damages are the central mechanism. Consequently, businesses find it difficult to maintain flexibility in cases of market fluctuation or when a higher-value alternative business opportunity arises. The obligation to perform the contract is viewed

more as a moral standard than an economic relationship, reducing the possibility of choosing an efficient breach.

Second, an excessive burden of proof for damages: Compensation based on expectation interests is only truly feasible if the aggrieved party can prove the value of the benefit they would have enjoyed. However, in Vietnamese law and practice: damages must be proven by invoices and documents; “damages for lost profits” are evaluated very strictly, etc. This results in reasonable expectations under the contract not being fully protected, making the efficient breach mechanism inoperable, as the breaching party does not know how much they must compensate when deciding to breach. Meanwhile, in the United States and Common Law countries, expectation interests can be proven through market pricing models, profit forecasts, or other indirect evidence. Judicial practice also shows a similar trend: courts often reject claims for lost profits because they fail to meet the requirement of proving “actual and determinable loss.” For example, in Judgment 19/2020 ^[13]/KDTM-PT, the Hanoi City People’s Court rejected a compensation claim because the aggrieved party could not prove the lost profit, despite economic grounds showing that the contract breach caused significant loss to the business.

Third, due to the 8% penalty cap in the Commercial Law 2005 ^[12]: The 8% penalty cap is considered one of the largest barriers to the development of a risk allocation mechanism according to the economic approach: “...the total penalty for multiple violations agreed upon by the parties in the contract, but not exceeding 8% of the value of the breached contractual obligation... It can be seen that the 2005 Commercial Law maintaining the regulation on the limit of the penalty level as above has many points that are not really reasonable or convincing.” It leads to three consequences: One, businesses cannot use penalty clauses as a risk allocation tool. Two, 8% is often much lower than the actual loss of the aggrieved party. Three, the obligor can breach with almost no significant cost. This creates an imbalance between risk and benefit for both sides, leaving the market without a contractual tool to adjust breach behavior toward economic efficiency.

Fourth, due to the traditional legal mindset viewing breach as a negative act: In common perception, contract breach is often viewed as a moral wrong or a “disrespect for commitment.” This strongly influences the perspectives of courts, lawmakers, and the business community. Meanwhile, the efficient breach doctrine considers breach to be merely a reasonable economic option under certain conditions. The conflict between the “moralization of contracts” and the “economization of contracts” makes the efficient breach model difficult to operate in practice.

Some Implications for Vietnamese Law Perspectives on the Application of the Efficient Breach Doctrine in Vietnam

Opposing View

The recognition of the efficient breach doctrine will undermine the fundamental principle of “Pacta Sunt Servanda” - the core element for maintaining trust and minimizing risks in civil contracting. The belief that parties will fulfill their commitments is essential for reducing monitoring and dispute costs. If the law allows a breaching

party to easily withdraw upon finding a more profitable transaction - provided they pay appropriate compensation - this could be abused, encouraging opportunistic behavior instead of compliance with commitments. The principle of full and timely compensation is the foundation for ensuring the stability and certainty of contractual agreements. Allowing parties to invoke economic reasons to avoid performing obligations will diminish trust in the binding nature of commitments and may lead to an increase in exploitative contract breaches. This abuse not only increases disputes, forcing the aggrieved party to bear additional self-protection costs, but also reduces the certainty of transactions, thereby decreasing the credibility and effectiveness of contracts. The core objective of a contract is the fulfillment of commitments, not the pursuit of material gain.

View Supporting Controlled Application

Adopting the efficient breach doctrine is a general trend in modern contract law, and Vietnamese law should gradually apply this thinking in a controlled manner. This is not intended to encourage breach, but rather to optimize resources and losses for the parties: “The efficient breach doctrine does not advocate for breach, but emphasizes that the law needs to design compensation mechanisms so that damages are allocated in a way that achieves overall economic efficiency. In many cases, the cost of specific performance far outweighs the actual benefit received by the aggrieved party.” In specific cases, when the cost for the breaching party to continue contract performance far exceeds the economic benefit received by the aggrieved party, specific performance leads to economic waste and unnecessary financial hardship for the breaching party. Utilizing “controlled” application - by allowing expectation damages that meet objective practical requirements - will protect the mandatory nature of the contract while still creating space for the law to reflect the true economic essence of the transaction. This helps optimize resource allocation in the economy while ensuring the aggrieved party is fully compensated according to actual value.

Several Implications for the Controlled Application of the Efficient Breach Doctrine in Vietnam

First, it is necessary to limit the application of specific performance measures in cases where there is an excessive discrepancy between the cost of performing the obligation and the economic benefit actually received by the aggrieved party. Maintaining an “absolute” enforcement mechanism is not only a waste of resources but also leads to inefficient outcomes for the economy. To apply the efficient breach doctrine, the law needs to add exception regulations allowing Courts to refuse requests for specific performance. Referring to the UNIDROIT Principles (UPICC) and the Principles of European Contract Law (PECL), Vietnam should codify the principle: the right to demand specific performance shall be limited if such performance causes economic or technical unreasonableness. In such instances, the Court will replace this remedy with expectation damages. This mechanism helps prevent the aggrieved party from abusing their rights to force the performance of obligations that cause social waste, while ensuring the aggrieved party still receives equivalent economic value through compensation.

Second, it is necessary to consider adjusting the penalty cap and establishing a mechanism for flexibility. The maximum penalty level of 8% of the value of the breached obligation under the Commercial Law 2005^[12] is highly rigid and does not correctly reflect the diverse needs of commercial transactions. From an economic perspective, this cap reduces the “cost of breach” to a level lower than actual damages, unintentionally encouraging “inefficient” breaches - where the breaching party profits from breaking the contract without bearing the full social cost of that action. To control efficient breach, the law should allow parties to freely negotiate “Liquidated Damages” clauses - a common mechanism in Common Law that allows parties to pre-value damages without being restricted by a cap, provided the agreed amount is a reasonable estimate of the expected loss. Allowing higher compensation agreements will force a party intending to breach to consider it carefully: they are only permitted to breach if the profit from the new opportunity is truly greater than this estimated compensation, ensuring genuine Pareto or Kaldor-Hicks efficiency.

Third, the mechanism for proving damages needs to be improved toward being simpler and more flexible. The operational capacity of the efficient breach doctrine depends significantly on quantifying the expectation damages of the aggrieved party. However, the biggest barrier in Vietnam is the judicial mindset requiring damages to be “actual and direct” (Article 302 of the Commercial Law); Courts often reject compensation claims for lost profits or opportunity costs due to a lack of specific invoices and documents. The law needs to accept abstract damage calculation methods as provided in Article 76 of the 1980 Vienna Convention (CISG). Specifically, it is necessary to allow the determination of damages based on the market price difference at the time of the breach instead of mandatory proof of specific losses. Simultaneously, financial valuation models and professional expert opinions should be accepted as legal evidence to determine expectation damages. Reducing the burden of proof is a prerequisite for the aggrieved party to trust the compensation mechanism and accept the other party's efficient breach instead of obstinately demanding specific performance.

Conclusion

Approaching contract breach from the perspective of economic efficiency marks an important step in modern legal thinking and reflects the utilitarian spirit of John Stuart Mill, whereby actions are evaluated based on their ability to maximize social welfare. In the field of contracts, the “efficient breach of contract” doctrine argues that breach does not always carry a negative meaning if it creates a greater net value and ensures full compensation for the injured party. Based on a comparison with Vietnamese law, the authors propose several controlled reform orientations: (i) Limiting the application of specific performance; (ii) Considering the adjustment of the penalty cap; and (iii) Simplifying the mechanism for proving damages. This approach does not deny the moral value of respecting commitments but moves toward a balanced legal framework that both ensures the binding nature of the contract and adapts to the efficiency requirements of a market economy. This is a suitable direction for the process of perfecting Vietnamese law according to international standards and sustainable development needs.

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