

The Use of Efficient Breach of Contracts in the Automotive Cluster of Querétaro, Mexico¹

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Abstract: Efficient breach is the idea that voluntarily breaching a contract could be economically advantageous for all the parties involved, as long as damages are paid to the non-breaching party. This vision is based on an economical perspective, but it fails to take into account other considerations within commercial relations. This article is the result of a research project in which interviews were performed to people involved in the automotive industry in the state of Querétaro, Mexico. The aim was to discover whether efficient breach is, in fact, used by merchants in the automotive cluster and the perspective that they have over this figure.

Keywords: Efficient Breach, Contracts, Cluster, Promise, Extra-Judicial.

Resumen: La doctrina del incumplimiento eficiente postula que la violación voluntaria de los contratos puede ser ventajosa desde un punto de vista económico para todas las partes, siempre que se pague por los daños y perjuicios ocasionados. Esta doctrina es meramente económica, puesto que no toma en cuenta otras cuestiones dentro de las relaciones mercantiles. Se presentan los resultados de un proyecto de investigación en el que se realizaron entrevistas a personas relacionadas con la industria automotriz en el estado de Querétaro, México. Se buscaba descubrir si el incumplimiento eficiente es usado por los comerciantes en el clúster automotriz de la entidad y la opinión que guardan respecto a la figura mencionada.

Palabras clave: Incumplimiento eficiente, contratos, clúster, promesa, extra-judicial.

Summary: I. *Introduction.* II. *What is a Cluster? Why Querétaro?.* III. *Efficient Breach.* IV. *Efficient Breach in Mexican Law.* V. *Voluntary Breach of Contracts in American Law.* VI. *Investigation Performed in the Automotive Cluster of Querétaro.* VII. *Conclusion.* VIII. *Acknowledgment.*

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I. Introduction

Efficient breach, the idea that voluntarily breaching a contract is economically sound as long as damages are paid to the affected party, has been studied for many years.² Although most of these studies have been theoretical, a combination both of law and economics, there have also been some practical studies.³ Even though this is a theory that originated in American Law, it can be applied to any legal system since it involves contracts and their breaches. Therefore, this doctrine could be applied in any system where contracts are concluded. The question is whether this figure is used by companies in places outside the United States, such as Mexico.

As part of the research project PAPIIT IA301921, carried out with funds provided by the *Dirección General de Asuntos del Personal Académico* (DGAPA) of the *Universidad Nacional Autónoma de México* (UNAM), semi-structured interviews were performed with people related to the automotive cluster in the city of Querétaro, Mexico, including people from the industry, the government, and academia. An industrial cluster, such as the automotive cluster in Querétaro, can be understood as “a group of close-by supporting industries [that create] competitive advantage in a range of interconnected industries that are all internationally competitive”.⁴

Part of the research objectives was to uncover the manner in which companies create trust among themselves and the way they solve conflicts. It is hoped that this information will contribute to the evolution of commercial law, so that future Mexican commercial law adjusts better to the requirements of merchants and that it is based on their own customs and practices instead of on a doctrine that is not based on real interactions. With that aim, people working at automotive companies, managers who work with automotive companies, people related to the academia that performs research with these companies, and people from the state government that deal with these companies were interviewed as part of this research project.

First, I will explore the concept of *cluster* and the reasons why the automotive cluster of Querétaro was chosen to perform this study. Then a brief exploration of the doctrine of efficient breach and the reasons it is supported. Next, I will attempt to establish how Mexican law handles these types of breaches using

² See Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach*, 97 VA. L. REV. 1939 (2011). Also Renzo Saavedra Velazco, *Obstáculos Jurídicos y Económicos a la Aplicación de la Teoría del Incumplimiento Eficiente, ¿Un Irritante Jurídico o una Figura de Aplicación Imposible?*, 58 THEMIS REV. DER. 247, 247 (2010). Also Raul Iturralde Gonzalez, *Commercial Archetypes, Practices and Principles: Tools for a Market Sensitive 21st Century Commercial Law* (2018) (SJD dissertation, University of Arizona) (on file with author).

³ See David Baumer & Patricia Marshall, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?*, 65 TEMPLE L. REV. 159 (1992).

⁴ Michael E. Porter, *The Competitive Advantage of Nations*, HARV. BUS. REV., Mar. 1990, at 73, 83, <https://hbr.org/1990/03/the-competitive-advantage-of-nations> (last visited Apr 4, 2023).

a similar study implemented on Colombian law as a basis, followed by a brief analysis of an investigation conducted in the United States regarding the use of efficient breach by American companies. Finally, the results of the interviews will be provided as a means to identify usage among companies related to the automotive industry in the state of Querétaro.

II. What is a Cluster? Why Querétaro?

Michael Porter established the idea of a cluster in his essay “The Competitive Advantage of Nations”.⁵ In that essay, he gives us the following definition: to “put forward a microeconomically based theory of national, state, and local competitiveness in the global economy... Clusters are geographic concentrations of interconnected companies, specialized suppliers, service providers, firms in related industries, and associated institutions in a particular field that compete but also cooperate”.⁶

Porter continues with the definition of a cluster: “[a] cluster is a geographically proximate group of interconnected companies and associated institutions in a particular field, linked by communalities and complementarities... More than single industries, clusters encompass an array of linked industries and other entities important to competition.”⁷ These entities and industries have understood that they can obtain benefits and become more efficient from establishing themselves closer to each other and establishing cooperative networks.

Porter explains: “Most cluster participants are not direct competitors but rather serve different segments of industries. Yet they share many common needs, opportunities, constraints, and obstacles to productivity. The cluster provides a constructive and efficient forum for dialogue among related companies, their suppliers, government, and other institutions”.⁸ Porter performs his analysis of the cluster based on competition and the form in which it affects productivity.⁹ Nevertheless, as Porter affirms, cooperation among the firms is also necessary.¹⁰

As explained by Porter, a cluster is an interconnected group of companies and other institutions; therefore, these companies and institutions must create networks of cooperation to function. One of the objectives of the research

⁵ *Id.*

⁶ Michael E. Porter, *Location, Competition, and Economic Development: Local Clusters in a Global Economy*, 14 *ECON. DEV. Q.* 15, 15 (2000).

⁷ *Id.* at 16.

⁸ *Id.* at 18.

⁹ *Id.*

¹⁰ “It should be clear that clusters represent a combination of competition and cooperation... Competition and cooperation can coexist because they are not different dimensions or because cooperation at some levels is part of winning the competition at other levels.” Porter, *supra* note 6 at 25.

project was to identify the manner in which these networks of cooperation function in the automotive cluster of Querétaro. Being a small representation of the interactions that occur between firms and companies, a cluster allows for the investigation of these interactions on a smaller scale. Industrial members, universities, research centers, and institutions from the local government make up the Automotive Cluster in Querétaro.¹¹ The automotive industry is one of the biggest and most important industries in Mexico.¹² The local government in the State of Querétaro has promoted the establishment and growth of several clusters in the region.¹³ The model followed in Querétaro is the triple helix model that seeks to “strengthen alliances between the auto parts companies, the research centers and the universities”.¹⁴ “These public-private alliances aspire to the development of an innovation ecosystem in which the interdependence between organizations and actors generates specialization and greater value to production”.¹⁵

Moreover, speaking of the reasons to locate and promote an aeronautical cluster in Querétaro, Burgos and Johnson point out:

Networks [...]: Usually, networks are assumed to develop during the emergence of an industrial cluster, but sometimes existing networks function as a supporting prerequisite. There was already a network of companies working together before Bombardier initiated operations in Querétaro. These companies later became Bombardier’s suppliers, providing the needed network for the development of the aeronautical cluster.¹⁶

Hence, it is important for industries in a cluster to develop networks of trust among themselves.¹⁷ The creation of trust among people and companies cannot be based on the mere use of contracts and the threat of the implementation of judicial processes. It was my belief that the network of trust among companies in the cluster would create *sui generis* mechanisms to solve disputes among the members of the cluster.¹⁸

¹¹ Raúl Iturralde González, Iliana del Rocío Padilla Reyes & Nicolas Peña Bravo, *Medios de Resolución de Conflictos. El Clúster Automotriz Queretano*, 37 *NTH* 68 (2021). Also CLÚSTER AUTOMOTRIZ DE QUERÉTARO, <https://autoqro.mx/> (last visited Apr 4, 2023).

¹² See *Importancia de la Industria Automotriz*, AMIA, https://www.amia.com.mx/publicaciones/industria_automotriz/ (last visited Apr 11, 2023).

¹³ See Rodrigo Garza Burgos & Jim Johnson, *Why Querétaro? The Development of an Aeronautical Manufacturing Cluster in Central Mexico: Why Querétaro?*, 60 *THUNDERBIRD INT’L BUS. REV.* 251 (2018).

¹⁴ Iturralde González, Padilla Reyes, and Peña Bravo, *supra* note 11 at 70. (Translation by the author).

¹⁵ *Id* (Translation by the author).

¹⁶ Burgos & Johnson, *supra* note 13 at 256-57.

¹⁷ I would argue that it is important not only for companies in a cluster, but for companies everywhere.

¹⁸ To see how this can happen, see the book by Ellickson. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

Nevertheless, the results of the research indicate that while the companies had not created their own mechanisms to deal with disputes among themselves, they show a preference to rely on commercial arbitration rather than using the traditional jurisdictional mechanisms.¹⁹ I believe that this shows the establishment of networks of trust among these companies as arbitration implies reaching agreements on matters such as the formation of the tribunal and the acceptance of its decisions.

Moreover, it was also my belief that these networks of trust could not be developed if companies relied only on economic calculations. In other words, the actions of companies that sought to create networks of trust could not depend on mere economic judgements. This is due to trust requiring more than predicting the possible gains of an action but estimating the effects of that action on the other person.

Thus, besides investigating the use of mechanisms outside the traditional judicial process, the use of efficient breach among the companies within the automotive cluster was also examined. That is because an efficient breach of contracts is an instrument based on pure economical calculations that does not consider the negative effects on the relationship of the parties. Therefore, I did not think that companies in a cluster would use it.

III. Efficient Breach

The idea of efficient breach is generated from seeing the law from an economic standpoint.²⁰ Efficient breach is based on the notion that it can be profitable for a party to intentionally breach its part of a contract with the caveat that it must compensate the other party for that breach.²¹ Efficient breach as a manner to solve conflicts among the parties of a contract makes sense only from an economic point of view.

Back in the 19th century, Justice O.W. Holmes expressed that:

[t]he 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. If you commit a contract, you are liable to pay a compensatory sum unless the promised

¹⁹ Iturralde González, Padilla Reyes, & Peña Bravo, *supra* note 11.

²⁰ “Efficient breach can be considered as an economic analysis of the law. It is a product of the school of thought known as “Law and Economics,” or “Wealth Maximization Theory,” which holds “that those actions that increase wealth are just and should be allowed, whereas those actions that decrease wealth are unjust and should be forbidden”. Iturralde González, *supra* n. 2 (citing Marco J. Jiménez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 60 (2008-09)).

²¹ Juan Antonio Gaviria Gil, *Sobre la aplicación de la teoría del incumplimiento eficiente de contratos en el derecho colombiano*, CON-TEXTO 37, 38 (2015). *Also* Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750 (7th Cir. 1988) (Posner J.) *see infra*. *Also* Iturralde Gonzalez, *supra* n. 2.

event comes to pass... But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.²²

Allowing parties to breach their contracts while, at the same time, obtaining more advantageous terms with a third party, makes sense from an economical point of view. Efficiency is reached since a gain is achieved and no party is injured, at least in theory, as the non-breaching party will be compensated with the payment of damages. Therefore, efficient breach indicates that breaching contracts is justified.

It is important to establish that this work does not seek to give a solution to efficient breach. This is due to the fact that a solution to a breach of contract is already given in every legal system: the payment of damages. The aim of this investigation is to uncover whether companies commit to efficiently breach their contracts because, from an economical point of view, theory indicates that this would be advantageous to them.

Seen from a mere economic point of view, “[r]epudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered”.²³ For example, Justice Posner, a defender of efficient breach from the bench, declared on a decision:

Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee’s actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn’t want to bring about such a result.²⁴

Justice Posner promotes the economic view in the name of efficiency. Breaching a contract, the theory goes, makes economic sense since it allows the parties to enter into more advantageous deals, which will promote economic efficiency overall. The idea is that, in general, there is a net gain as the breaching party obtains an economic gain, while the victim of the breach would be left in the same position as if the contract would have been performed through the payment of damages.²⁵

²² O. W. Holmes, *The Path of the Law*, 10 HARVARD. L. REV. 459, 462 (1897). See Markovits & Schwartz, *supra* n. 2 at 1981. Also Iturralde González, *supra* n. 2.

²³ Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1969). Also Iturralde González, *supra* note 2.

²⁴ *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1988) (Posner J.). Also Iturralde González, *supra* note 2.

²⁵ “It is true that if there is a very stiff penalty for breach, parties will be discouraged from committing “efficient” breaches, that is, breaches that confer a greater benefit on the contract

As explained before, the aim of this article is not to give a solution to efficient breaches since that solution already exists, *i.e.*, the payment of damages in their different forms. Nevertheless, since authors support the idea that the breach of promises is economically sound if the victim is repaid, the possibility that efficient breach is used by companies based on efficiency and economical gain needs to be explored.

IV. Efficient Breach in Mexican Law

Most of the doctrine created around efficient breach comes from Common Law jurisdictions.²⁶ Even though there is some doctrine about efficient breach on this side of the aisle, the Civil Law side, the reality is that the studies are few and far between. Therefore, there are almost no studies on the application of efficient breach in Mexican law.

Since voluntarily breaching promises makes sense from an economic point of view, or so says the efficient breach theory, the objective is to uncover whether efficient breach is, in effect, used by the companies at the automotive cluster in Querétaro.

However, before looking at the results of the research, it is important to determine whether Mexican law is sympathetic to the use of efficient breach, in other words: whether Mexican law allows companies to breach their contracts and obtain the economic benefits described by the theory of efficient breach. To approach the application of efficient breach in Civil law jurisdictions, a paper from a country with a system similar to Mexico's will be studied and its method applied to Mexican law.

Professor Juan Antonio Gaviria Gil performed a study of the efficient breach of contracts to determine whether this theory was compatible with Colombian Law.²⁷ Professor Gaviria analyzed Colombian law to see what laws and regulations allowed the implementation of efficient breach and which ones would prevent it.²⁸ I will perform a similar study on Mexican Law basing my comparison on the study performed by Prof. Gaviria Gil.

Professor Gaviria Gil starts by pointing that Colombian Law mandates the payment of any earnings that the victim would have obtained in case that the contract had been fulfilled.²⁹ The professor explains that an efficient breach would not be allowed if the defaulting party were forced to pay not the earnings that the victim would have obtained (earnings that have to be considered

breaker than on the victim of the breach, in which event breach plus compensation for the victim produces a net gain with no losers and should be encouraged³⁰.

XCO Int'l, Inc. v. Pac. Sci. Co., 369 F.3d 1000, 1001 (7th Cir. 2004) (Posner J.).

²⁶ See Birmingham, *supra* note 23. Also Baumer & Marschall, *supra* note 3.

²⁷ Gaviria Gil, *supra* n. 21.

²⁸ *Id.* at 46-55.

²⁹ *Id.* at 46-47.

for any efficient breacher), but the earnings obtained by the defaulting party, which would make the transaction moot.³⁰ So, according to Prof. Gaviria, efficient breach will be allowed when the restitution mandated by law is limited to the damages caused and earnings are not materialized.³¹

The Mexican Federal Civil Code indicates that breach of contracts (or “obligations”) compels the payment of damages,³² which in Mexico are understood as two types of damages, those that affect the wealth of the person,³³ and those that deprive him of the licit earnings that he should have received.³⁴

The Federal Civil Code in Mexico indicates that a breach of contract will allow the affected party to receive both kinds of damages as long as they are the immediate and direct result of the breach.³⁵ The earnings obtained by the breacher are not considered when computing the damages to be paid to the affected party, but the licit earnings that it should have obtained if the contract had been fulfilled.

Professor Gaviria Gil indicates that the payment of the earnings received by the breacher can be requested in the case of illegitimate enrichment,³⁶ nevertheless, that would not apply in these cases.³⁷ The same non-application results in the case of the Mexican Federal Civil Code as this law describes illegitimate enrichment as “whoever with no cause enriches himself damaging someone else is obligated to compensate the impoverishment to the extent of the enrichment.”³⁸ Illegitimate enrichment refers to those situations in which a person receives a benefit with no legitimate cause.³⁹ In this case, the person enriched himself through a breach of contract, which allows the affected party to sue for damages.⁴⁰

³⁰ *Id.*

³¹ *Id.* at 47.

³² Código Civil Federal [CC], art. 2104, Diario Oficial de la Federación [DOF] 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

³³ “*Daño*” CC, art. 2108, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

³⁴ “*Perjuicios*” CC, art. 2109, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

³⁵ CC, art. 2110, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

³⁶ Gaviria Gil, *supra* n. 21 at 47.

³⁷ *Id.*

³⁸ CC, art. 1882, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

³⁹ *See* CÓDIGO CIVIL FEDERAL COMENTADO: LIBRO CUARTO, DE LAS OBLIGACIONES, 62 (Juan Luis González Alcántara coord., 2015). *Also* SERGIO AZÚA REYES ET AL., CÓDIGO CIVIL PARA EL DISTRITO FEDERAL EN MATERIA COMÚN Y PARA TODA LA REPÚBLICA EN MATERIA FEDERAL: TEXTO COMENTADO. T. IV: LIBRO CUARTO. PRIMERA PARTE. DE LAS OBLIGACIONES 49–50 (2 ed. 1993).

⁴⁰ “Any increase in the assets of one person to the detriment of the assets of another, which does not have as a ‘cause’ or origin a ‘legitimate’ reason, that is, based on the law, falls under the figure of illegitimate enrichment[...] any circumstance that would have given rise to enrichment, whether legitimately or illegitimately, since the existence of a legitimate cause renders the reason

Professor Gaviria Gil holds that, according to Colombian law, the affected party can decide to receive the payment of damages or to request specific performance.⁴¹ Nevertheless, Gaviria reminds us that several issues make it extremely difficult to demand the performance of the breached obligation.⁴² These issues include the impossibility of performing the obligation (as the good was given to a good-faith third party or the service can no longer be given)⁴³ or that forcing the performance of the obligation could be abusive when compared with the payment of damages.⁴⁴

Moreover, Professor Gaviria alludes to the results of a study conducted on other Civil Law jurisdictions regarding the implementation of specific performance as a remedy to the breach of contracts.⁴⁵ According to Gaviria, this study shows that specific performance is seldom used in Denmark, France, or Germany nor in cases regarding the UN Convention on Contracts for the International Sale of Goods.⁴⁶

Regarding Mexico, similar provisions can be found in the Federal Civil Code, which indicates that “the offended party has the election to request the reestablishment of the previous situation [specific performance], when possible, or the payment of damages.”⁴⁷ Professor Gaviria points out that the enforcement of specific performance in Civil Law countries is not as widespread as is often considered.⁴⁸ He claims that this lack of use is a result of the costs associated with this remedy of specific performance, because the offended party would rather receive money than to continue dealing with the breacher, and with the lack of good faith in the performance once compelled, and also because it could take a long time for a judicial order to force the compliance.⁴⁹

After analyzing the laws that could allow the performance of efficient breach, Prof. Gaviria studies those acts and laws that could prevent parties from recurring to efficient breach in Colombia.⁵⁰ He starts by studying a norm in Colom-

for being of the figure of illegitimate enrichment null and void...” Enriquecimiento ilegítimo. El que su actualización tenga como origen un error derivado de un vínculo contractual no le da el adjetivo “con causa.” Tercer Tribunal Colegiado en Materia Civil del Primer Circuito [TCC], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXVIII, Julio de 2008, Tesis I.3o.C.680 C, Registro digital 169300 (Mex.) (Non-binding precedent) (translation by the author).

⁴¹ Gaviria Gil, *supra* n. 21 at 47-48.

⁴² *Id.* at 48.

⁴³ *Id.*

⁴⁴ *Id.* at 47 *citing* the case of *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921).

⁴⁵ Henrik Lando & Caspar Rose, *On the Enforcement of Specific Performance in Civil Law Countries*, 24 INT'L REV. L. & ECON. 473 (2004). *in* Gaviria Gil, *supra* n. 21 at 49.

⁴⁶ Lando & Rose, *supra* note 45 *in* Gaviria Gil, *supra* n. 21 at 49.

⁴⁷ CC, art. 1915, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

⁴⁸ Gaviria Gil, *supra* n. 21 at 50.

⁴⁹ *Id.*

⁵⁰ The part where Prof. Gaviria analyses the breach of contract between producers and

bia that forbids inducing the breach of a contract.⁵¹ Nonetheless, it seems that no such law exists in Mexico.

In Mexico, art. 6 bis of the Commercial Code establishes that “[m]erchants must perform their activities based on fair dealing in industrial or commercial matters...”⁵² followed by a list of activities that would be considered as unfair competition. However, inducing the breach of a contract (either malicious or not) is not considered one of these activities. A review of the activities deemed unfair competition in the Federal Antitrust Law also fails to uncover the induction of a breach of contract as a listed activity.⁵³

In one of the last points he makes, Prof. Gaviria states that liability in American contract law is not based on fault, which means that a party is only liable for those damages that could be reasonably foreseeable by the parties.⁵⁴ Also, Civil Law jurisdictions will look at the intention of the breacher to impose damages, according to Prof. Gaviria.⁵⁵ He quotes the following article from the Colombian Civil Code:

If fault cannot be imputed to the debtor, he is only responsible for the damages that were foreseen or could be foreseen at the time of the contract; but if there is fault, he is responsible for all the damages that were the immediate or direct consequence of not having fulfilled the obligation or of having delayed its fulfillment.⁵⁶

The author explains that in Colombian law, the fact that unforeseen damages can be claimed prevents the efficient breach from being applied, since the defaulting party cannot estimate the burden of paying those unknown damages.⁵⁷ “[I]t is very difficult for those that want to efficiently breach a contract to ascertain unforeseeable damages, to quantify them, and keep a profitable default.”⁵⁸ It seems that the same cannot be said regarding Mexican law.

With reference to the payment of damages, the Mexican Federal Civil Code does not seem to have an article as that of the Colombian one. Regarding fault, the Mexican code only declares that “liability originated from fault is enforce-

consumers will not be analyzed here as this work is limited to relations between companies. *Id.* at 16. Also, Prof. Gaviria refers to another form of efficient breach that happens when the party is forced to breach due to unforeseen circumstances. That is also beyond the scope of this paper. *Id.* at 17.

⁵¹ Art. 17 of Law 256 (1996) in Gaviria Gil, *supra* n. 21 at 50.

⁵² Código de Comercio [CCom], DOF 7-10 a 13-12-1889, últimas reformas DOF 28-03-2018 (Mex.).

⁵³ Ley Federal de Competencia Económica [LFCE], DOF 23-05-2014, últimas reformas DOF 20-05-2021 (Mex.).

⁵⁴ Gaviria Gil, *supra* note 21 at 53 citing Hadley v. Baxendale 9 Ex 341 (23 February 1854).

⁵⁵ Gaviria Gil, *supra* note 21 at 53.

⁵⁶ Código Civil [C.C.] art. 1616 (Colom.) (translation by the author).

⁵⁷ Gaviria Gil, *supra* note 21 at 54.

⁵⁸ *Id.* (translation by the author).

able in all obligations”⁵⁹ and that “damages must be an immediate and direct consequence of the breach of the obligation when they have happened or when they are expected to happen.”⁶⁰

Lastly, and interestingly, Prof. Gaviria refers to cultural barriers against the usage of efficient breach.⁶¹ “[E]fficient breach could be seen as something immoral in Civil Law [jurisdictions] where the principle of *pacta sunt servanda* may be respected more.”⁶² While it is the opinion of Prof. Gaviria that Colombian law prevents the usage of efficient breach, no such limits seem to occur in Mexican law. This opens the door to its usage in Mexico, at least from a legal point of view. The research sought to uncover whether it was in fact used.

V. Voluntary Breach of Contracts in American Law

Professors David Baumer and Patricia Marschall performed a study on the attitudes of businesspeople regarding the willful breach of commercial contracts in some parts of the United States.⁶³ The authors wanted to see the manner in which businesses deal with breaches of contract. The authors surveyed businesses in order to study, among other factors, the perceived morality of a breach of contract when said breach was motivated by a better deal.⁶⁴

The authors start by briefly mentioning the difficulties that the doctrine of efficient breach would have in its application in the United States due either to issues relating to the absorption of fees and difficult to obtain damages,⁶⁵ the morality of keeping promises,⁶⁶ or the effects of market forces punishing “perennial sellers”.⁶⁷ The authors performed an investigation among businesspeople in order to find out how those that actually deal with deliberate breaches of contracts react to them.

Regarding the use of judicial means to correct the action of a non-compliant party, most of the businesspeople that were part of the study indicated that a deliberate breach would make a lawsuit more likely.⁶⁸ It is interesting to note

⁵⁹ CC, art. 2106, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

⁶⁰ CC, art. 2110, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.). A similar situation happens with penal clauses, which are mentioned by Prof. Gaviria as a manner to prevent efficient breaches. Gil, *supra* note 21 at 54. Nevertheless, payment of penal clauses is limited to the amount of the contract in Mexico. CC, art. 1843, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

⁶¹ Gaviria Gil, *supra* note 21 at 55.

⁶² *Id.*

⁶³ Baumer & Marschall, *supra* n. 3.

⁶⁴ *Id.* at 161.

⁶⁵ *Id.* at 161-62.

⁶⁶ *Id.* at 162.

⁶⁷ *Id.* at 163.

⁶⁸ *Id.* at 166.

that one of the respondents mentioned his disdain for starting judicial proceedings, “going to court is a legal lottery where you don’t know whether you will win”.⁶⁹ The results given by the authors seem to indicate a preference by businesspeople to fulfill their contracts.⁷⁰

With respect to the use of nonjudicial remedies, the results of the study indicate willingness in withhold future businesses from willful breachers. Moreover, the person who expressed his intention not to use judicial remedies seemed to mean that withholding future businesses was his primary weapon against willful breachers.⁷¹ The survey showed that businesspeople in this area of the United States tended to use nonjudicial remedies to deal with contract breaches.⁷²

The survey showed that businesspeople in that part of the United States tend to favor nonjudicial means to solve problems specially with long time clients.⁷³ “The conduct of businesspersons evidence both a desire to cultivate reliable trading partners and a reluctance to rely on the courts for contractual remedies. The interviewees stressed the importance of goodwill and trust among trading partners”.⁷⁴

VI. Investigation Performed in the Automotive Cluster of Querétaro

In accordance with the *Plan de Desarrollo Institucional* of the *Universidad Nacional Autónoma de México*, this university seeks to promote research projects on science and humanities.⁷⁵ As part of UNAM’s promotion of research projects, the *Programa de Apoyo a Proyectos de Investigación e Innovación Tecnológica* (PAPIIT) was created, and the mentioned projects are granted by the *Dirección General de Asuntos del Personal Académico*. These are the results of the research performed as part of the project PAPIIT IA301921 *Industria Automotriz y Ecosistema de la Innovación en Querétaro*.

The government of the Mexican state of Querétaro has promoted the establishment of industrial cooperation networks known as clusters.⁷⁶ Clusters are

⁶⁹ *Id.* at 166.

⁷⁰ “Mr. Fabricator said I’m a firm believer in living up to what you say you are going to do.”
Id. at 166.

⁷¹ *Id.* at 166.

⁷² *Id.*

⁷³ “These results indicate a preference for nonjudicial remedies over litigation where there has been a long-term relationship between trading partners.” *Id.* at 167.

⁷⁴ *Id.* at 168.

⁷⁵ Universidad Nacional Autónoma de México, *Plan de Desarrollo Institucional 2019-23*. available at: <https://www.rector.unam.mx/doctos/PDI2019-2023.pdf>. In Iturralde González, Padilla Reyes, and Peña Bravo, *supra* note 11 at 69.

⁷⁶ See Concyteq, *El Ecosistema CTI en Querétaro – Innovación para el Desarrollo Sustentable* (2017) available at: <http://www.concyteq.edu.mx/concyteq/uploads/publicacionArchivo/2017-12-1272.pdf>. Also Burgos & Johnson, *supra* note 13.

based on the idea that companies located near each other will create synergy that will allow them to become more competitive, as explained by Porter:

Far more significant than mere access to components and machinery, however, is the advantage that home-based related and supporting industries provide in innovation and upgrading – an advantage based on close working relationships. Suppliers and end-users located near each other can take advantage of short lines of communication, quick and constant flow of information, and an ongoing exchange of ideas and innovations. Companies have the opportunity to influence their suppliers’ technical efforts and can serve as test sites for R&D work, accelerating the pace of innovation.”⁷⁷

The networks created in the state of Querétaro function under what is known as a “triple helix” that seeks cooperation among universities, the government, and private companies.⁷⁸ The most modern descriptions of these innovation systems see them as “dynamic systems by nature with self-governing mechanisms where the trust among their members, the alliances, the cooperation networks and the solution of conflicts are key factors for their success.”⁷⁹

As part of the research project, businesspeople related to the automotive industry in Querétaro were interviewed. This also included interviews with people in the state government that deal with the automotive cluster, and researchers (both from academia and private companies) who deal with automotive companies. In total, ten interviews with people related to companies, organizations, and the local government were performed to establish whether companies used efficient breach were performed. As requested by the interviewed companies, neither their names nor the names of their personnel will be disclosed.

Part of the results of this investigation were previously published in another essay.⁸⁰ That text explained the data obtained on the manner in which automotive companies create trust and the manner in which they solve conflicts among them.⁸¹ In other words, whether companies use judicial or extrajudicial means of conflict resolution.⁸² Since the information gathered for that essay is the same as for this one, some of the data and arguments previously presented will be used in this article.

Regarding the issue of efficient breach, the results of the interviews showed that although most of the interviewees understood the concept of efficient

⁷⁷ Porter, *supra* n. 4 at 83.

⁷⁸ Iturralde Gonzalez, Padilla Reyes, & Peña Bravo, *supra* note 11 at 70.

⁷⁹ *Id.* at 69 (citing Nataliya Smorodinskaya et al., *Innovation Ecosystems vs. Innovation Systems in Terms of Collaboration and Co-Creation of Value*, in PROCEEDINGS OF THE 50TH HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES (2017)) (translation by the author).

⁸⁰ Iturralde Gonzalez, Padilla Reyes, & Peña Bravo, *supra* note 11.

⁸¹ *Id.*

⁸² *Id.*

breach, none of them was aware of a situation in which it had been used.⁸³ One of the interviewees, an in-house legal counsel for a big auto parts company, pointed out that the concept may be known in Mexico, but that it is not often used: “[Our company] does not dismiss its use, nevertheless, at least in Mexico, it has not been developed among companies, it is not something that tends to be included in contracts.”⁸⁴

Some of the interviewees considered unethical such actions of breaching a contract to obtain a better business deal somewhere else:

I feel that that it would be an easy way to get rid of a supplier that seemed as a good one. I could think that he does not care about his ethics, his brand, his future in the sector, what he is doing is to sell himself and, therefore, he will gain in the short term but lose in the long term.⁸⁵

The same interviewee claims that the fact of being offered to cover damages would not change his view on the breach⁸⁶ For the interviewee, the damage has already been done and the payment would not make any difference.⁸⁷ Moreover, the time that the parties have dealt with each other would be more important than the offer to pay damages for the breach.⁸⁸

Another issue considered by some of the interviewees is the costs related to a judicial process.⁸⁹ Sometimes, as an interviewee from an automotive company relates, it is cheaper and easier to stop doing business deals with the person that breached the contract.⁹⁰ The interviewee comments that they always start ne-

⁸³ See interview with person who worked in automotive companies, in Querétaro (Sep. 13, 2021) (on file with author).

⁸⁴ Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021) (on file with author) (translation by the author). It seems that the interviewee may have confused efficient breach with a clause used in contracts. This only shows the lack of usage of efficient breach among companies in the automotive cluster.

⁸⁵ Interview with person associated with the automotive cluster, in Querétaro (Jul. 6, 2021) (on file with author) (translation by the author).

⁸⁶ Interview with person associated with the automotive cluster, in Querétaro (Jul. 6, 2021).

⁸⁷ “It is as trying to cover a hole that will never be 100% filled. The damage is done... you may be able to charge [the other party] what you can redeem, but the issue is not the economic one...”

Interview with person associated with the automotive cluster, in Querétaro (Jul. 6, 2021) (translation by the author).

⁸⁸ “I think that [my decision would be affected more] by the length and the [type of] relationship with [the supplier], I think that that would have a greater effect than the size of the issue... I think that we trust more the long-time relationships, and I would stop to think more on the length of the relationship.” Interview with person associated with the automotive cluster, in Querétaro (Jul. 6, 2021) (translation by the author).

⁸⁹ See Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021).

⁹⁰ Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021).

gotiations in good faith and expect the other party to behave in the same manner.⁹¹ Moreover, in the event that there is a breach of contract, the interviewee also expects the breach to have been in good faith, *i. e.*, that the breach was caused by market forces and not voluntary.⁹²

Most of the participants in the interviews showed a lack of practical knowledge on the issue of efficient breach. Some of them mentioned having knowledge of it as a concept or doctrine, but not to have seen it in practice.⁹³ Although the lack of knowledge does not indicate that the figure does not exist, it is interesting to observe how people related to the government, the academia, and the industry do not seem to be in constant contact with efficient breach. It is a good indicator that the figure is not used in the automotive industry in Querétaro, Mexico.

VII. Conclusion

The theory of efficient breach indicates that it would be economically advantageous to breach a promise made as long as the breacher pays damages to the victim. From an economic perspective, this is efficient as it allows all parties, at least in theory, to gain an economical advantage. The breacher gets a better deal with a third party, which is economically advantageous; and since the victim would receive payment for damages, he would be in a similar position as if the contract had been performed. All parties, the breacher, the third party, and the victim would, in theory, be better off in this manner.

Nevertheless, this perspective is based solely on economic determinations that fail to take into account the trust needed to establish those promises from the beginning. Studies performed by academics in the United States fail to demonstrate the use of efficient breach by companies in that country. The research performed in the Automotive cluster of Querétaro also indicates a lack of use by companies here.

The trust that is required for a correct functioning of a market, that is the trust required to enter into agreements, would prevent the application of efficient breach even if it makes economic sense. This is even more relevant in clusters, where the objective is to create networks of trust among companies, governments, and academia. The results of the research show that although companies in the Automotive cluster know about efficient breach, they do not use them in their interactions since their use would jeopardize the trust generated up to that point.

⁹¹ Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021).

⁹² Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021).

⁹³ See interview with a person who worked in automotive companies, in Querétaro (Sep. 15, 2021).

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