

**AALS Workshop on Integrating
Transnational Perspectives into the First Year Curriculum**

Contracts

**TRANSNATIONAL PERSPECTIVES
ON SPECIFIC PERFORMANCE**

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1. Introduce basic American doctrine:
 - 1.1. Specific performance is an extraordinary remedy, and a plaintiff must show that it has no adequate remedy at law, among other things. Although the remedy is always discretionary, it is usually available for unique items, such as land or works of art. Although the UCC takes a slightly more liberal attitude, it continues in the tradition that specific performance is an extraordinary remedy. *See* UCC §§ 2-709, 2-716.
 - 1.2. Specific performance implicates the defendant's liberty interest, especially in personal services contracts. Nevertheless, subject to the requirement that the same extraordinary showings be made, specific performance may be obtained (or at least strongly encouraged) through a negative injunction, even if the Lord Chancellor claims not to be doing indirectly what he may not do directly. *See Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. Div. 1852).
2. Specific performance is the ordinary remedy both in U.S. law governing many international sales and in the civil law. Explain those systems:
 - 2.1. The CISG is part of U.S. contract law and generally governs sales of goods between companies in adopting countries. *See* CISG art. 1. The United States has adopted the CISG, as have most other major commercial countries that come to mind. The CISG will govern many mundane American commercial purchases and sales involving Mexico, Canada, China, France, and a host of other countries. We ignore the CISG at considerable risk. *See generally* William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 72-77, 90 (2000). Perhaps more importantly, we lose a broader perspective on the common law and the UCC, and we hold back an effective tool for understanding familiar law more precisely.
 - 2.1.1. Parties often, perhaps most of the time, choose law other than the CISG to apply. *See* CISG art. 6. Still, the treaty applies to countless transactions, and lawyers need to know whether to advise their clients to use the Convention or to opt out.

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- 2.2. The civil law prevails in most of the world—generally, those countries that are not England or formerly English. The civil law, by definition, is an outgrowth of Roman law. Most civil-law countries have a civil code, usually based on the French *Code civil* or the German BGB. Those laws recognize specific performance as an ordinary remedy for breach of contract. The classic but now outdated treatment is John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959).
3. A judgment for specific performance is the remedy generally assumed by French contract law (and especially sales law), except where the obligation is personal.
 - 3.1. Although the French courts will not imprison a recalcitrant defendant, the judgment can be effected, for example, by seizure of movables that have been sold (through *saisie-revendication*, a replevin-like action), expulsion of the defendant from an immovable, or a system of monetary penalties for failure to comply (*astreinte*). See generally BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 211, 216-20 (2d ed. 1992); C. CIV. arts. 1142-1144 (Fr.); see also *id.* art. 1583 (title to things sold passes on agreement).
 - 3.2. The story of the enforcement of judgments for *exécution en nature* is long and interesting, and it includes a princess and the fabled café society of Paris. It is available in Dawson's article.
4. Under German law, both under the original conception and the recent revision (effective 2002), the law assumes that specific performance will generally be the remedy for breach. See BGB § 241(1). There are exceptions, such as for impossibility, BGB § 275(1), and for personal services contracts if specific performance would be unreasonable, BGB § 275(3), and most interestingly, a good faith limit based on manifest disproportion, BGB § 275(2). To wit (an unofficial translation):

BGB § 275 Exclusion of the obligation to perform

- (1) A claim for performance cannot be made in so far as it is impossible for the obligor or for anyone else to perform.
- (2) The obligor may refuse to perform in so far as performance requires expenditure which, having regard to the subject matter of the obligation and the principle of good faith, is manifestly disproportionate to the obligee's interest in performance. When determining what may reasonably be required of the obligor, regard must also be had to whether he is responsible for the impediment.
- (3) Moreover, the obligor may refuse to perform if he is to effect the performance in person and, after weighing up the obligee's interest in performance and the impediment to performance, performance cannot be reasonably required of the obligor.

- 4.1. The revision brings German law closer to the CISG, the Principles of European Contract Law, and other more modern conceptions of the law. See generally Reinhard Zimmermann, *Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law*, 6 EDINBURGH L. REV. 271, 313-14 (2002); see also Dawson at 527-29, 535. The newest treatment will be available shortly: REINHARD ZIMMERMANN, *THE NEW GERMAN LAW OF OBLIGATIONS: HISTORICAL AND COMPARATIVE PERSPECTIVES* ch. 2 (scheduled for publication from Oxford University Press in December 2005).

5. The CISG adopts for international sales the civil law view, allowing specific performance as an ordinary remedy both for the buyer, who “may require performance,” CISG art. 46, and the seller, who “may require the buyer to pay the price, take delivery or perform his other obligations,” *id.* art. 62.
 - 5.1. The idea that the aggrieved party may demand performance is shown also by the *buyer’s* right to demand repair (as long as it is not unreasonable). *See* CISG art. 46(3). *Compare* UCC § 2-508 (*seller’s* right to cure).
 - 5.2. Although CISG article 28 contains a limit on the specific performance right, article 28 should not be (mis)read to gut the specific performance remedy. The provision states: “If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”
 - 5.2.1. Some seem to understand this to mean that specific performance is only available in American sales when the UCC would grant specific performance, and some may cite *Magellan Int’l Corp. v. Salzgitter Handel GmbH*, 76 F. Supp. 2d 919, 926 (N.D. Ill. 1999), for this reading. I believe this view misreads article 28 and *Magellan*. Article 28 speaks only to what a court is “bound” to do. That is all. Thus, an American court may not be able to grant specific performance under UCC § 2-716 but may still grant specific performance under the CISG (although the court would not be “bound” to do so). Article 28 thus makes the UCC standard potentially relevant, *see Magellan*, 76 F. Supp. 2d at 926, but not dispositive.
 - 5.2.2. Moreover, article 28 will only have traction in a common-law court. A sale governed by the CISG may well be litigated in a court in a civil-law country, or perhaps even more likely, may be subject to an arbitral award that can be entered as a judgment by a court in a civil-law jurisdiction.
 - 5.3. The right to performance, of course, is not absolute. The buyer may demand substitute goods only if their nonconformity amounts to a fundamental breach. CISG art. 46(2). The buyer’s right to demand repair must not be unreasonable. *Id.* art. 46(3). And there are other limits, both legal and practical. *See, e.g.*, Shael Herman, *Specific Performance: A Comparative Analysis*, 7 EDINBURGH L. REV. 5 (pt. 1), 194 (pt. 2), at 195-96 (2003).
6. A practical perspective: What is the effect of allowing specific performance as an ordinary remedy?
 - 6.1. Clients may have countless reasons for preferring specific performance to damages.
 - 6.1.1. The availability of specific performance could arguably change the settlement value of a case and allow plaintiff to settle for an amount greater than contract damages, as noted by Judge Posner in *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 279-80 (7th Cir. 1986):

“Suppose, by way of example, that Carbon County’s coal costs \$20 a ton to

produce, that the contract price is \$40, and that NIPSCO can buy coal elsewhere for \$10. Then Carbon County would be making a profit of only \$20 on each ton it sold to NIPSCO ($\$40 - \20), while NIPSCO would be losing \$30 on each ton it bought from Carbon County ($\$40 - \10). Hence by offering Carbon County more than contract damages (i.e., more than Carbon County's lost profits), NIPSCO could induce Carbon County to discharge the contract and release NIPSCO to buy cheaper coal. For example, at \$25, both parties would be better off than under specific performance, where Carbon County gains only \$20 but NIPSCO loses \$30."

- 6.1.2. Damages are generally undercompensatory, and specific performance may be less so, especially where damages are difficult to measure.
 - 6.1.3. Plaintiff may have a very high subjective value that cannot be satisfied by reference to market values. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.12 (6th ed. 2003). There could be similar problems with cover, which may be late, unreliable, or incompatible with other commitments: consider the facts of *Austin Instrument v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971) (precision parts for military contract).
 - 6.1.4. In any event, plaintiffs would prefer to be able to elect between specific performance and damages.
- 6.2. There may not be that many more cases demanding specific performance, even if it were an ordinary remedy.
- 6.2.1. Mitigation and damages will often be quicker and surer, and plaintiffs are likely to prefer that course even if specific performance were generally available.
 - 6.2.1.1. Mitigation and damages may seem less risky, particularly since this defendant has already shown itself untrustworthy, and specific performance leaves everything in the defendant's hands (even if the defendant is being powerfully prodded). Mitigation keeps more of the resolution in the plaintiff's hands, and the damages remedy leaves as little as possible to the defendant.
 - 6.2.1.2. In more concrete terms, does an aggrieved buyer really want a defaulting seller to perform? Does an aggrieved seller want an order telling the buyer to pay for undelivered goods, when the likely reason for nonpayment is that the buyer lacks the money? The answers to these questions are likely to be "yes" only when specific performance is available under American law anyway.
 - 6.2.1.3. This also helps explain why the irreparable injury rule is rarely used to deny specific performance. *See* Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damages Measures*, 100 *YALE L.J.* 369, 388-89 (1990) (construing Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 *HARV. L. REV.* 688 (1990)).
 - 6.2.2. Litigation in France and Germany seems to bear this out: while specific performance is theoretically an ordinary remedy, in practice it is not the typical

result. *See id.* at 389; Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 277 n.24 (1979); Dawson at 530; NICHOLAS at 220; G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT ¶ 46, at 53 (1988).

- 6.3. Specific performance may allow the plaintiff to avoid the duty to mitigate damages. This position is technically espoused, after full debate, by the CISG, *see* art. 77 (mitigation is a limitation on damages, but not other remedies). There are less technical arguments, however, that mitigation may still be required, at least to some extent. *See, e.g.*, Herman at 196-201 (arguments based on good faith, fundamental breach, and the reasonableness limit on the repair right).
7. Theoretical, moral, and historical perspectives: Does the (un)availability of specific performance tell us anything about the common law in general or contract law in particular?
 - 7.1. The moral basis of contractual obligation: “French law takes a moral stance [through its attitude and principle that the effect of a contractual obligation is that the law will constrain the debtor to perform] while English law emphasizes security of transactions and economic efficiency.” NICHOLAS at 212.
 - 7.1.1. This difference in attitude is shown by the Holmes quote and by the readiness of the common law to embrace the idea of efficient breach, *see NIPSCO*, and the notion of a contract as an option not to perform, *see Avery Wiener Katz, The Option Element in Contracting*, 90 VA. L. REV. 2187 (2004); Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428 (2004).
 - 7.1.2. The option view suggests that contract law is quite separate from tort law and is not about amelioration or prevention of wrongs but is simply about commercial planning and economic efficiency.
 - 7.1.3. Is Anglo-American law morally coherent to imprison some defendants who will not perform contracts that happen to fall within traditional equity jurisdiction, but not those who breach other contracts? Is there any reason to think that the equity defendants are more morally reprehensible, or that the equity plaintiffs are more deserving of the imprisoning power of the state? (In this connection, we may note that irreparable harm does not have to be especially great harm.)
 - 7.1.4. Morality and the liberty interest can be argued in more than one direction. The question is how to choose between (a) liberty of contract (including the freedom to agree to a term for specific performance, expressly or impliedly), (b) prevention of undue compulsion of the defendant, (c) minimizing the costs of undercompensation, and (d) giving the plaintiff the performance to which it is morally entitled. *See* Schwartz, 89 YALE L.J. at 296-98.
 - 7.1.4.1. Moreover, undue compulsion arises not only in personal services contracts, as to which specific performance is unavailable, but also in contracts for real estate and unique goods, as to which specific performance is available, even if

the defendant has a great attachment to the thing in question (like a home). If we care about the liberty interest that much, we should eliminate specific performance in cases where it has been granted for centuries. *See id.*

- 7.1.5. In the German debates, one deputy argued that abolition of imprisonment for debt precluded imprisoning defendants who fail to comply with a judgment for performance. He suggested following French law, which does not allow imprisonment. A government spokesman responded that the French rule “does not correspond to the German legal conscience.” Another deputy said that personal liberty does not include the freedom to flout the judgment of a court. This view prevailed. Indeed, German court officials were empowered to call on the police or, if necessary, the army. Dawson at 526-28.
- 7.2. Is specific performance really a stranger to the common law? We are fond of quoting Holmes, perhaps in an effort to provoke: “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.” O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Yet specific performance has been available in Anglo-American law for centuries, albeit through the intervention of equity rather than through the common-law courts. And the common law itself originally granted specific performance as the ordinary remedy for breach of an executory agreement (in the earlier days of the action of covenant). *See, e.g.*, Statute of Wales 1284, 1 Stat. 65; J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 69 & n.19, 362 (1990).
8. Moral and historical arguments aside, should specific performance be an ordinary remedy?
 - 8.1. Specific performance can discourage efficient breach, or at least lead to post-breach negotiation costs (which are deadweight losses), as well as added judicial costs. *See* POSNER § 4.12; *see also* Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).
 - 8.2. Specific performance is more efficient: it reduces the inefficiency of undercompensation (which gives undue incentives to breach), reduces the need for liquidated damages clauses, minimizes strategic behavior, and saves the cost of litigating over the amount of damages. Schwartz, 89 YALE L.J. at 291-92; *see also* Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 343 (1984) (“in the absence of stipulated remedies in the contract that survive scrutiny on the usual formation defenses, specific performance is more likely than any form of money damages to achieve efficiency in the exchange and breach of reciprocal promises” leading to more mutually beneficial contracts, lower transaction costs, and the highest valuer receiving performance).
 - 8.3. What does it mean to be an “ordinary” remedy? We think of damages as being available as of right, but they are frequently unavailable because of problems of proof, foreseeability, mitigation—and perhaps most often, the refusal of contract law to take notice of them (e.g., distress, disruption, attorneys’ fees). Still, we do not categorize damages as an extraordinary remedy; we simply cabin the remedy as necessary.

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