A comparative overview on performance as a remedy: a key to divergent approaches

CHAPPUIS, Christine


Available at: http://archive-ouverte.unige.ch/unige:55225

Disclaimer: layout of this document may differ from the published version.
Chapter 2

A Comparative Overview on Performance as a Remedy: A Key to Divergent Approaches

Christine Chappuis*

1. INTRODUCTION

Performance is the natural remedy for breach of contract in civil law systems.1 In common law systems, specific performance is an exceptional remedy and will only be granted if damages are inadequate. Such is the general understanding of one of the great rifts between the two systems. The clash seen as "civil law morality" versus "common law economic efficiency" bears a slight emotional undertone summarized by Holmes's words, "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."2

* My special thanks go to Professors Todd Rakov, Robert Shavell and George Triantis of Harvard Law School, with whom I discussed some of the issues addressed in this paper, in particular the economic approach to specific performance. I also owe thanks to Sébastien Bois, Joëlle Becker and Ersilia Gianella, assistants at the Faculty of law of the University of Geneva, for their help in gathering the necessary material. Literature and cases have been taken into account until June 2008.


2 HOLMES Oliver Wendell, The Path of Law, 10 HARV. L. REV. 457-478, 462 (1897). See also, ZEIGEL Jacob S., The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives, in NINA M. GALSTON / HANS SMIT, INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 1999, § 9.03 at 9-10: "To a common law mind it may seem puzzling that civilians are still so attached to a remedy that is inefficient economically at any rate in those cases where damages would adequately compensate the buyer"; GOETZ Charles J. / SCOTT Robert E., Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an
This often cited dictum is *a priori* unacceptable to a civilian mind. However there is a great benefit in a comparative law approach to performance as a remedy for breach of contract: it reveals a basic misunderstanding not only between civil and common law, but also within a given civil law system. Y.-M. Laithier, in his telling comparative law analysis, examines the sharp criticisms occasioned by the French Cour de Cassation’s refusals to order specific performance and notes that “Les réactions seraient peut-être moins vives si on prenait conscience que le “principe” d’exécution forcée en nature n’existe que dans la théorie générale du contrat et qu’il est par suite mythique.” The observation is true well beyond the French borders.

Performance is a remedy to which the aggrieved party is entitled in case the other party does not fulfil its obligations. The remedy — rather than performance itself — is said to be specific when it aims at giving the aggrieved party “the very performance that was promised.”

Civil law jurisdictions attach a broad scope to performance covering any means by which the aggrieved party receives the substance of what it contracted for. Common law jurisdictions restrict “specific performance” to a decree directed personally against the party in

---

3 Laithier 2004 (n. 1), N° 28 p. 50.
A COMPARATIVE OVERVIEW ON PERFORMANCE AS A REMEDY 53

breach, possibly under the threat of a conviction for contempt of court in case of non compliance.7

Several factors obscure any discussion on performance as a remedy. On the one hand, compelling a party to fulfil its contractual duties presents a practical difficulty, unless that party's participation is not required. These issues are usually addressed by procedural law but not necessarily in a very efficient manner.8 Monetary claims leading to summary proceedings present no particular difficulty. The same applies when the contract provides for delivery of existing goods;9 performance can be physically brought about by the seizure of the goods. In case of the sale of land, the court10 can substitute the missing declaration of will on its own to transfer title to the land. But contracts for goods to be produced or for services to be rendered do require the participation of the defaulting party which cannot easily be compelled directly. If direct means such as those mentioned above are not available, indirect means may produce the desired result.11 One such common means is substitute transaction. Instead of waiting for the defaulting party to perform, the other party gets the goods or services from a third party. Another way to compel performance is the imposition of a judicial penalty if the defaulting party does not comply with the court's order to perform. Finally, the court can issue a negative order (injunction), ordering the party bound by a duty not to do something to refrain from breaching that duty, if need be under the threat of a judicial penalty.

Another problem lies, on the other hand, in the fact that compelled performance of the obligations as promised is not necessarily the best solution once the circumstances have changed and the party affected by this change is no longer willing to perform. Often, it may be too late. The breach has occurred and there is no going back: the goods have been sold a second time and property

9 See the difference made by SHAVELL Steven, Specific Performance Versus Damages for Breach of Contract: An Economic Analysis, 84 TEX. L. REV. 831-876 (2006), p. 831 et seq., between contracts to convey existing goods and contracts to produce new goods or to provide services.
10 "Court" will be understood as including an arbitral tribunal (see Article 1.11 UP).
11 The opposition between "direct" and "indirect" means of compelling performance is used by the French scholars: e.g., MALAURIE Philippe / AYNÉS Laurent / STOFFEL-MUNCK Philippe, DROIT CIVIL, LES OBLIGATIONS, 2d ed., Paris (Defrénois) 2005, text before N° 1129.
transferred to another party or, in view of the urgency of the matter, the aggrieved party has no other solution but to resort to a substitute transaction. There is also a risk that performance may be faulty if compelled. In such situations, very frequent in practice, the aggrieved party has scant interest in compelling performance.

A third difficulty concerns a common confusion between the remedy claimed by a party, the court’s order and the enforcement of this order. The order to perform must be distinguished from the enforcement of this order, at least in civil law jurisdictions. In common law systems, the court who orders performance is burdened with the supervision of its order. Furthermore, the issues are covered by separate legal writings. Contract law writings leave open the procedural consequences of a court’s order for performance or do not devote much attention to it, whereas procedural law writings are not too concerned with the preceding substantive issues.

Keeping these various difficulties in mind, the two main legal traditions will be briefly described and compared. The second part of this paper is devoted to examining how the UNIDROIT Principles of International Commercial Contracts 2004 (UP) deal with performance as a remedy.

2. TWO MAIN LEGAL TRADITIONS

Whereas in the civil law countries the aggrieved party’s right to performance is generally recognized, in the common law specific performance is a discretionary remedy and will only be granted if damages are inadequate. After a survey of the positions of civil law systems on performance and of common law systems on specific performance, some lessons will be drawn from this comparison.

2.1 Divergent positions about (specific) performance

At the outset, the positions are totally divergent. In the civil law tradition, performance is said to flow naturally from the principle *pacta sunt servanda*. Conversely, the natural remedy in the common law tradition is damages. The civil law rule (performance) is the exception in the common law system and the common law rule (damages) is the exception in the civil law tradition.

13 Article 7.2.2 UP Comment 3b.
2.1.1 Civil law jurisdictions

Any serious comparative law writing in the field of remedies for breach of contract should be based upon G. H. Treitel’s authoritative *Remedies for Breach of Contract*, initially published in 1976 in the International Encyclopedia of Comparative Law, and his “Four Typical Solutions” of enforced performance: (a) subject to exceptions (German system); (b) based on content of obligations (French system); (c) specific performance as a discretionary remedy and (d) mixed approaches. In thirty-two years however, attention has shifted towards the so-called mixed approaches with the adoption of the 1980 Convention on the International Sales of Goods (CISG), the UP, the Principles of European Contract Law (PECL) and the new civil codes (Québec, Dutch, Chinese, etc.). Moreover, the new German Civil Code (BGB) has been clarified on the issue of performance and is completed with procedural provisions based on the criterion of the content of the obligation, whereas the same criterion appears more blurred than ever by the French battle of meanings attached to Article 1142 FCC.\(^{14}\) The main focus today seems rather to aim at setting a principle and define the exceptions to it (Treitel’s first typical solution which is very similar to the so-called mixed approach).

Modern texts like the Civil Code of Québec (1991),\(^{15}\) of the Netherlands (1992)\(^{16}\) and of China (1999)\(^{17}\) clearly grant the right to

---


\(^{15}\) Article 1590 QCC: “An obligation confers on the creditor the right to demand that the obligation be performed in full, properly and without delay. Where the debtor fails to perform his obligation without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole or in part by equivalence, 1) force specific performance of the obligation; 2) obtain, in the case of a contractual obligation, the resolution or resiliation of the contract or the reduction of his own correlative obligation; 3) take any other measure provided by law to enforce his right to the performance of the obligation.”

\(^{16}\) Article 3:296(1) DCC: “Unless the law, the nature of the obligation or a juridical act produce a different effect, the person who is obliged to give, to do or not to do something vis-à-vis another is ordered to do so by the judge upon the demand of the person to whom the obligation is owed”; see SCHELHAAS HARRIËT N. (GEN. EDIT.) ET. AL., *THE PRINCIPLES OF EUROPEAN CONTRACT LAW AND DUTCH LAW, A COMMENTARY*, The Hague, London, New York (Kluwer) 2002 (cited as SCHELHAAS–AUTHORS), SCHELHAAS–LOOS, p. 354 N° 1 (translation of Article 3:296(1) DCC on p. 353).

\(^{17}\) Article 110 CCC: “Where a party fails to perform, or rendered non-conforming performance of, a non-monetary obligation, the other party may require performance,
claim performance as one of the remedies for breach of contract. The German Civil Code, modified in 2002, is also based on the principle that the creditor is entitled to a judgment for performance even if it its language addresses the right rather than the remedy. BGB Section 275 introduces three types of exceptions to the right to claim performance: (a) impossibility of performance; (b) manifest disproportion between the aggrieved party’s interest in performance and the expenditure required from the other party; (c) performance of a personal nature which cannot reasonably be required of the party in breach. Due consideration must be given to the breaching party’s responsibility in the impediment. These substantive law rules are completed by the detailed provisions of the Zivilprozessordnung which organise performance of contracts in accordance with the content of the obligation, i.e., delivery of specified movable goods (§ 883 ZPO), delivery of a given quantity of fungible goods (§ 884 except where: (i) performance is impossible in law or in fact; (ii) the subject matter of the obligation does not lend itself to enforcement by specific performance or the cost of performance is excessive; (iii) the obligee does not require performance within a reasonable time.” (translation available at: http://www.cclaw.net/library/contractlawPRC.php).


20 § 275 BGB: “(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.” (emphasis added) (Translation available at: http://www.iuscomp.org/glam/statutes/BGB.htm#b2s1t11, last consulted on 18 April 2008).


acts which can be undertaken by a third party (§ 887 ZPO), acts which cannot be undertaken by a third party (§ 888 ZPO) and duty not to do or to tolerate (§ 890 ZPO). An act, which cannot be accomplished by a third party, can be ordered under the threat of a Zwangsgeld (or Zwangshaft) of no more than €25,000. An order not to do or to tolerate can lead to a Zwangsgeld up to €250,000. It has been observed that, although in theory performance is the first remedy in case of breach, claims for performance do not seem very frequent in practice.

Older texts, such as the French or the Swiss Civil Codes, are less outspoken. Neither provides for performance as a remedy in general. On the contrary, according to Article 1142 FCC, “every obligation to do or not to do resolves itself into damages in case of non-performance by the debtor.” The primary remedy, at least for the above mentioned types of obligations, seems to be damages, which sounds very much like the common law systems. However, on the basis of Article 1134(1) CCF, which gives the contract the force of law, French legal scholars bind performance to the enforceable character of the contract (force obligatoire du contrat) in an indissoluble bond. This entails a confusing discussion on the true meaning of Article 1142(1) FCC and the role of performance and damages as a remedy for breach of contract.

23 § 888(1) ZPO (upon request of the judge).
24 § 889(1) ZPO (upon request of the creditor). See ZIMMERMANN (n. 19), p. 43 ff.
26 Translation by LAITHIER, 2005, p. 113.
The damages rule laid down in this article seems to have become the exception. Apparently indifferent to these debates, the French courts have granted performance in some instances: orders to re-do construction work, to demolish work, to enter into a legal transaction, to close down a business, to return the promised subject matter, to re-instate a lessee or an employee, to transfer shares, to end an activity. However, according to Y.-M. Laithier, the Cour de Cassation does not hold that performance be a remedy available to the aggrieved party as a matter of principle, which leads him to the conclusion that, under French law, the primacy of specific performance “has a purely academic existence.” As can be expected, this discrepancy between legal theory and court practice leads to a great deal of uncertainty on the discretion of the courts and the rules according to which they grant or refuse performance. The particularity of French law lies in the astreinte — a sum of money the defaulting party is bound to pay for each day (or any other period) this party remains in default.

Although the Swiss Code of Obligations opens the chapter on non performance with the right to damages (Article 97 SCO), performance is so obviously considered a primary remedy that it is not stated, but implied (see, Article 107(1) CO), which apparently brings the Swiss CC close to the French system. With regard to an obligation to do, the

---


32 ANCEL (n. 12), N°10 p. 109: “les décisions ici vont dans tous les sens.”

33 See Alexis Mourre’s chapter in this volume.

34 Article 97(1) SCO: “When the creditor cannot obtain performance of the obligation or can only obtain non conforming performance, the debtor must compensate the damage resulting thereof unless he proves that he is not at fault.” THEVENOZ Luc, Commentaire Romand (Thévenoz / Werro, Edits), Code DES OBLIGATIONS I, Geneva, etc (Helbing) 2003, CO 97 N 1: “CO 97 ne règle pas l’action en exécution, premier moyen de droit qui appartient au créancier. Le droit d’agir en justice pour exiger la condamnation du débiteur à fournir la prestation due est conçu par l’ordre juridique Suisse comme une composante inhérente à tout droit subjectif privé.”
creditor may be authorized by the court to obtain performance from another party at the debtor’s cost; if an obligation not to do is breached, the creditor has a right of removal.\textsuperscript{35} The current procedural statute enjoins the court who orders a party to do or to refrain from doing something, to issue its order under the threat of the criminal offence of non compliance with a court order\textsuperscript{36} (Article 76 of the Statute on Federal Civil Procedure of December 4, 1947). This Statute is presently undergoing a reform. The draft provision, which clarifies the possible enforcement measures,\textsuperscript{37} is applicable to obligations to do, not to do or to tolerate. It provides four alternative orders: (a) threat of the criminal offence of non compliance with a court order (Article 292 SPC); (b) fine up to 1,000 francs per day; (c) seizure of a movable good or expulsion from an immovable property; and (d) performance by a third party.\textsuperscript{38}

One notes that there is hardly a theoretical approach to the limits to performance as a remedy either by Swiss scholarly writings\textsuperscript{39} or by court decisions. These limits must therefore be drawn from the general rules according to which performance cannot be ordered if: (a) the contract is not valid and in force; (b) performance is impossible (Article 119 SCO); (c) the party who does not perform has a right to withhold performance;\textsuperscript{40} (d) it would be contrary to the principle of good faith.

\textsuperscript{35} Article 98 SCO. This article is rarely applied because it requires the intervention of the court and a cost advance: THÉVENOZ, (n. 34), CO 98 N 5; WEBER Rolf H., BERNER KOMMENTAR, DIE FOLGEN DER NICHTERFÜLLUNG, Article 97-109, Bern (Stämpfli) 2000, CO 98 N 88 ff (ineffective weapon in the creditor’s hands).

\textsuperscript{36} Article 292 SCP (non compliance with a court order). Example: ATF 90 (1964) II 158 c. 5 (bank ordered to return shares under the threat of SCP 292).


\textsuperscript{38} Interestingly, the Draft has given up an earlier idea to introduce the payment of an astreinte per breach day to the aggrieved party. On the rationale, see the Government commentary in FF 2006 6841 ff., 6992 (http://www.admin.ch/ch/f/ff/2006/6841.pdf). For a critical and argued opinion, see LANDROVE Juan Carlos / GREUTER James John, The Civil Astreinte as an Incentive Measure in Litigation and International Arbitration Practice in Switzerland: Is There a Need for Incorporation?, in CHAPPUIS C. / FOËX B. / KADNER GRAZIANO T. (EDITS), L’HARMONISATION INTERNATIONALE DU DROIT, Genève, etc. (Schulthess) 2007, p. 523 ff., p. 533-536.

Art. 343 of the new Swiss Code of civil procedure now in force (as of 1 January 2011) is applicable to obligations to do, not to do or to tolerate, and provides five measures: a) threat of the criminal offence of non compliance with a court order (Art. 292 SPC), b) fine up to 5 000 francs, c) fine up to 1 000 francs per day, d) seizure of a movable good, d) performance by a third party.

\textsuperscript{39} With the exception of MÜLLER-CHEN MARKUS, FOLGEN DER VERTRAGSVERLETZUNG, Zürich (Schulthess) 1999 (cited as: MÜLLER-CHEN 1999), § 2.III, p. 118 ff., who follows an interesting comparative law approach, though with few references to Swiss law on this issue.

\textsuperscript{40} For example: exceptio non adimpleti contractus (Article 82 SCO), expiry of the period of prescription (Article 127 ff. SCO), etc.
for a party to claim performance because of a gross disparity between the parties’ interests, as in case of hardship (clausula rebus sic stantibus, (Article 2(2) SCC).

One can note the same uncertainty as in French law resulting from the discrepancy between an academic preference for performance and the parties’ usual choice of damages.\textsuperscript{41} Firstly, the records show few claims and, consequently, orders for performance in specie.\textsuperscript{42} Secondly, the courts make a direct though unexplained link between the principle pacta sunt servanda applicable to valid contracts and enforcement in specie,\textsuperscript{43} while Swiss law of contracts\textsuperscript{44} neither forbids nor commands such a link. If the court actually orders performance of an obligation to do or not to do, it is bound to do so under the threat of the criminal offence of non compliance with a court order.\textsuperscript{45} The rules set down in the Swiss Code of Obligations adopt a more pragmatic stance, at least in a commercial setting. Where the seller has not delivered the goods in due time, Article 190(1) SCO presumes that the buyer will abandon his claim for performance and claim for damages instead; contracts for labour or other services can be terminated by anticipation by a party who can then be hold in damages.\textsuperscript{46} The termination of lease contracts follows the opposite rule.\textsuperscript{47} The situation is disputed as far as no special rules apply to the contract.\textsuperscript{48}

\textsuperscript{41} See MÜLLER-CHEN Markus, Der Erfüllungsanspruch – primärer Inhalt der Obligation?, in JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 1996, DAS DEUTSCHE ZIVILRECHT, 100 JAHRE NACH VERKÜNDIGUNG DES BGB, ERREICHTES – VERFEHLTES – ÜBERSEHENES, Stuttgart, etc. (Richard Boorberg Verlag) 1996 (cited as: MÜLLER-CHEN 1996), p. 35; his contention that damages is the primary remedy in practice leads him to the conclusion that practical differences with the common law tradition are small (see ref. cit. at n. 64).

\textsuperscript{42} In about twenty years of the Swiss Federal Court’s practice, parties have sought performance of a non-monetary contractual obligation in eleven cases, been granted it under the threat of Article 292 SCP in eight cases (ATF 133 (2007) III 421; ATF 132 (2006) III 460; TF 5P.509/2006; TF 4C.308/2001; TF 4C.195/1999; ATF 125 (1999) III 451, JdT 2000 I 163; TF 4C.467/1995; ATF 90 (1964) II 158) and refused it in two cases (ATF 133 III (2007) 139; ATF 114 (1988) II 57, JT 1988 I 364); in one instance, the case was sent back to the lower court (see below, n. 49). The result is scant even if the research may have overlooked a few cases.

\textsuperscript{43} ATF 133 (2007) III 360 c. 8, 8J 2007 I 482; MARCHAND Sylvain, Le juge face à la résiliation douteuse d’un contrat de distribution exclusive, in L’ÉVOLUTION RÉCENTE DU DROIT DES OBLIGATIONS, Lausanne 2004, p. 97 ff., 115, raises a critical but minority voice, noted as such by the Supreme Court but not discussed, against the possibility of compelling performance of a contract for services against the will of the party whose duty it is to render the service.

\textsuperscript{44} See Article 97, 98, 107, 205 ff, etc. SCO.

\textsuperscript{45} Article 292 SPC.

\textsuperscript{46} Article 336a, 337c, 377, 404 SCO.

\textsuperscript{47} Article 266a(2) SCO: an untimely termination only produces its effects at the end of the regular termination period; Article 271 ff SCO: either the termination is not valid at
Example: In a recent case about the effects of the unjustified termination of a license agreement, the Swiss Federal Court\textsuperscript{49} had to determine if a licensee was allowed to claim performance of the license agreement. Based on the principle that promises must be kept (\textit{pacta sunt servanda}), the court considered that an unjustified termination was of no effect unless otherwise provided by the law (otherwise is provided for employment contracts or contracts for services\textsuperscript{50}).\textsuperscript{51} It followed that the contract was to be performed. However, no order for performance was issued under the threat of the criminal offence of non compliance with a court order because of another problem. As the measure was only provisional,\textsuperscript{52} the special requirements for such measures remained to be verified. The case was therefore sent back to the inferior court for further factual findings and decision on these requirements.\textsuperscript{53} All in all, it must have taken at least fourteen months before the licensee got an answer relating to the outcome of its claim of a provisional order of performance.\textsuperscript{54} What might have happened during those months can only be guessed at. If the licensor's sole obligation was to let the other party use its trademark, the performance of that obligation needed no participation on the part of the principal and the licensee could simply go on using the trademark.\textsuperscript{55} There is no factual indication in this decision about the possible alternative solutions for the licensee. As the inadequacy of damages is not an issue Swiss courts are concerned about, performance could be ordered in all or, notwithstanding a valid termination, the contract remains in force for a certain period if the requirements of Article 272 SCO are met.\textsuperscript{48} The general part of the SCO contains no general rules, except Article 107 SCO, applicable to delay in performance, which gives the aggrieved party the right to claim performance.\textsuperscript{49} ATF 133 (2007) III 360 c. 8, SJ 2007 I 482.

\textsuperscript{50} According to Article 337b and 404 SCO, an unjustified termination leads to damages (above, n. 46).

\textsuperscript{51} Brushing aside without much consideration an “isolated” opinion (MARCHAND (n. 43), p. 115), the Swiss Federal Court considered that a party could be compelled against its will to maintain a contractual relationship when the law did not exceptionally allow termination and damages (ATF 133 (2007) III 360 c. 8.3, SJ 2007 I 482).

\textsuperscript{52} There was an ongoing arbitration on the issue of the validity of the termination.

\textsuperscript{53} ATF 133 (2007) III 360 c. 9, SJ 2007 I 482, three requirements: difficulty in compensating the future damage in the absence of a provisional order, urgency and likelihood of an infringement of the law.

\textsuperscript{54} Given the termination in April 2006, the first decision refusing performance in July 2007, the Federal Court’s decision granting performance in March 2007, the second decision of the lower court would not be rendered before at least 14 months.

\textsuperscript{55} The licence was of an exclusive type. Would the licensee have been able to obtain a negative order if the licensor had intended to grant a license to a third party?
principle. The Federal Court’s decision ends on an inconsistency. It first lists the well-known conditions of a provisional order, and then adds a further requirement which shows its reluctance to compel performance: as the intrusion on a party forced to act in a certain way is particularly significant, the requirements of such an order should be strictly analysed, says the Federal Court. It may well happen that the relation of trust between the parties has broken up and no further collaboration — even provisional — might prove possible. This was to be decided by weighing the interests of the parties. Concealed behind the provisional character of the order, appears an unspoken exception to performance as a remedy.

2.1.2 Common law jurisdictions

Even though the common law jurisdictions are undoubtedly as diverse as the civil law jurisdictions, they do agree that specific performance is an exceptional remedy available only when damages are not adequate. The sanction of a decree of specific performance lies in the threat of fine or imprisonment for contempt of court. An important feature of the common law is the discretionary nature of the remedy. On one hand, the exercise of that discretion is said to follow a “settled practice;” on the other, it “defies neat categorization,” which makes the comparison no easier. The exceptions to the damages remedy are based on the historical competition between law and equity courts, principles of risk allocation, the moral character of the

56 See also ATF 125 (1999) III 451, JdT 2000 I 163, refusing to reverse an interim measure rendered in Switzerland and ordering delivery of goods by an English company.
57 See above, n. 53.
62 YORIO (n. 60), §1.3 p. 12.
63 A historical review of specific performance across time and jurisdictions, though interesting, would lead too far for the present purposes. Reference can be made to several scholarly writings: WHITTAKER Simon, Un droit à la prestation plutôt qu’un droit à l’exécution ? Perspectives anglaises sur l’exécution en nature et la réparation, in Colloque,
promise accounting for expectancy damages and, finally, law and economics.\textsuperscript{64} For English law, Atiyah brings the exceptions to the primacy of damages together under three main principles: damages are inadequate; the contract involves personal services; the court has no means to ensure that its order be executed.\textsuperscript{65} Farnsworth puts forward the adequacy test as the most important issue the aggrieved party has to establish\textsuperscript{66} and sets a list of discretionary and practical limitations, \textit{i.e}., indefiniteness, insecurity, difficulty in enforcement, personal service contracts, unfairness and public policy.\textsuperscript{67} Injunctions restraining a party from committing a future breach or ordering it to undo the breach done seem to be more liberally granted than specific performance.\textsuperscript{68}

Under English law, a typical situation in which damages are not adequate and specific performance might be ordered is the sale of "specific or ascertained goods."\textsuperscript{69} Though the law does not restrict specific performance to cases in which goods are "unique," the courts show reluctance in granting the remedy.\textsuperscript{70} However, if the goods are urgently needed by a manufacturer for the purpose of its business, damages may be an inadequate remedy and specific performance consequently ordered (specific delivery of a quantity of steel was

\begin{flushleft}
\footnotesize
EXECUTION DU CONTRAT EN NATURE OU PAR EQUIVALENT, \textsc{Revue des Contrats} 2005, 49 ff., 50-54; \textsc{Farnsworth on Contracts} (n. 4), §12.4; \textsc{Farnsworth E. Allan, Specific Relief in American Law, in Etudes offertes à Jacques Ghéstin, le contrat au début du XX\textsuperscript{e} siècle, Paris (L.G.D.J.) 2001, p. 331-340 (cited as: \textsc{Farnsworth, 2001); Bejesky (n. 1), p. 361-374; Dawson (n. 1); Haack Hansjörg, Erfüllung oder Schadenersatz?, Eine rechtsvergleichende Untersuchung der Rechtsbehelfe nach deutschem und englischen Recht bei Nichterfüllung des Vertrages, Achen (Verlag Shaker) 1994; Wéry 1993 (n. 28).

\textsuperscript{64} On the exceptional nature of specific performance in the common law, see Yorio (n. 60), §1.4.

\textsuperscript{65} Atiya's introduction, p. 378-379.

\textsuperscript{66} \textsc{Farnsworth on Contracts} (n. 4), §12.6.

\textsuperscript{67} \textsc{Farnsworth on Contracts} (n. 4), §12.7.

\textsuperscript{68} \textsc{Treitel, Contracts} 2007 (n. 61), N° 21-051 ff.

\textsuperscript{69} Section 52 of the Sale of Goods Act 1979: "(1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. (2) The plaintiff's application may be made at any time before judgment or decree. (3) The judgment or decree may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court."

\textsuperscript{70} \textsc{Treitel, Contrat} 2007 (n. 61), N° 21-023 n. 110 and example n. 114 (courts refusing specific performance of a set of Heppelwhite chairs); he also notes it is not easy to defend the notion "that damages are necessarily an adequate remedy for breach of a contract to sell goods unless they are 'unique'" (N° 21-023 \textit{in fine}). On the idiosyncratic position of English law on specific performance, see \textsc{Whittaker} (n. 63).
\end{flushleft}
ordered during the steel strike of 1980 because no alternative supplies were available).\textsuperscript{71}

Example: The House of Lords’ landmark decision in Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd\textsuperscript{72} provides a good example of the rather restrictive English views. According to a lease for a term of thirty-five years, the tenant Argyll, owner of a chain of supermarkets, had taken up a positive obligation to keep the premises in a shopping centre open for retail trade during the usual hours of business. Argyll closed its supermarket in 1995, about twenty years before the term of the lease. The trial judge refused to order specific performance of the lease (mandatory injunction). Considering the practice he followed as “outmoded,”\textsuperscript{73} the Court of Appeal ordered the tenant to trade on the premises during the remainder of the term or until an earlier sub-letting or assignment. Based on the practice, the House of Lords allowed the appeal and restored the judge’s refusal to order specific performance. The “settled and invariable practice”\textsuperscript{74} not to require a person to carry on business was confirmed in view of the difficulty of constant supervision of the order over the years and other factors, such as the quasi-criminal procedure of punishment for contempt considered as too powerful a weapon,\textsuperscript{75} the imprecision in the terms of the order\textsuperscript{76} and, finally, the fact that the loss suffered by the tenant (by running a business at a loss for an indefinite period) might be far greater than the loss the landlord would suffer from the contract being broken.\textsuperscript{77} Against these various reasons, the fact that the tenant had “by his own breach of contract, put himself in such an

\textsuperscript{71} TREITEL, CONTRAT 2007 (n. 61), N° 21-025, and Howard E. Perry v. Co Ltd v. British Railways Board [1980] 2 All E.R. 579 Ch D.

\textsuperscript{72} Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd, [1997] C.L.C. 1114; the decision has much been commented on, see for instance, TREITEL, CONTRACTS 2007 (n. 61), N° 27-026; SPRY (n. 5), Appendix C, p. 668 ff, considers that “though the case was perhaps of a borderline nature,” the decision of the House of Lords was in accordance with equitable principles; ATIYA’S INTRODUCTION (n. 59), p. 382-383; PHANG Andrew, Specific Performance – Exploring the Roots of “Settled Practice”, 61 MOD. L. REV. 421-432 (1998), at p. 429, notes the tension between individual rights and utilitarian considerations, submits “that the concept of constant supervision ought not to be a conclusive factor in the decision of the court as to whether or not to grant specific performance” (p. 426), and raises the “question whether the entire approach toward specific performance ought to be radically reconceived and this remedy become the rule rather than the exception” (p. 427); MÜLLER-CHEN Markus, ANSPRUCH AUF WEITERFÜHRUNG EINES UNRENTABLEN GESCHÄFTES IM COMMON LAW, ZEup 1998 332-350 (cited as: MÜLLER-CHEN 1998).

\textsuperscript{73} [1997] C.L.C. 1114, 1121.

\textsuperscript{74} [1997] C.L.C. 1114, 1117.

\textsuperscript{75} [1997] C.L.C. 1114, 1118.

\textsuperscript{76} [1997] C.L.C. 1114, 1119.

unfortunate position”78 did not weigh much: “it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship.”79 In the end, the fact that it “would be burdensome to make Argyll resume business only to stop again after a short while”80 and the risk that the absence of a suitable assignee could have forced Argyll to carry on business until 201481 led the House of Lords to confirm the first decision — notwithstanding the fact that an assignee had in fact taken Argyll’s place.

United States courts82 seem more generous in granting specific performance than their English counterparts.83 Specific performance has thus been extended to buyers of generic goods if their need for actual supply is especially urgent, as confirmed by UCC § 2-716(1)84 with the words “or in other proper circumstances.”85 More generally, the Restatement of the Law Second, Contracts (§357-360),86 lists the factors affecting adequacy of damages which bar the remedy of specific performance.87 The difficulty in proving damages with reasonable certainty or in procuring a suitable substitute performance by means of damages, and the likelihood that an award of damages could not be

82 Fundamental reference for the USA is YORIO (n. 60).
83 BEJESKI (n. 1), 393, for sales of goods.
84 § 2-716(1) UCC: “Specific performance may be decreed if the goods are unique or in other proper circumstances. In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties agree to specific performance, specific performance may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.”
85 TREITEL, REMEDIES 1998 (n. 1), p. 64. The commentary to the UCC is more liberal in connection with specific performance than the text of the rule: FARNSWORTH ON CONTRACTS (n. 4), §12.6. See also, YORIO (n. 60), §11.1.
86 RESTATEMENT OF THE LAW SECOND, CONTRACTS, §357(1): “Subject to the rules stated in §§ 359-69, specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty;” §359(1): “Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party;” §360: “In determining whether the remedy in damages would be adequate, the following circumstances are significant: (a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected.”
87 YORIO (n. 60), §2.4-2.5.
collected ("enforcement-proof defendant") are considered as significant in terms of inadequacy of damages. The adequacy test has become relative and is based on a comparison between the remedies of specific performance and damages in view of determining which of them affords more effectively a suitable protection to the aggrieved party's interest.88

Example: In an American shopping centre case, City Stores Co. v. Ammerman,89 the owners of a department store (City Stores) were granted specific performance against the builders and developers of a shopping centre (Ammerman). City Stores had been given an option to lease one of the major buildings to be constructed at the contemplated shopping centre. Upon Ammerman's repudiation, City Stores requested specific performance of the promises to construct and lease a store. The District Court admitted that the agreement was sufficiently definite even if substantial terms thereof had been left to future negotiation, because they were to be equal to those given to other major tenants. Concerning difficulties of supervision in contracts for the construction of buildings,90 the court considered that if these difficulties do not outweigh the importance of specific performance for the aggrieved party, they are not an obstacle to a decree of specific performance. As the contract involved a building to be built on land controlled by its owner, it was impossible for City Stores to employ another contractor to carry out the construction at Ammerman's expense.91 The difficulties of supervision were not insuperable in view of the fact that the court could appoint a special master to help the parties settle the differences that might appear.92 Finally, the court rejected Ammerman's contention that they could make more money by dealing with a third party than with City Stores on the ground that this was not reason enough for denying specific performance; as long as performance was not impossible and did not cause the financial ruin of the party, specific performance might be granted. Therefore, specific enforcement was considered "entirely appropriate" in this case.93

This decision shows a more relaxed and imaginative approach to supervision than the one put forward by the trial judge and the House of Lords in Argyll (which I. C. F. Spry94 considers as "greatly overstated"

88 Farnsworth on Contracts (n. 4), §12.6 p. 746-747; Yorio (n. 60), §2.5.
89 266 F. Supp. 766 (D.D.C. 1967); aff'd 394 F.2d (D.C. Cir 1968). Yorio, §13.4.2, holds this case to be "marginal."
90 On specific performance of construction contracts, see Yorio (n. 60), §13.
94 Spry (n. 5), p. 671. Burden of supervision generally considered as being exaggerated:
A COMPARATIVE OVERVIEW ON PERFORMANCE AS A REMEDY

by Lord Hoffmann). It is also more favourable to the aggrieved party in assessing the latter’s gain against the cost of performance for the other party. Yorio notes that

The court was on the horns of a dilemma: if it attempted to assess damages, City Stores might be undercompensated; if the court instead ordered specific performance, City Stores might be overcompensated as a result of a settlement with Ammerman. As between these choices, specific performance seems the safer and fairer course since it eliminates any risk that City Stores, the innocent victim of a breach, might be undercompensated.95

The (reversed) Court of Appeal’s decision in Argyll96 showed similar concerns about adequacy of damages and the position of the innocent party faced with the other party’s wanton and unreasonable behaviour.

The common law preference for the substitutional remedy of damages over specific performance has received a firm support from the economic analysis of contract law as developed in particular in American law.97 According to the theory of efficient breach,98 a breach

---

95 YORIO (n. 60), §13.4.2 p. 346; at §13.4.1, §13.4.3 and §13.4.4, he discusses three other construction cases in two of which specific performance was refused and one in which specific performance was granted; he approves of all four decisions (§13.4 p. 342).
98 FARNSWORTH ON CONTRACTS (n. 4), §12.3: "According to traditional economic theory, the mechanism of bargained-for exchange plays a vital role in the voluntary reallocation of goods, labor, and other resources in a socially desirable manner. The basic notion is that an economy will operate 'efficiently' only to the extent that available goods and resources are utilized in their most productive manner. Ideally, each good must be consumed by the person who values it most highly, and each factor of production must be employed in the way that produces the most valued output." (p. 735-736); see the fundamental work of POSNER Richard A., ECONOMIC ANALYSIS OF LAW, 6th ed., New York (Aspen) 2003; for a presentation on specific performance and efficient breach, EISENBERG Melvin A., Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law, 93 CAL. L. REV. 975-1050 (2005), p. 997; ULEN Thomas S., The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedy, 83 MICH. L. REV. 341-403 (1984), p. 344 ff; LINZER Peter, On the Amorality of Contract Remedies - Efficiency, Equity, and the Second Restatement, 81 COLUM. L. REV. 111-139 (1981), p. 112 ff; on efficient breach in construction and repair contracts, YORIO (n. 60), §13.2.4 with examples. For a presentation from a civilian point of view, see LAITHIER 2004 (n. 1), Nos 405 ff.; FONTAINE Marcel, Les sanctions de l'inexécution des obligations contractuelles: synthèse et perspectives, in FONTAINE MARCEL/VINEY GENEVIEVE, LES
of contract is economically efficient if the breaching party’s gain resulting from the breach (net of expectation damages) exceeds the aggrieved party’s loss. Rather than being prohibited, breach of contract should be favoured in order to allocate resources to their highest joint value while minimizing the cost of reallocation. In short, economic theory encourages breach of contract when the result of non-performance is economically efficient, that is “if the value of the gain to the reluctant party is greater than the value of the loss to the other party.” 99 Specific performance should therefore not be ordered if it leads to an economically inefficient allocation of resources.

Many scholars, American and other, have expressed doubts about and reservations on the theory of efficient breach. 100 Although the economic approach is undoubtedly in line with the most frequent choice of the aggrieved party — who prefers the quick remedy of damages if substitute goods or services are available — the general presumption that specific performance is only a secondary and exceptional remedy falls short of the aggrieved party’s legitimate expectations for several reasons. First, there is a significant risk of under compensation if the court is too short in its assessment of damages101-102 or when litigation and renegotiation costs are not


101 Swiss courts, for example, are clearly under compensatory with their awards of damages. In ATF 126 (2000) III 388 c. 11, during the construction of a private house, water damage occurred due to the architect; several rooms could not be used for a certain time, but the Swiss federal court considered that the impossibility to use those
covered by the damages. The second risk stems from litigation related issues: the difficulty of proving certain items of the damage, the requirement of foreseeability of the damage, the duty to mitigate, etc. might result in a reduction in the amount of damages granted by the court. Third, even when the damage is fully compensated, the situation remains detrimental for the aggrieved party. Instead of being able to go about its business as expected, the aggrieved party is forced to bargain or litigate its way out of the contract and, furthermore, to bargain into a new contract. These elements can hardly be all compensated by an award for damages, even if the court is prepared to take them into account. Bargaining out of one contract into another presents no insuperable difficulty only as far as standard goods or services are concerned. If the goods or services present idiosyncratic features, the aggrieved party runs a risk of not being adequately compensated.

Scholarly writings advocating an economic analysis of contract law are currently adopting a more balanced economic approach towards specific performance. S. Shavell draws a line between contracts to produce new goods or to provide services and contracts to convey existing goods. From an economic point of view, damages are preferable for the first type of contracts since specific performance would tend to lower joint value. In the case of contracts to convey property, the remedies seem to be roughly equivalent, except where there is a risk of underestimation of the value of performance which tends to lower the joint value for the parties. In the latter case, specific performance would be preferable. As S. Shavell considers it desirable from a general economic perspective to allow parties to contract as they want and chose their own remedy, he notes that the common law's resistance to allowing parties to resort to specific performance seems problematic. As to R. E. Scott and G. G. Triantis, they go even further and "propose that specific performance be adopted as the general default rule" in commercial contracts, thus

---

102 See YORIO, as quoted at 95.
103 SHAVELL (n. 9).
104 SHAVELL (n. 9), p. 841-846.
105 SHAVELL (n. 9), p. 846-853, and 861.
106 SHAVELL (n. 9), p. 864-865.
encouraging parties to negotiate termination provisions seen as embedded options serving a risk management function.  

The economic approach to specific performance leading to the theory of efficient breach has been received with mixed feelings by civil law scholars. The economic efficiency of a rule or behaviour must be considered as an important — though probably underestimated — tool to be used jointly with others such as the hierarchy of values in a given system, the psycho-sociological approach of relational contracts and contractual practice.  

This short survey of specific performance in common law systems will be concluded with an observation by I.C.F. Spry who identifies two recent trends: firstly, a decline in the tendency of the courts to refuse specific performance in view of the adequacy of damages, secondly, a tendency to simply question which remedy would be more just. This trend, favourable to the granting of specific performance, is confirmed by other scholarly writings as well as by the Restatement, Second, of Contracts: “There is ... a tendency to liberalize the granting of equitable relief by enlarging the classes of cases in which damages are not regarded as an adequate remedy. This tendency has been encouraged by the adoption of the Uniform Commercial Code.”

2.1.3 What comparison shows

Given these obvious differences between the legal traditions, no compromise would seem possible. However, there is agreement on the fact that “the differences in practice are smaller than one would suppose.”

108 See FONTAINE (n. 98), p. 1019 ff., N° 140 ff.; LAITHIER’s thorough analysis of performance with economic tools stands out as an exception (n. 1).
109 FONTAINE (n. 98), N° 148 with references at n. 325.
110 FONTAINE (n. 98), N° 152 ff. See below, at B.3.
111 SPRY (n. 5), p. 60.
112 TREITEL, REMEDIES 1988 (n. 1), N° 69 p. 71; HARRIS/TALLON-OGUS (n. 7), p. 254 ff; FARNsworth ON CONTRACTS (n. 4), §12.6 p. 746 f.; FARNsworth 2001 (n. 63), p. 339; BEJESKY (n. 1), p. 402; ELDER (n. 100), p. 10; LINZER (n. 98), p. 126 ff (with examples). For a more balanced opinion, see YORIO (n. 60), §2.5 p. 43: “Modern flexibility in applying the adequacy test cuts both ways, with expansion in the availability of specific relief in some areas (such as output and requirements contracts) but contraction in other areas (such as real estate contracts).”
113 RESTATEMENT (SECOND) OF CONTRACTS § 359 Comment a (1979).
Although performance is an exceptional remedy in common law jurisdictions — particularly under English law — scholarly writings devote a great deal of attention to the subject. Besides C. F. Spry’s impressive seventh edition on equitable remedies or E. Yorio’s volume on contract enforcement, the general treatises on contracts all spare a comprehensive chapter on specific performance.  

Moreover, an important number of articles have discussed the merits and drawbacks of specific performance over the years. And conversely, civil law scholars show only a recent interest in performance as a remedy, mainly induced by comparative law research. This should not come as a surprise since the remedies approach, familiar to common law systems, has found understanding as of late in civil law systems thanks, notably, to the CISG, the UP and the PECL. As a consequence, common law jurisdictions have developed a “settled practice” on the exceptional cases where specific performance is admitted, whereas civil law jurisdictions are much less consistent on the limits of performance as a remedy.

Civil law systems taking performance as axiomatic have busied themselves finding procedural means of forcing the breaching party to perform but have devoted insufficient attention to the limitations of performance as a remedy. Uncertainty remains great in this respect. It is one thing to grant the aggrieved party the right to compel performance. It is another to decide that the court has no choice but to order performance. In other words, does a civil law court have the same power as a common law court to refuse an order for performance if it considers damages as a more adequate remedy? As any remedy, performance is subject, first, to a number of conditions which have to be checked. It is subject, secondly, to exceptions. Because of their (sometimes implicit) insistence on performance as a remedy, the civil

---

115 E.g. TREITEL, REMEDIES 1988 (n. 1); 1 CHITTY ON CONTRACTS, 29th ed., General Principles, London (Sweet & Maxwell) 2004; FARNSWORTH ON CONTRACTS (n. 1).

116 See for examples, the articles by BEJESKY (n. 1), DAWSON (n. 1), EISENBERG (n. 98), ELDER (n. 100), FARNSWORTH 2001 (n. 63), 1970 (n. 99), GOLDSTEIN (n. 99), KRONMAN (n. 100), LINZER (n. 98), SCHWARZ (n. 100), SCOTT / TRIANTIS (n. 107), SHAVELL (n. 9), SMITH (n. 100), ULEN (n. 100), WALT Steven, For Specific Performance under the United Nations Sales Convention, 26 TEX. INT’L L. J. (1991) 211 ff.

117 LAIT.HIER (France, 2004, n. 1); MÜLLER-CHEN (Switzerland, 1999, n. 39); HAACK (Germany, 1994, n. 63); WÉRY (Belgium, 1993, n. 28), with a historical rather than comparative law approach.

118 EBERHARD Stefan, LES SANCTIONS DE L’INEXÉCUTION DU CONTRAT ET LES PRINCIPES UNIDROIT, Lausanne (CEDIDAC) 2005, p. 77 ff., contrasts the “remedies approach” with the “causes approach” familiar to the Swiss and German traditions; see also, LAIT.HIER 2004 (n. 1), N° 4, about French terminology on “sanctions” instead of “remèdes.”

119 This would be the logical inference from the traditional opposition between common law and civil law traditions.
law systems tend to be less explicit on exceptions for which they often rely on general rules such as abuse of right. Modern texts have corrected that defect and list more or less precisely the exceptions to performance. When examining exceptions such as “excessive” cost of performance or “manifest” disproportion between performance expenditure and the obligee’s interest in performance, the court is granted certain discretion as to its order. Once the focus is put on the exceptions to performance, one can see that civil law courts are bound to order performance, but only where all the conditions are met and the exceptions are not. To some extent they are granted discretion too, in the appraisal of some elements of the exceptions.

The economic approach aiming at contractual efficiency corresponds to and explains, up to a certain point, the choice of parties faced with a variation of the market or other circumstances affecting the economic value of performance. International contract practice has responded to situations where performance becomes too burdensome for a party and would lead to economically unsound results. Clauses have been developed, especially in long-term (relational) contracts, which take into account the change of circumstances during the life of the contract. These clauses aim either at maintaining the relationship on modified terms or at terminating it. Force majeure clauses belong to the second type. Hardship clauses, also widely used in international commercial practice, provide for negotiations in response to changed circumstances and belong mainly to the first type. The parties have the opportunity to organize a procedure in which certain events trigger renegotiations allowing adaptation of the contract instead of its termination. Other clauses can be observed, such as “English clauses,” most-favoured customer or first-refusal clauses, which address changed market conditions. In the first two cases, the contract is adapted to meet the more favourable terms offered by or granted to a

121 For example, § 275 BGB (see above, n. 20; see also Article 110 of the Chinese Civil Code (above n. 17) and, to a lesser extent, Article 3:296(1) of the Dutch Civil Code (above n. 16).
122 See the chapter devoted to force majeure clauses in FONTAINE Marcel/DE LY Filip, DRAFTING INTERNATIONAL CONTRACTS, AN ANALYSIS OF CONTRACT CLAUSES, Ardsley, New York (Transnational Publishers, Inc.), 2009, p. 401 ff
123 Article 6.2.1 UP Comment 2; see the chapter devoted to hardship clauses in FONTAINE/DE LY (n. 122), p. 453 ff.
124 See the corresponding chapter in FONTAINE/DE LY (n. 122), p. 493 ff.
125 “English” clause: one party has received a more favourable offer from a third party; most-favoured customer clause: a party has offered more favourable terms to a third party.
competitor. The first-refusal clause gives the party benefiting from it an opportunity of passing a new transaction with the other party.\textsuperscript{126} Buying its way out of a contract whose economic efficiency has diminished or disappeared is not the only mechanism imagined by parties to an international commercial contract. Though economic analysis is a helpful tool for the understanding and drafting of such clauses, the idea of efficient breach is foreign to them.

The economic approach also contributes towards an understanding of the discrepancy between theory and practice in civil law systems. Practice tends to favour damages as a simple remedy for non-performance. Often the aggrieved party has no wish to go through the trouble to get a court order for performance as a substitute transaction will bring about the expected result. No reasonable party from a civil law country will choose the costly and time consuming remedy of compelled performance if it can get the services or goods from another party on the market.\textsuperscript{127} Moreover, even where performance is granted by a court, this does not mean that the aggrieved party will be able to enforce that judgement without resorting to a procedural substitute (zivilprozessuale Ersatzvornahme). The outcome is the same, but obtaining a procedural substitute is an operation much more complex that a cover transaction leading to a damages claim.\textsuperscript{128}

Besides these practical reflections, a current tendency towards convergence can be observed on a theoretical level. Common law courts — especially American courts — get less reluctant in granting specific performance and economic theory is reducing its fundamental opposition based on the search for the most economically efficient solution. Performance does not anymore appear as necessarily unfavourable in view of economic efficiency. Moreover, civil law systems are becoming aware of the necessity of acknowledging and systematizing the limits to performance.

However, differences between the two traditions remain. Obviously, performance is granted more readily in civil law than in common law jurisdictions. Given the reverse starting point, the burden does not lie on the same party in each system. When the system grants

\textsuperscript{126} FONTAINE/DE LY (n. 122), p. 493; interestingly, FONTAINE/DE LY (n. 122), p. 528 ff., consider that common law offers a better protection (injunction) than French or Belgian law if the party bound by the clause of a first-refusal is threatening to conclude a contract with a third party in disregard of the preferential right.


\textsuperscript{128} HAACK (n. 63), p. 200.
the aggrieved party a right to claim performance, the burden of establishing an exception to performance (as a manifest disproportion between the parties' interests or impossibility of performance) lies with the breaching party. Where the primary remedy is damages, the burden of establishing inadequacy of damages or another exception to the damages rule lies with the aggrieved party who will have to convince the court that the detriment it suffers cannot be compensated by an award of damages.

Another difference must be mentioned. Damages are subject to the duty of mitigation whereas performance is not. The latter may lead to over-compensation and encourage over-reliance on the part of the aggrieved party, two reasons explaining the common law reluctance towards specific performance. Finally, as to the delivery of goods the picture is strangely diverse notwithstanding the fact that performance is easy to compel where goods are concerned. Performance is granted only where "specific or ascertained goods" are concerned under English law,129 if the "goods are unique or in other proper circumstances" under the UCC,130 whereas the German Zivilprozessordnung, though devoting different provisions to specific goods (bestimmte Sachen) and generic goods (vertretbare Sachen),131 provides for seizure of the goods in both cases. The difference may be explained by the common law courts' dread of supervision132 and by the fundamental inadequacy of damages when a substitute transaction is available, as is generally the case with generic goods.

The general context shows that if there are indeed differences between the two approaches, they are not insuperable in practice. The rift is more of a theoretical nature than of practical relevance. Such is the international legal setting in which and for which the drafting of the UNIDROIT Principles on international commercial contracts was begun in 1980.

3. THE UNIDROIT PRINCIPLES AND THE REMEDY OF PERFORMANCE

The UNIDROIT Principles on international commercial contracts, prepared by a group including representatives of all the major legal systems of the world in the field of contract and international trade

129 See above, n. 69.
130 See above, n. 84.
131 See above, after n. 22.
132 If the contract relates to unidentified goods, would the court have to get involved in the identification process?
law, provide a system of soft law rules that aims at establishing balanced rules acceptable for every legal tradition. Both the civil law and the common law traditions have been taken into account in the drafting of principles achieving a compromise between opposing concepts. This balancing of contradicting traditions is particularly obvious with regard to performance as a remedy. Four provisions are devoted to the right to performance of non-monetary obligations (Article 7.2.2 to 7.2.5 UP). Under the Principles, specific performance is not a discretionary remedy; the court must order performance, unless an exception applies. Where the court orders performance, it may also order a judicial penalty at its discretion. The principles governing performance will be assessed by means of the three examples developed in the first part.134

3.1 The rule and the exceptions

Article 7.2.2 UP borrows performance as a rule from civil law and gives no discretionary power to the court.135 It is worth mentioning that Article 7.2.2 UP goes one step further than the 1980 Convention on the International Sales of Goods (CISG). Although the right to claim performance is expressly stated in Article 46 CISG136 and Article 62 CISG, the Sales Convention has left the divergence between legal traditions open, in that it allows a court not to enter a judgement for specific performance unless it would so under its own law (Article 28 CISG).137 While the CISG maintains the court’s discretionary power, the Principles opt for performance as the rule, however, strictly contained by five exceptions which are intended to meet the

---


134 See at n. 49, 72 and 89.

135 Article 7.2.2 UP Comment 2.

136 Article 46 CISG adopts a wide understanding of performance and includes performance *stricto sensu* (para. 1), delivery of substitute goods (para. 2) and repair of non conforming goods (para.3).

fundamental common law reluctance as well as civil law restrictions to performance.

According to Article 7.2.2 UP, a party may not require performance of a non monetary obligation, if “(a) performance is impossible in law or in fact; (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive; (c) the party entitled to performance may reasonably obtain performance from another source; (d) performance is of an exclusively personal character; or (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.” These exceptions are examined hereafter.

3.1.1 Impossibility and exclusively personal character

The aggrieved party does not have the right to require performance if performance is impossible (lit. a) or of an exclusively personal character (lit. d). Although civil law tradition is scarce on the exceptions to the “natural” remedy of specific performance, both exceptions can be found in civil law. They are also known in the common law tradition. Impossibility seems an obvious exception, may it be in fact or in law.\footnote{See for example, § 275(1) BGB; YORIO (n. 60), §5.5. According to PECL Note 3(b), the rule is common to the laws of Europe.} It should be remembered that impossibility only affects performance as a remedy. The contract remains valid in case of initial impossibility (Article 3.3(1) UP). If impossibility amounts to force majeure, non performance is excused (Article 7.1.7 UP). In both cases, the aggrieved party cannot claim for performance. If impossibility results of the refusal of a public permission which does not affect the validity of the contract (Article 6.1.17(2) UP), the first exception to performance (a) also applies. As to performance of an exclusively personal character,\footnote{The exception in Article 7.2.2(d) UP is more restrictive than the corresponding exception in Article 9:102(2)(c) PECL, as it applies only to performance of an “exclusively” personal character.} a judgement compelling a party to fulfil its obligation would interfere with that party’s personal liberty. That is why performance is generally not available for such obligations.\footnote{Article 9:102 PECL Note 3(d). See also text above at n. 20, 65 and 67.} The “exclusively personal” character will only be admitted if performance is not delegable and requires individual skills or involves a confidential or personal relationship.\footnote{Article 7.2.2 UP Comment 3(d). The last exception in case of a “confidential or personal relationship” is expressly mentioned by Article 9:102(2)(c) PECL.} This means that
the UNIDROIT Principles admit a right to performance of standard services which are not of a unique character.

3.1.2 Unreasonable burden

The second exception (lit. b) is twofold. It addresses performance which is unreasonably burdensome or expensive for the other party and enforcement of the order of performance which is unreasonably burdensome or expensive for the court.\textsuperscript{142} If, as a result of a drastic change of circumstances, performance has become unreasonably onerous, it would be contrary to the general principle of good faith and fair dealing to hold the other party to its obligation (Article 1.7 UP). The requirements are less strict than those set down by Article 6.2.2 UP for hardship.\textsuperscript{143} The right to performance lapses if the burden or the expenses are "unreasonable" for the breaching party. It is not required that the equilibrium of the contract be fundamentally altered and the considered events do not have to be unforeseeable nor beyond the control of the party who does not perform the contract (Article 6.2.2(b)(c) UP). Such general limit to performance, based on the principle of good faith, is widely accepted in civil law jurisdictions.\textsuperscript{144}

As for common law tradition, this exception addresses the economic concerns about the remedy of specific performance. The party in breach should not be made to suffer a loss through having to perform the contract, which exceeds the loss the aggrieved party would suffer from the contract being breached.\textsuperscript{145}

Another important concern for common law courts — not shared by civil law courts — is the supervision of the execution of orders for performance which is addressed by the second part of letter b.\textsuperscript{146} Though difficulty of supervision does not constitute an absolute bar to performance,\textsuperscript{147} common law courts remain reluctant to assume the burden of supervising an order of performance. If a court considers that burden or the expenses of it "unreasonable", this exception allows it not to order performance. As seen above,\textsuperscript{148} an English court was not prepared to assume the burden of supervising the re-opening and operating of a supermarket, whereas, in City Stores, the American

\textsuperscript{142} The first exception is also provided by Article 9:102(2)(b) PECL, but not the second one.

\textsuperscript{143} See also, Article 9:102 PECL Comment. F. EBERHARD (n. 118), p. 117; SCHWENZER (n. 143), p. 296.

\textsuperscript{144} Text above, after n. 20 and before n. 40. Article 9:102 PECL Note 3(c).

\textsuperscript{145} Argyll Stores (Holdings) Ltd [1997] C.L.C. 1114, 1120.

\textsuperscript{146} Article 9:102 PECL (Comment F) does not address this issue.

\textsuperscript{147} See above, n. 65, 67; YORIO, §3.3.

\textsuperscript{148} See above at n. 72 and 89.
courts were ready to supervise the conclusion of a lease contract and the construction of a store, if necessary with the help of a "special master," which shows a different stance in relation to supervision.

3.1.3 Replacement transaction

The aggrieved party is further barred from requiring performance if the latter may reasonably be obtained from another source (lit. c). Though the UNIDROIT Principles do not take up the basic rule that performance may only be required when damages are inadequate, they do provide the availability of substitute performance as an exception to performance. According to the Restatement of Contracts, the difficulty of procuring a suitable substitute performance is precisely one of the factors affecting adequacy of damages. The third exception provided in Article 7.2.2(c) UP has regard to the economic reality resulting from the ordinary behaviour of customers on the market. The Comment to this paragraph provides the following explanation:

Many goods and services are of a standard kind, i.e., the same goods or services are offered by many suppliers. If a contract for such staple goods or standard services is not performed, most customers will not wish to waste time and effort extracting the contractual performance from the other party. Instead, they will go into the market, obtain substitute goods or services and claim damages for non-performance.

This provision takes into account the main obstacle to specific performance in the common law tradition. Substitute performance must be "suitable" under the Restatement, "reasonably" available under the UNIDROIT Principles. Both adjectives indicate that the mere fact that a substitute can be obtained is in itself not sufficient. Although this restriction to performance is not known in the civil law systems, it is in line with the practice of contract litigation in civil law systems.

149 This exception is also provided by Article 9:102(2)(d) PECL.
150 §360 of the RESTATEMENT OF LAW SECOND, CONTRACTS (n. 86).
151 Article 7.2.2 UP Comment 3c.
153 Article 7.2.2 UP Comment 3c.
3.1.4 Request within reasonable time

The last limitation to the right to require performance has to do with the time limit within which the request ought to be made. In order to avoid uncertainty and unfair speculation to the detriment of the breaching party, performance must be required within a reasonable time after the aggrieved party has, or ought to have, become aware of the non-performance.\(^{154}\) This limit taken up from common law is also known in certain civil law jurisdictions.\(^{155}\)

3.2 Judicial penalty

The performance rule with its exceptions is completed by a provision allowing the court, at its discretion, to order the breaching party to pay a penalty if it does not comply with the order to perform (Article 7.2.4 UP). Whether judicial penalties belong to substantive law or to procedural law\(^ {156}\) will be left open. As provided for in Article 7.4.2 UP, they belong to substantive law rules in that they clearly give the aggrieved party a supplementary right in case of non-performance. The German Zwangseld or Zwangshaft and the Swiss threat of non-compliance with a court order are provided for in procedural statutes. Notwithstanding these differences, a comparison can only be made if the various types of penalties are examined as one corpus.

Different types of judicial penalties have been developed over the years in several jurisdictions.\(^ {157}\) Considering the judicial penalties provided for in common law countries (contempt of court), Germany (Zwangseld), Switzerland (non-compliance with a court order) and France (astreinte),\(^ {158}\) one can draw a twofold classification between penalties consisting in a fine payable to the State (common law jurisdictions, Germany and Switzerland) or in an amount to be paid to the aggrieved party (France, Belgium). The first category can be further

---

\(^{154}\) See the similar rule concerning the loss of the right to termination (Article 7.3.2(2) UP).

\(^{155}\) Article 9:102 PECL Note 4. SCHWENZER (n. 143), p. 299. Under Swiss law, this limit would be based on Article 2(2) of the Civil code (SCC), but limited to exceptional situations where the breaching party is led to believe that, given the extended delay and other circumstances, the other party has given up its claim for performance (HONSELL Heinrich, in BASLER KOMMENTAR, ZIVILGESTZBUCH I (Article 1-456 ZGB), 3d ed., Basel, etc. (Helbing) 2006, Article 2 N 49).

\(^{156}\) On procedural issues, see David RAMOS MUÑOS's contribution to this volume.

\(^{157}\) Other legal systems don’t provide for such sanctions considered as an inadmissible infringement on personal freedom: Article 7.2.4 UP Comment 1.

\(^{158}\) See above, at I.A., and references cited by Alexis MOURRE, n. 11-20, who also mentions Belgium, the Netherlands, Denmark, Finland, Greece, Spain and Portugal.
divided between penalties with a criminal character (common law jurisdictions,\textsuperscript{159} Switzerland\textsuperscript{160}) or an administrative character (Germany).

The aim of all types of penalties is to ensure compliance with the court’s order, be it a state court or an arbitral court, by way of the threat imposed on the unwilling party. The concern of effectiveness of court decisions is a common one,\textsuperscript{161} shared by the arbitral community.\textsuperscript{162} It explains why disobeying court orders is termed as acting in “contempt of court” in the common law tradition. Judicial penalties may also lessen the pressure on courts resulting from the duty to supervise the execution of their decisions. Such penalties are seen as the most effective means of ensuring compliance with an order for performance of a contract notwithstanding one party’s unwillingness to perform.\textsuperscript{163}

Turning to judicial penalties based on criminal law (common law contempt of court, Swiss law non compliance with a court order), one may hesitate in front of such a “powerful weapon,” such a “heavy-handed” enforcement mechanism.\textsuperscript{164} The reluctance common law courts show in ordering specific performance can, at least in part, be explained by the “drastic character of the remedy.”\textsuperscript{165} It is obviously important to ensure that courts’ decisions ordering performance of a contract be respected by the parties — in reality, the respect of all courts’ decisions must be ensured. But it does not seem that criminal law would be an adequate tool. Non-performance of a contractual obligation does not have much in common with a criminal offence.\textsuperscript{166} The two fields should be kept carefully apart.

Retaining the deterrent effect of the threat to pay a penalty, but dismissing its criminal character, the UNIDROIT Principles have chosen the model of the French \textit{astreinte}. The judicial penalty provided for in Article 7.2.4 UP presents the following characteristics. The penalty is imposed at the discretion of the court. It can apply to all kinds of orders without limit as to the content of the obligation. The amount is payable to the aggrieved party and is to be

159 Contempt of court.
160 Non-compliance with a court order (Article 292 of the Swiss Penal Code).
161 Prestige of courts threatened by the parties’ non-compliance: YORIO (n. 60), §3.2.1; intention of preserving respect for judicial authority as an explanation of the development of the \textit{astreinte} by French courts since 1940: DAWSON, p. 519-520.
162 See Alexis MOURRE’s contribution to this volume, at n. 23-24.
163 Article 7.2.4 UP Comment 1.
164 These are Lord Hoffmann’s words in Argyll, [1997] C.L.C. 1114, 1118.
165 TREATEL, Contracts 2007, para 21-016, quoting Argyll (see above).
166 Except where criminal law takes up specific deviant behaviours involving contract law (i.e. corruption contracts).
A COMPARATIVE OVERVIEW ON PERFORMANCE AS A REMEDY

distinguished from damages and from agreed payment for non-
performance.

3.3 Assessment of the principles

Having clearly placed performance as a primary and not a
discretionary remedy, the UNIDROIT Principles take up the civil law
approach. The emphasis on exceptions is borrowed from common
law tradition, as is the substance of those exceptions, some of which
are common to both traditions, at least in part. The same trend is
followed by the European Principles of Contract Law and the recent
Draft Common Frame of Reference aiming at an informal
Europeanization of private law. Among five exceptions, one can
recognise elements stemming from either common or civil law
tradition which have been reformulated and integrated in a new
balanced set of rules. The choice of performance as the primary
remedy can only be understood in the light of the strict restrictions to
which that remedy is subject.

3.3.1 Performance as the primary remedy

The Comment infers the primacy of performance over damages
from the binding character of the contract (Article 1.3 UP). In support
of that choice, one may add that performance brings the aggrieved
party as close as possible to what is entitled to under the contract
agreed upon by the parties under the terms and conditions commonly
devised by them. Furthermore, the remedy of performance avoids
possible difficulties in assessing the damage suffered by the
aggrieved.

---

167 In international arbitration, the availability of performance as a remedy has been
recognised as early as 1977 in Texaco Overseas Petroleum Company / California Asiatic Oil
international 350-389 (1977), with introduction by Lalive Jean-Flavien (p. 319-349);
168 The same option is followed by Article 9:102 PECL Comments A-B and Note 1, and
by the recent Draft Common Frame of Reference (DCFR), Principles, Definitions and
Model Rules of European Private Law, prepared by the Study Group on a European
Civil Code and the Research Group on EC Private Law (Acquis Group), based on a
revised version of the Principles of European Contract Law, Munich (Sellier) 2008, III. -
169 Article 7.2.2 PU Comment 1.
170 Comment B to Article 9:102 PECL.
3.3.2 Exceptions to performance

Although the adequacy test developed in the common law systems is not, as such, mentioned by Article 7.2.2 UP, the main concern covered by the test is addressed by two exceptions: unreasonable burden on the party (letter c) and availability of replacement transaction (letter d), both of which set significant limits to the right to performance.

The content of the obligation subject to compelled performance is indifferent, contrary to the French classification of obligations to give, to do and not to do, apparently underlying the controversial Article 1142 FCC. The French tradition has invented the *astreinte* in order to circumvent this provision and given courts a tool ensuring their orders are obeyed. One of the great advantages of this device is that a penalty can be imposed whatever the content of the obligation, since its execution does not depend on the obligee’s willingness. As the UNIDROIT Principles have taken up judicial penalty, the classical distinction based on the content of the obligation can be relinquished.

By accepting the exclusively personal character of performance as an exception to the remedy, the UNIDROIT Principles are meeting the common concern of common law and civil law traditions for personal freedom.

Reasonableness is an important criterion qualifying three of the exceptions: the burden caused by performance (letter c), the availability of substitute transaction (letter d) and the time within which performance must be required (letter e). The courts regain some of their lost discretion in the assessment of the three conditions qualified by this criterion. The circumstances which play a significant role in common law decisions about specific performance, find their way into the decision on performance.

3.3.3 Do the UNIDROIT Principles allow or even encourage efficient breach of contract?

Performance and efficient breach are incompatible, the former preventing the latter from being committed. It does not follow that the obligor is forbidden to weigh the cost of performance against damages. When performance is unreasonably expensive, the obligor may definitely refuse to perform. The aggrieved party is then left with damages. From a common law point of view, this means that the obligor regains the freedom to choose between performance and

---

171 MALAURIE / AYNÈS / STOFFEL-MUNCK (n. 11), N° 3, 1129 ff.
damages when an exception to the right to performance is met, for instance, when performance is unreasonably expensive or when a reasonable substitute is available. Therefore, the above question receives a balanced answer. If the UNIDROIT Principles do not encourage breach, they allow a cost-benefit calculation to a certain extent.

3.4 Judicial penalty

This mechanism has given raise to criticism, even among French scholars, but so strong was the belief in its efficiency that it has existed for more than a century before receiving a statutory basis in 1972, modified in 1991, and is firmly settled today. The Unidroit penalty rule has been little commented upon. One critic finds dubious the justification of a payment to the aggrieved party and not the state, and the fact that judicial penalty can be provided for performance of all kind of obligations and the absence of criteria for calculation of the penalty.

In support of the judicial penalties provided for by the UNIDROIT Principles, it should be pointed out beforehand that a fair balance between the interests of the parties has been reached by the provisions on performance. The penalty is subject to the strict exceptions listed in Article 7.2.2 UP. It is left to the discretion of the court and should not be imposed as a rule. Payment of the penalty does not exclude a claim for damages (Article 7.2.4(2) UP), as penalty and damages achieve different goals (deterrent effect, compensation of the damage suffered by the aggrieved party). However, courts may take the payment of the penalty into account in assessing the damages. As noted by the Comment, payment of damages will usually occur well after the payment of a judicial penalty. The latter may thus be compared to a partial payment of damages by instalments when the

---

172 MALAURIE / AYNÈS / STOFFEL-MUNCK (n. 11), N° 1132; VINEY Geneviève, Exécution de l’obligation, faculté de remplacement et réparation en nature en droit français, in M. FONTAINE / G. VINEY, LES SANCTIONS DE L’INEXECUTION DES OBLIGATIONS CONTRACTUELLES, ÉTUDES DE DROIT COMPARE, Bruxelles, Paris (L.G.D.J.) 2001, N° 22; WÉRY (n. 5), N°22-23. See also, the historical account of DAWSON (n. 1), p. 506 ff.

173 The Unilex database shows no articles (nor cases) relating to Article 7.2.4 UP. From the point of view of procedure and arbitration, see the opinion favorable to astreinte of LANDROVE / GREUTER (n. 38), who note that the ALI/UNIDROIT Principles of Transnational Civil Procedure have taken it up too (p. 550). As to substantive rules, see the positive opinion of EBERHARD (n. 118), p. 126 ff. Strongly dissenting, SCHWENZER (n. 114), p. 302 f.


175 Article 7.2.4 UP Comment 2.

176 Article 7.2.4 UP Comment 4.
penalty is imposed in form of a payment by instalments.\textsuperscript{177} Consider that the breaching party is ordered to pay a given amount per day, week, month, etc. Once performance has occurred, the damage suffered as a result of delay will have to be assessed. In the meantime, the aggrieved party is not left merely waiting for a payment of damages at some further stage. It will be the courts' duty to ensure that the combination of a judicial penalty with damages (possibly added to an agreed payment for non-performance, Article 7.4.14 UP) does not lead to a result which would be contrary to the fundamental idea of good faith and fair dealing underlying the UNIDROIT Principles.\textsuperscript{178}

Such being the general context of the judicial penalty, the above-mentioned criticisms may receive following answers. First, the justification of a payment to the aggrieved party can be found in the necessity to compensate disadvantages which are not taken into account under the ordinary rules on damages.\textsuperscript{179} The payment of the penalty combined with the claim for damages may possibly lead to a final payment higher than the amount strictly necessary to compensate the expectation damages. Such difference is already accepted as far as the payment of an agreed sum is concerned (Article 7.4.13(2) UP). If mandatory provisions of the law of the forum prohibit the payment of penalties to a party, they prevail and prevent the infringement of public policy (Article 7.2.4(2) UP).\textsuperscript{180} Second, the judicial penalty may, admittedly, be ordered for performance of all kind of obligations — which is also true of the \textit{astreinte}\textsuperscript{181} — but only if the requirements set down by Article 7.2.4 UP are met, which limits the scope of application of the judicial penalty in comparison with the \textit{astreinte}. As an indirect means of compelling performance, the judicial penalty does not have to be related to the type of obligation to be fulfilled. Third, the absence of criteria for the calculation of the amount of the penalty may indeed be regretted. However, given the diversity of the situations in which a judicial penalty might be ordered, the abstract determination of criteria for the fixing of the amount of the penalty would seem a hazardous enterprise. Even the mere fixing of a maximum amount seems pointless, as a specific number may be either too high or too low in view of a given situation.\textsuperscript{182}

\textsuperscript{177} Article 7.2.4 UP Comment 5.
\textsuperscript{178} See Comments to Article 1.7 UP.
\textsuperscript{179} Article 7.2.4 UP Comment 4, and Article 7.4.1 ff UP.
\textsuperscript{180} Article 7.2.4 UP Comment 3.
\textsuperscript{181} However, under French law, \textit{astreinte} cannot be imposed in case of non-performance of a personal obligation, MALAURIE / AYNÈS / STOFFEL-MUNCK (n. 11), N° 1134.
\textsuperscript{182} See the maxima set down by the German ZPO (above, n. 23-24).
3.4.1 Examples

Of the facts in the Swiss case, we only know a minimum: the subject matter of the licence contract was the use of a trademark for golf shoes, clothes and other items. The contract was concluded for a ten-year term and terminated with immediate effect by the licensor after a little less than eight years for a cause unknown. Besides arbitration on the validity of the anticipated termination, the licensee requested a provisional order for performance in front of a State court. Two of the exceptions to performance would have to be examined in the present case (letters b and d). First, the granting of the right to use a trademark might become too burdensome for the licensor if the relation of trust between the parties had disappeared. Second, whereas neither performance by the licensor, nor by the licensee probably requires "individual skills," performance of both may involve "a confidential and personal relationship" which would be reason enough for refusing an order for performance. An important feature of the case is the provisional character of the order sought. The particular difficulty lies in the fact that if performance is refused, the harm will have been done without, perhaps, any possibility of reversing it by a later judgement granting performance.

In trying to apply the UNIDROIT rules on performance to the facts in Argyll, one must distinguish the situation before the closure of the supermarket and the situation after the closure decided upon by the management in the course of a business review of the chain of supermarkets. The supermarket had made a loss of about £70,000 the previous year; after the closure, a resumption of business was estimated to cost over £1 million. As to the situation before the closing, it appears that the carrying on of the business, given the loss of the previous year, was clearly not impossible in fact (letter a), but that it might be unreasonably burdensome or expensive for the supermarket to remain open in spite of the one time loss of £70,000 (letter b). On the basis of this single figure, without any notion about the gross and net turnover, about the general course of business or about the other

183 Above, n. 49.
184 Article 7.2.2 UP Comment 3d.
185 Another difficulty under Swiss law concerns the validity of an anticipated termination: see VULLIÉTY Jean-Paul, Résiliation extraordinaire injustifiée d'une concession de vente en droit Suisse: poursuite ou fin du contrat?, SJ 2003 II 91-113 (termination is void if unjustified; performance of a distribution agreement can be claimed; see the different opinion of MARCHAND, at n. 51).
186 Above, at and after n. 72.
party's loss,\footnote{One may wonder why no figures concerning the owner of the shopping centre's loss are mentioned in the decision.} no conclusion can be drawn as to the economic unreasonableness of keeping the supermarket open, if not for the whole remaining period, at least for a given time. The second question which has to be asked if an initial order to carry on business had been decreed is whether enforcement would be unreasonably burdensome for the court. As already noted, the court's worries about the company's lack of good will in complying with the order may well be exaggerated, particularly if the order is limited in time. This might have been a good case for a judicial penalty providing a strong incentive for the company to run the business as efficiently as reasonably possible. Turning now to the situation after the closing, the cost of refitting and reopening the supermarket was estimated at over £1 million. Even without any other figures, such a cost may indeed seem unreasonable. Argyll might then argue that the limit set by Article 7.2.2(c) UP was exceeded. The result would be the same as the one reached by the House of Lords. To sum up, an order to carry on business for a given period might be decreed before closure,\footnote{Lord Hoffmann seems to have contemplated the possibility for the shopping centre's owner of having obtained an injunction before the closure of the supermarket: [1997] C.L.C. 1114, 1123.} but not afterwards, which raises one further question.

What about the wilful character of Argyll's breach? Under German law, the court would certainly take this element into account according to § 275(1)1 BGB,\footnote{Above, n. 20.} when examining if performance required expenditure which was manifestly disproportionate to the aggrieved party's interest, since Argyll was "responsible" for the increased cost of performance (cost for re-opening of the supermarket). This might lead to a refusal to take the increase in the cost of performance into consideration. As to Article 7.2.2(c) UP, it contemplates exceptional cases, particularly when there has been a drastic change of circumstances and performance, though still possible, has become "so onerous that it would run counter to the general principle of good faith and fair dealing (Article 1.7) to require it."\footnote{Article 7.7.2 UP Comment 3b.} The test applies to the landlord's claim for performance by Argyll in view of the supermarket incurring losses. In this respect, the question is whether the wilful character of Argyll's breach is a circumstance which has to be considered. A typical example of behaviour contrary to the principle of good faith and fair dealing is when a party exercises a right merely to damage the other party or when the exercise of a
right is disproportionate to the originally intended result.\textsuperscript{191} The standards to be applied should not be domestic standards unless they are generally accepted among the various legal systems.\textsuperscript{192} As to the first aspect, the reason for Argyll closing the unprofitable supermarket was a corporate decision taken in the context of the fierce competition in the supermarket business.\textsuperscript{193} There was no intention to damage the owner of the shopping centre. Moreover the decision to close the supermarket in view of the economic difficulties might hardly be disproportionate to the originally intended result, which was to have the shop trading on the premises until the term of the lease; a supermarket on the road to bankruptcy would not have served the originally intended result of the lease contract.\textsuperscript{194} As to the second aspect, according to Lord Hoffmann,\textsuperscript{195} landlord and tenant were both aware that the remedy for breach was likely to be limited to an award of damages, which is not a common international standard in view of the civil law preference for performance over damages. Given the discrepancy between civil and common law in this respect, no general standard as to performing rather than breaching and paying damages can be established. Argyll’s behaviour should therefore not be considered as contrary to good faith and fair dealing in international trade. It follows that the “wilful” character of the breach should not be taken in consideration when examining whether re-opening the supermarket would be unreasonably burdensome. In conclusion, it appears that the application of the UNIDROIT Principles to the facts of the case would not lead to another result than in the decision of the English House of Lords.

\textit{City Stores}\textsuperscript{196} raises several difficulties as to the future tenant’s claim for performance of the option to lease a building to be constructed in the shopping centre. Under the UNIDROIT Principles, the existence of a binding option would be admitted because there was a sufficient agreement between the parties (Article 2.1.1 UP), an agreement whose terms could be appropriately completed by the court in reference to the terms of the contracts with the other major tenants (Article 4.8 UP).\textsuperscript{197} Enforcement of an order for performance did not put an excessive burden on the court since it could appoint a special

\begin{itemize}
\item[191] Article 1.7 UP Comment 2.
\item[192] Article 1.7 UP Comment 3.
\item[193] [1997] C.L.C. 1114, 1116.
\item[194] This reasoning assumes that the supermarket chain’s economic difficulties are not overstated. As the case mentions no figures, this assumption cannot be verified.
\item[195] [1997] C.L.C. 1114, 1122-1123.
\item[196] Above, n. 89.
\item[197] Argument examined by the District Court at 266 F. Supp. 766, 778 (D.D.C. 1967).
\end{itemize}
master; here again the court could impose a judicial penalty on the landlord (Article 7.2.4 UP). The landlord’s mere contention that it “could make more money by dealing” with another party would not amount to performance becoming too burdensome as long as the limit of what is reasonable has not been exceeded (Article 7.2.2(b) UP). Finally, the future tenant was not in a position to obtain the construction of the building from a third party as a substitute transaction since the building was to be built on land controlled by the landlord (Article 7.2.2(c) UP). None of the exceptions provided for in Article 7.2.2 UP being met, the future tenant would have a right to performance according to the UNIDROIT Principles. The result would again be the same as in the decision of the American courts.

These examples provide illustration of the application of the UNIDROIT Principles to several critical issues like the cost of performance and the availability of a substitute, which in both cases must remain within reasonable limits, the absence of significance of a wilful breach and, finally, the importance (and probably frequency) of provisional remedies for performance decreed before it is too late to prevent a future breach.

4. CONCLUSION

In the light of the general observation that parties’ preference most frequently goes towards the remedy of damages, Holmes’s words appear less shocking, although many lawyers, from a civil law or common law background, would hardly be ready to consider the sign “Parking prohibited. Penalty $10” as equivalent to the sign “Parking allowed. Price $10.”

The UNIDROIT rules on performance as a remedy offer a key to the understanding of the fundamental divergence between civil law and common law systems. They shed a light on each system’s inadequacies. Obsessed by performance as the natural remedy for breach, civil law systems tend to forget the necessary restrictions to the remedy. Conversely, haunted by specific performance as an

---

198 Id. at 774-778.
199 Id. at 779.
200 Argument examined by the Court of Appeals at 394 F.2d 950, 956.
201 Quoted above, n. 2.
203 On a scale ranking the legal systems from the less aware of the necessity to word exceptions to performance as a remedy to those who have rationalised these exceptions, one would place the French (n. 26, 28), Swiss (n. 34-35) and Québec (n. 15) Civil Codes at
equitable remedy only, common law systems lack categorization of the exceptions.

The UNIDROIT provisions on the right to performance — first among the three remedies for non-performance\textsuperscript{204} — achieve an interesting balance between over-reliance on the side of the aggrieved party and the other party’s interest not to be compelled to perform at an unreasonable cost. The resulting set of rules takes its inspiration from both common law and civil law systems. Hence, the Principles are a perfect tool of supplementing insufficient domestic law rules on performance as a remedy.\textsuperscript{205} As such, they offer useful guidance to a court faced with the difficult question whether or not to order performance in view of the possibly incomplete applicable rules.

Although the concrete results of the divergent rules might not be so opposite, one great difference remains between the legal systems. In civil law systems — the UNIDROIT Principles and the European Principles are to be counted on that side — the burden lies on the breaching party. Since the aggrieved party enjoys a right to performance, it can simply rely on the (valid) contract. The breaching party then has to convince the court that performance is not the proper remedy. In common law systems, the entire burden lies on the aggrieved party which has to establish the existence and non-performance of the contract, as well as the fulfilment of an exception to the damages rule.

\textsuperscript{204} The three remedies are performance (Article 7.2.1-7.2.5 UP), termination (Article 7.3.1-7.3.6 UP) and damages (Article 7.4.1-7.4.13 UP).

\textsuperscript{205} See Preamble, para. 6.