Chapter II

Performance of contracts

"[T]he only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised act does not come to pass"[1]

"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 [...]"[2]

Case 5: Right to receive performance of a contract or just a right to receive damages?

Case scenarios

(1) The owner of a painting by the very famous 19th-century English artist J. M. W. Turner, enters into a contract to sell the painting to an interested party. Before the execution of the contract, the seller changes his mind and decides to keep the painting for his family. He is prepared to compensate the purchaser. However, the purchaser demands performance of the contract.

(2) Two businessmen enter into a contract for the sale of 10 standard packaging machines for the price of €600,000. Subsequently, the market price of such machines increases and the seller regrets having entered into the contract. The purchaser insists on the delivery of the machines. Similar machines are readily available on the market for a higher price.

(3) A well-known German opera singer, the niece of a famous composer, is hired by Her Majesty's Theatre in London for a period of three months. The contract stipulates that she may not sing in other establishments for the duration of the contract. Nevertheless, she signs a contract with the Royal Opera House in Covent Garden for the same period for a higher salary. The directors of Her Majesty's Theatre want performance of the contract, or at the very least they want the singer to be prohibited from singing in another establishment for the duration of the contract.

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1 OLIVER WENDELL HOLMES, *The Common Law*, Boston: Little Brown, 1881, p. 301.

2 "The right to initiate legal proceedings demanding that a debtor be compelled to provide the service due is seen by the Swiss legal order as an inherent component of all individual private rights [...]". LUC THEVENOZ AND FRANZ WERRO (eds), *Commentaire Romand: Code des obligations*, Vol. I, Basel: Helbing Lichtenhahn, 2003, Art. 97, n° 1.

Questions

(1) In each of the three case scenarios above, a contract has been concluded. One of the parties refuses to perform the agreed contract but the other party insists that the contract be performed.

How does the Vienna Sales Convention deal with such a situation?

(2) How is the question of whether there is a right to receive performance of a contract dealt with in the civil codes of *Quebec, Austria, Italy* and *The Netherlands*, and in the *Finnish* and *Danish* laws on the sale of goods according to the rules cited below?

(3) How would the three case scenarios above be treated under *German* and *French* law?

(4) What is the function of the *astreinte* in *French* law and of fines in *German* law? What are the fundamental differences between these two coercive measures?

Should any future European legislation in the field of contract law include the *astreinte* as a means of putting pressure on the debtor?

(5) What is the general rule in *English* law? Under what conditions might *specific performance* be granted?

How would the above case scenarios be treated under *English* law? How would they be treated under the *American* Uniform Commercial Code and under the Restatement Second, Contracts 2nd?

(6) In each of the different legal systems, when does a creditor have a right to receive performance of a contract? When is there no such right? How many different approaches can be identified? Present the solutions in a systematic manner.

In what circumstances would a creditor prefer to claim for performance of a contract rather than for damages?

(7) What solution is adopted by the UNIDROIT Principles, the Principles of European Contract Law, and the Draft Common Frame of Reference? The rules in the principles are inspired by the solutions found in which countries? Do the principles take the interests of the creditor sufficiently into account?

What is your opinion of Article 7.2.4 of the UNIDROIT Principles?

Table of contents

I. Vienna Sales Convention

United Nations Convention on Contracts for the International Sale of Goods (CISG)

Art. 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

[...]

Art. 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Art. 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

II. Various Legal Orders

1. Civil Code of Quebec

Art. 1590
(1) An obligation confers on the creditor the right to demand that the obligation be performed in full, properly and without delay.
(2) 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;

[...]

3. take any other measure provided by law to enforce his right to the performance of the obligation.

2. Burgerlijk Wetboek (*Dutch Civil Code*)

Art. 3:296
(1) Tenzij uit de wet, uit de aard der verplichting of uit een rechtshandeling anders volgt, wordt hij die jegens een ander verplicht is iets te geven, te doen of na te laten, daartoe door de rechter, op vordering van de gerechtigde, veroordeeld.

[...]

Art. 3:296
(1) Unless the law, the nature of the obligation or a juridical act produce a different result, 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.

[...]

3. Kauppalaki (*Finnish Law on the Sale of Goods*)[3]

§ 23
(1) Ostajalla on oikeus pysyä sopimuksessa ja vaatia sen täyttämistä. Myyjä ei kuitenkaan ole velvollinen täyttämään sopimusta, jos sille on olemassa este, jota myyjä

[3] For an overview on the Scandinavian legal orders, see ZWEIGERT AND KÖTZ, *An Introduction to Comparative Law*, 3rd edn, Oxford: Oxford University Press, 1998, pp. 276–85.

ei voi voittaa, tai jos sopimuksen täyttäminen edellyttäisi uhrauksia, jotka ovat kohtuuttomia verrattuna ostajalle siitä koituvaan etuun, että myyjä täyttää sopimuksen.
(2) Jos este tai epäsuhde lakkaa kohtuullisessa ajassa, ostaja saa kuitenkin vaatia, että myyjä täyttää sopimuksen.
(3) Ostaja menettää oikeuden vaatia sopimuksen täyttämistä, jos hän viivyttelee kohtuuttoman kauan vaatimuksen esittämisessä.

§ 23
(1) The buyer is entitled to enforce the contract and to require its performance. The seller is, nevertheless, not obliged to perform the contract if there is an impediment that he cannot overcome or if the performance would require sacrifices that are disproportionate to the buyer's interest in performance by the seller.
(2) If the impediment or disproportion ceases to exist within a reasonable time, the buyer may, nevertheless, require performance of the contract.
(3) The buyer loses his right to require performance of the contract if he defers his claim for an unreasonably long time.

4. Købeloven (*Danish Law on the Sale of Goods*)[4]

§ 21
(1) Leveres salgsgenstanden ikke i rette tid og skyldes dette ikke køberens forhold eller en hændelig begivenhed, for hvilken han bærer faren, har køberen valget mellem at forlange genstanden leveret og at hæve købet.

[...]

§ 21
(1) If the goods are not delivered by the agreed time and this is not due to circumstances attributable to the buyer or an accidental event for which the buyer bears the risk, the buyer may demand performance or declare the contract avoided.

[...]

5. Codice civile (*Italian Civil Code*)

Art. 1453. Risolubilità del contratto per inadempimento.
Nei contratti con prestazioni corrispettive, quando uno dei contraenti non adempie le sue obbligazioni, l'altro può a sua scelta chiedere l'adempimento o la risoluzione del contratto, salvo, in ogni caso, il risarcimento del danno.

[4] For a brief introduction to Danish law see ULLA ROSENKJAER, ANNE GLEERUP AND LEIF RØRBAEK, *An Introduction to Danish Law*, 2nd edn, Drammelstrupgaard, 2008; BØRGE DAHL, TORBEN MELCHIOR AND DITLEV TAMM (eds), *Danish Law in a European Perspective*, 2nd edn, Copenhagen: Thomson, 2002.

Art. 1453. Dissolution of contract for non-performance.
In contracts providing for mutual counterperformance, when one of the parties fails to perform his obligations, the other party can choose to demand either performance or dissolution of the contract, saving, in any case, compensation for damages.

6. Österreichisches Allgemeines Bürgerliches Gesetzbuch (ABGB) (*Austrian Civil Code*)

§ 918.
(1) Wenn ein entgeltlicher Vertrag von einem Teil entweder nicht zur gehörigen Zeit, am gehörigen Ort oder auf die bedungene Weise erfüllt wird, kann der andere entweder Erfüllung und Schadenersatz wegen der Verspätung begehren oder unter Festsetzung einer angemessenen Frist zur Nachholung den Rücktritt vom Vertrag erklären.

[...]

§ 918.
(1) When one party to a nongratuitous contract does not perform it at the time, the place or in the way agreed, the other party can either require performance as well as damages for delay or after having fixed an appropriate time period for performance, terminate the contract.

§ 919
Ist die Erfüllung zu einer festbestimmten Zeit oder binnen einer festbestimmten Frist bei sonstigem Rücktritt bedungen, so muss der Rücktrittberechtigte, wenn er auf der Erfüllung bestehen will, das nach Ablauf der Zeit dem anderen ohne Verzug anzeigen;
[...]

§ 919
If performance is to be completed within a fixed time period or by a specified date or else risk termination, the party who has the right to terminate the contract must, if they still insist on requiring performance, make this known to the other party without delay after the expiration of the time period or passing of the deadline.

III. Germany

1. Bürgerliches Gesetzbuch, BGB (*German Civil Code*)

§ 241. Pflichten aus dem Schuldverhältnis
(1) Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kann auch in einem Unterlassen bestehen.

[...]

§ 241. Duties arising from an obligation
(1) By virtue of an obligation a creditor is entitled to claim performance from the debtor. The performance may also consist in forbearance.

[...]

§ 433. Vertragstypische Pflichten beim Kaufvertrag.
(1) Durch den Kaufvertrag wird der Verkäufer einer Sache verpflichtet, dem Käufer die Sache zu übergeben und das Eigentum an der Sache zu verschaffen. Der Verkäufer hat dem Käufer die Sache frei von Sach- und Rechtsmängeln zu verschaffen.
(2) Der Käufer ist verpflichtet, dem Verkäufer den vereinbarten Kaufpreis zu zahlen und die gekaufte Sache abzunehmen.

§ 433. Typical duties in a contract of sale.
(1) By a contract of sale, the seller of a thing is bound to deliver the thing to the buyer and to transfer ownership of the thing to the buyer. The seller must procure the thing for the buyer free from material and legal defects.
(2) The buyer is bound to pay the seller the agreed purchase price and to take delivery of the thing.

§ 611. Vertragstypische Pflichten beim Dienstvertrag.
(1) Durch den Dienstvertrag wird derjenige, welcher Dienste zusagt, zur Leistung der versprochenen Dienste, der andere Teil zur Gewährung der vereinbarten Vergütung verpflichtet.
(2) Gegenstand des Dienstvertrages können Dienste jeder Art sein.

§ 611. Typical contractual duties in a service contract
(1) By means of a service contract, a person who promises to perform a service is bound to perform the services promised, and the other party is bound to pay the agreed remuneration.
(2) Services of any type may be the subject matter of service contracts.

2. Zivilprozessordnung, ZPO
(*German Code of Civil Procedure*)

Zwangsvollstreckung zur Erwirkung der Herausgabe von Sachen
und zur Erwirkung von Handlungen und Unterlassungen

Execution of judgments to obtain the return of goods and the performance of an obligation to do something or refrain from doing something

§ 883. Herausgabe bestimmter beweglicher Sachen.
(1) Hat der Schuldner eine bewegliche Sache oder eine Menge bestimmter beweglicher Sachen herauszugeben, so sind sie von dem Gerichtsvollzieher ihm wegzunehmen und dem Gläubiger zu übergeben.
[...]

§ 883. Return of specific personal property
(1) If a debtor is obliged to deliver a specific item of personal property (chattel) or a specified number of items of personal property (chattels), these items must be taken from him by the bailiff and returned to the creditor.

§ 884. Leistung einer bestimmten Menge vertretbarer Sachen.
Hat der Schuldner eine bestimmte Menge vertretbarer Sachen oder Wertpapiere zu leisten, so gilt die Vorschrift des § 883 Abs. 1 entsprechend.

§ 884. Delivery of a specified quantity of identified goods.
If the debtor must provide a specified quantity of identified goods or documents, § 883(1) is applicable.

§ 887. Vertretbare Handlungen.
(1) Erfüllt der Schuldner die Verpflichtung nicht, eine Handlung vorzunehmen, deren Vornahme durch einen Dritten erfolgen kann, so ist der Gläubiger von dem Prozessgericht des ersten Rechtszuges auf Antrag zu ermächtigen, auf Kosten des Schuldners die Handlung vornehmen zu lassen.
(2) Der Gläubiger kann zugleich beantragen, den Schuldner zur Vorauszahlung der Kosten zu verurteilen, die durch die Vornahme der Handlung entstehen werden, unbeschadet des Rechts auf eine Nachforderung, wenn die Vornahme der Handlung einen größeren Kostenaufwand verursacht.
(3) Auf die Zwangsvollstreckung zur Erwirkung der Herausgabe oder Leistung von Sachen sind die vorstehenden Vorschriften nicht anzuwenden.

§ 887. Obligation to do something that may be done by a third party.
(1) If the debtor does not fulfil an obligation to do something that could be performed by a third party, the creditor can, on the authority of the court of first instance, granted at his request, have the obligation performed at the expense of the debtor.
(2) At the same time, the creditor can request that the debtor be ordered to pay the expected cost of the performance of the obligation, which does not affect his right to claim extra payment if the performance of the obligation costs more.

(3) These paragraphs are not applicable to the execution of judgments on claims for the return or the delivery of property.

§ 888. Nicht vertretbare Handlungen.
(1) Kann eine Handlung durch einen Dritten nicht vorgenommen werden, so ist, wenn sie ausschließlich von dem Willen des Schuldners abhängt, auf Antrag von dem Prozessgericht des ersten Rechtszuges zu erkennen, dass der Schuldner zur Vornahme der Handlung durch Zwangsgeld und für den Fall, dass dieses nicht beigetrieben werden kann, durch Zwangshaft oder durch Zwangshaft anzuhalten sei. Das einzelne Zwangsgeld darf den Betrag von fünfundzwanzigtausend Euro nicht übersteigen. [...]
(2) Eine Androhung der Zwangsmittel findet nicht statt.
(3) Diese Vorschriften kommen im Falle der Verurteilung zur Eingehung einer Ehe, im Falle der Verurteilung zur Herstellung des ehelichen Lebens und im Falle der Verurteilung zur Leistung von Diensten aus einem Dienstvertrag nicht zur Anwendung.

§ 888. Acts which cannot be performed by a third party.
(1) If an act cannot be performed by a third party, that is to say that it depends exclusively on the will of the debtor, the debtor may be ordered, on the basis of a request to the court of first instance, to perform the act or pay a fine and, where the fine cannot be recovered, face imprisonment or simply face imprisonment alone. Each fine must not exceed an amount of €25.000. [...]
(2) The debtor need not be forewarned of the sanctions.
(3) These paragraphs are not applicable to judgments relating to marriage, judgments relating to the restitution of conjugal rights and judgments for the performance of services under an employment contract.

§ 890. Erzwingung von Unterlassungen und Duldungen.
(1) Handelt der Schuldner der Verpflichtung zuwider, eine Handlung zu unterlassen oder die Vornahme einer Handlung zu dulden, so ist er wegen einer jeden Zuwiderhandlung auf Antrag des Gläubigers von dem Prozessgericht des ersten Rechtszuges zu einem Ordnungsgeld und für den Fall, dass dieses nicht beigetrieben werden kann, zur Ordnungshaft oder Ordnungshaft bis zu sechs Monaten zu verurteilen. Das einzelne Ordnungsgeld darf den Betrag von zweihundertfünfzigtausend Euro, die Ordnungshaft insgesamt zwei Jahre nicht übersteigen.
(2) Der Verurteilung muss eine entsprechende Androhung vorausgehen, die, wenn sie in dem die Verpflichtung aussprechenden Urteil nicht enthalten ist, auf Antrag von dem Prozessgericht des ersten Rechtszuges erlassen wird.
(3) Auch kann der Schuldner auf Antrag des Gläubigers zur Bestellung einer Sicherheit für den durch fernere Zuwiderhandlungen entstehenden Schaden auf bestimmte Zeit verurteilt werden.

§ 890. Performance of obligations to refrain from doing something or to tolerate something.
(1) If the debtor contravenes his obligation to refrain from doing something or to tolerate an act, the court of first instance may, on the application of the creditor, impose a fine and if this cannot be recovered, impose a prison sentence, or just impose a prison sentence of up to six months. Each fine must not exceed the amount of €250.000, the prison sentences may not exceed 2 years in total.

(2) The sentence must be preceded by a forewarning that, if not contained in the pronounced judgment, is given by the trial judge at first instance upon request.
(3) The debtor may also, upon the request of the creditor, be ordered to provide security for a certain period of time, for damage caused by future violations.

3. KONRAD ZWEIGERT AND HEIN KÖTZ, *An Introduction to Comparative Law*, 3rd edn (transl. TONY WEIR), pp. 470–74

VIII. The Performance of Contracts

35

Claims to Performance and Their Enforcement

I

A PERSON who enters a contract expects the other party to do as he promised. He may be disappointed. The *goods* may not be delivered, the purchased premises may not be vacated, the tenant may stay on after the end of the lease, the singer may not give the covenanted recital, or the ex-employee may set himself up in competition contrary to his promise. The question then arises what forms of relief the legal system will offer the innocent contractor who has been deceived in his expectation that the contract will be performed. One point is agreed in all modern legal systems: the creditor must not simply proceed to help himself and snatch the goods from the vendor, thrust the tenant into the street, or use similar private and forcible methods to compel the other contracting party to perform his promise. The innocent party must go to court and establish the claims which accrue to him on non-performance of the contract before he takes any further steps against the debtor, and those steps too must proceed under the supervision of the state.

The contractor who has suffered a loss because he has not got what he was promised may be content with monetary compensation. This will normally be the case if something as good as what was promised can he procured elsewhere, even at a higher price, for the innocent party will be content to sue the defaulter for damages for the extra he has to pay. But what is to be done when it is difficult or even impossible to calculate the harm, or when no calculation one can do will reflect any special interest the creditor may have in having the contract performed? If a man buys a picture which has a 'sentimental value' for him, inestimable in money, perhaps because it is a portrait of a noted ancestor, is he only to claim damages if the picture is not delivered or can he ask a court to order the auctioneer to deliver the picture to him? Under what circumstances – and this is our first question – may a court, at the instance of the plaintiff, order the defendant to perform his contract *in natura*, that is, order the auctioneer to deliver the picture, the tenant to vacate the dwelling, the singer to give the concert as promised, and the employee to cease from competition?

Even if the court grants the creditor's claim for performance, he still does not have what he really wants, for many debtors do not satisfy a claim even if it has been established in court, either because they cannot do so or think they cannot, or because they do not want to. Here the state helps the creditor by set procedures for using its coercive powers to satisfy his claim against the debtor's will, unless the debtor's co-operation is required, when it will influence his will with forceful sanctions, threatened or applied.

We shall devote no further attention to the execution of money claims such as judgments for the price of goods. This is done in all countries by having state execution officials seize and sell the property of the debtor and then hand the proceeds of the sale to the creditor.

Two questions therefore remain for discussion. Under what circumstances may a contractor ask a court to issue judgment ordering the other party to perform the contract? How is such a judgment, not being simply a money judgment, actually executed?

II

In *German* law and in related systems it is axiomatic that a creditor has the right to bring a claim for performance of a contract and to obtain a judgment ordering the debtor to fulfill it. For this purpose it is immaterial whether the debtor's obligation is to deliver goods pursuant to a sale, to vacate a dwelling house, or to produce a work of art. The view that it is of the very essence of an obligation that it be actionable in this sense is so fundamental that it is not expressly stated in any legislative text, but the words of §241 of the Civil Code, that the creditor is entitled, on the grounds of the creditor–debtor relationship, to demand performance from the debtor, imply that actual performance may be demanded before a court and that a judgment ordering performance in kind may be issued by it.

However, a judgment ordering the debtor to perform is not of much use to the creditor unless the legal system provides the means to make it effective. Accordingly one must turn to the question whether and how such a judgment can be enforced. The way in which the question is dealt with in German law is quite characteristic. The Code of Civil Procedure carefully distinguishes all the various types of claim which might underlie a judgment for performance, and provides quite distinct forms of execution for each of them. Thus §883–6 of the Code deal with the execution of judgments on claims for the delivery of property. The method provided – the only method – is for the bailiff *(Gerichtsvollzieher)* to take the chattel from the debtor or to require him to leave the premises, with the help of the police, if necessary, and then to hand over the chattel or premises to the creditor. If the claim on which the creditor has obtained judgment is that the debtor should take some positive action other than handing over the property, a distinction is made, if the act in question is one which could he equally well performed by someone else, that is, it need not he performed by the debtor personally but is, as the Code of Civil Procedure puts it, *vertretbar*, then the method of execution – the only method – is for the creditor, on the authority of the court granted at his request, to have the act performed by a third party at the expense of the debtor (*Ersatzvornahme*, §887 Code of Civil Procedure).

As examples of acts which are *vertretbar*, or capable of substitute performance, one may cite manual tasks which call for no especial talent and can therefore be carried out by third parties – the execution of building operations (LG Hagen JR 1948, 314), the installation of a lift in an apartment block (KG JW 1927, 1945), the printing of a manuscript (OLG Munich MDR 1955, 682). The making of an extract from the books of a business or the production of its accounts may also be 'vertretbar' if an expert could do it after inspecting the debtor's records (OLG Hamburg MDR 1955, 43).

If the act to which the creditor lays claim is one which can be performed only by the debtor himself, it is said to be *unvertretbar*. In such a case the method of execution provided by the Code of Civil Procedure (§888) is to threaten the unwilling debtor with a fine or imprisonment.

This is possible only when the act in question 'depends exclusively on the will of the debtor', in the words of §888 Code of Civil Procedure. It is therefore not possible where, for example, the debtor's obligation is to do something which calls for special artistic or scientific talent, for the performance of such acts does not depend exclusively on the debtor's will. However good his intentions may be, a composer cannot compose his sonata nor a law professor write his commentary without the right inspiration, mood, energy, and other preconditions of great spiritual creativity (see OLG Frankfurt OLGE 29, 251). Finally the Code of Civil Procedure lists in §888 several more specific cases where these methods of penal pressure are unavailable. Thus one may not execute a judgment obtained by one spouse requiring the other to reconstitute the conditions of married life, and one may not execute a judgment which orders the defendant to perform services under a contract of employment. The employer may certainly obtain a judgment which imposes on the employee the duty to perform his obligations under the contract of service (so, in terms, RGZ 72, 393, 394), but this judgment cannot be enforced, because the employee must at all times remain free to decide how to dispose of his labour, even if this involves a breach of contract; in such a case the employer must content himself with a claim for damages.

There is a special regulation for the case where the positive act required of the debtor by the judgment is a declaration of intention or consent (Willenserklärung); the effect of §894 Code of Civil Procedure is that as soon as the judgment is final the declaration is deemed to have been made.

If, instead of requiring the debtor to take positive action, the judgment orders him to abstain from action or to permit someone else to take action, §890 Code of Civil Procedure applies: should the debtor act in breach of such a duty, the court may, on the application of the creditor, imprison him or fine him, the fine going once again to the Treasury. The debtor must have notice that such sanctions are to be invoked: this notice is normally contained in the original judgment.

IV. France

1. Code civil français (*French Civil Code*)

Art. 1142
Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur.

Art. 1142
An obligation to do something or to refrain from doing something ends in damages in the event of non-performance on the part of the debtor.[5]

Art. 1143
Néanmoins, le créancier a le droit de demander que ce qui aurait été fait par contravention à l'engagement, soit détruit; et il peut se faire autoriser à le détruire aux dépens du débiteur, sans préjudice des dommages et intérêts, s'il y a lieu.

Art. 1143
Nevertheless, a creditor is entitled to request that what has been done through breach of the undertaking be destroyed; and he may have himself authorised to destroy it at the expense of the debtor, without prejudice to damages, if there is an entitlement to them.[6]

Art. 1144
Le créancier peut aussi en cas d'inexécution, être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur. [...] Celui-ci peut être condamné à faire l'avance des sommes nécessaires à cette exécution.

Art. 1144
A creditor may also, in the event of non-performance, obtain authorisation to have the obligation performed himself, at the debtor's expense. [...] The latter may be ordered to advance the sums necessary for that performance.

Art. 1184
(1) La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement.
(2) Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts.
(3) La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances.

5 Translation by EG.
6 Translation by EG.

Art. 1184
(1) A resolutive condition is always implied in synallagmatic contracts, covering the event in which one of the two parties does not carry out his undertaking.
(2) In such a case, the contract is not automatically terminated. The party towards whom the undertaking has not been fulfilled has the choice either to compel the other party to fulfil the agreement where this is possible, or to request termination of the contract and damages.
(3) An application for termination must be made before the courts, and the defendant may be granted time according to circumstances.[7]

Art. 1610
Si le vendeur manque à faire la délivrance dans le temps convenu entre les parties, l'acquéreur pourra, à son choix, demander la résolution de la vente, ou sa mise en possession, si le retard ne vient que du fait du vendeur.

Art. 1610
If the seller fails to make delivery within the time agreed upon by the parties, the purchaser may choose to apply for avoidance of the sale, or for his being vested with possession, if the delay results only from an act of the seller.

2. Cour de cassation française, 3e ch. civ. (*French Cour de cassation*) 11 mai 2005, Belhadj c/ SA Les Bâtisseurs du Grand delta, Bull. civ. 2005 III, n° 103, p. 96 = D. 2005. IR. 1504

LA COUR [...]
Sur le moyen unique:
Vu l'article 1184 du Code civil;
Attendu que la partie envers laquelle l'engagement n'a point été exécuté peut forcer l'autre à l'exécution de la convention lorsqu'elle est possible;
Attendu, selon l'arrêt attaqué (CA Aix-en-Provence, 23 sept. 2003), que M. et Mme Tahar Belhadj ont signé avec la société Les Bâtisseurs du Grand Delta un contrat de construction de maison individuelle dont ils ont réglé la totalité du prix tout en refusant de signer le procès-verbal de réception en raison d'une non-conformité aux stipulations contractuelles relatives au niveau de la construction; qu'ils ont assigné la société de construction afin d'obtenir sa condamnation à démolir puis reconstruire la maison, ou, à défaut, sa condamnation au paiement d'une somme équivalente au coût des opérations de démolition et de reconstruction;
Attendu que pour débouter M. et Mme Tahar Belhadj de leur demande, l'arrêt retient que la non-conformité aux stipulations contractuelles ne rend pas l'immeuble impropre à sa destination et à son usage et ne porte pas sur des éléments essentiels et déterminants du contrat; Qu'en statuant ainsi, alors qu' elle avait constaté que le niveau de la construction présentait une insuffisance de 0,33 mètre par rapport aux stipulations contractuelles, la

[7] Translation by EG.

cour d'appel qui n'a pas tiré les conséquences légales de ses propres constatations, a violé le texte susvisé;
Par ces motifs:
Casse et annule [...] l'arrêt rendu le 23 septembre 2003, entre les parties, par la cour d'appel d'Aix-en-Provence [...] et [...] les renvoie devant la cour d'appel de Grenoble;

Translation

THE COURT [...]
On the only ground for appeal:
In view of Article 1184 of the Civil Code;
Whereas the party towards whom the obligation has not been performed can compel the other to perform the agreement where this is possible;
Given that, according to the contested decision (Court of Appeal, Aix-en-Provence, 23 September 2003), Mr and Mrs Tahar Belhadj signed a construction contract for a detached house with the company *Les Bâtisseurs du Grand Delta* for which they paid the whole of the price and refused to sign the acceptance report because of non-compliance with the provisions of the contact in relation to the height of the construction; that they have brought proceedings against the construction company in order to obtain an order against the company to demolish and then reconstruct the house, or, in the absence of this, an order to pay the sum equivalent to the cost of demolition and reconstruction;
Given that in order to dismiss Mr and Mrs Tahar Belhadj's claim, the decision holds that the non-compliance with the provisions of the contract does not render the building unfit for purpose and use and does not affect the essential and decisive elements of the contract; that by ruling in this way, when it had established that the height of the construction fell short of the height in the contractual provisions by 0.33 metres, the court of appeal did not draw the legal consequences from its own observations, infringed the aforementioned text;
For these reasons:

Quashes [...] the decision given on 23 September 2003, between the parties, by the court of appeal in Aix-en-Provence [...] and [...] sends the parties before the court of appeal in Grenoble;

Case note, Sabine Bernheim-Desvaux, Sanction du défaut de conformité aux stipulations contractuelles de construction [*Remedy for lack of conformity with the contractual provisions on construction*] JCP 2005. II. 10152 (Translation from the French original)

[...]

Right to performance strictly in conformity with the contract

By virtue of Article 1184 of the Civil Code, the creditor [the person to whom the obligation is owed] can compel the other party to perform the agreement where this is possible. This

right to performance in conformity with the contract, although in contrast with Article 1142 of the Civil Code, is the result of the combined efforts of academic writing and case law. In fact, the largely majority academic opinion [...] considers that compulsory performance is part of the essence of the obligation as only this remedy is capable of ensuring that the rights of the parties as well as the law are entirely respected. This ideal remedy is legitimately founded in the binding force of contracts and in the respect of someone's word. Demolombe wrote, on this matter in *Traité des contrats* (*vol. 24, 2e éd., 1870, n° 488*): "the fundamental principle of our matter is that agreements lawfully entered into take the place of law for those who have made them (*Civil Code, Art. 1134*); and as a result, it is the creditor's right to request, from the debtor [the person who owes performance of the obligation], effective performance of the same obligation as contracted for". This academic opinion has strongly influenced substantive law [...] and the courts order performance of a contract unless physically or morally impossible because it infringes one of the debtor's essential freedoms (*Cass. 1re civ., 20 janv. 1953: JCP G 1953, II, 7677*). Compulsory performance is mandatory for the court as it is bound by the contract which is the law between the parties. It is irrelevant whether the creditor has suffered harm [...] Equally, it does not matter that performance of the obligation be financially or socially disastrous and that the debtor loses everything [...]

The binding nature of this measure thus encourages virtuous behaviour and reinforces legal certainty, while at the same time avoiding judicial activism often considered to be suspicious. And yet ...

Appropriateness of judicial discretion to grant remedies

When compulsory performance is possible, the question of its economic efficiency is raised in practice before for the courts [...] Particularly in the field of construction, it would be beneficial to give the courts the discretionary power to grant remedies, mainly in order for them to calculate the proportionality of the cost of repairs (or of the demolition and reconstruction) compared to the creditor's interest. [...] Even though this [proposal] was favourably received by the Cour de cassation until the 1960s [...] the tendency has completely reversed today [...]

3. Cour de cassation (civ. 1re) 20.10.1959 (*Soc. X... c. P...*), D. 1959, 537, with case note by G. Holleaux

COUR DE CASSATION
(CH. CIV., 1re SECT. CIV.)
20 octobre 1959

ASTREINTE, ASTREINTE PROVISOIRE, NATURE JURIDIQUE, DOMMAGES-INTÉRÊTS, DISTINCTION, LIQUIDATION, GRAVITÉ DE LA FAUTE, FACULTÉS DU DEBITEUR.

Est légalement justifié l'arrêt décidant que l'astreinte provisoire, mesure de contrainte entièrement distincte des dommages-intérêts, et qui n'est en définitive qu'un moyen de vaincre la résistance opposée à l'exécution d'une condamnation, n'a pas pour objet de compenser le dommage né du retard et est normalement liquidée en fonction de la gravité de la faute du débiteur récalcitrant et de ses facultés [...]

(Soc. X... C. P...) – ARRET

LA COUR; – Sur le moyen unique, en ses deux branches: – Attendu qu'il est reproché à l'arrêt attaqué (Riom, 10 déc. 1956, D. 1956. 101) d'avoir, lors de la liquidation d'une astreinte précédemment ordonnée pour assurer l'exécution d'une obligation de faire, pris en considération la résistance fautive du débiteur, sans s'attacher à mesurer l'importance du préjudice causé au créancier par le retard de l'exécution, alors que selon le pourvoi, le juge qui liquide une astreinte est tenu de ne pas dépasser le montant du dommage dont la constatation est indispensable pour justifier la condamnation; – Mais attendu qu'en décidant que l'astreinte provisoire, mesure de contrainte entièrement distincte des dommages-intérêts, et qui n'est en définitive qu'un moyen de vaincre la résistance opposée à l'exécution d'une condamnation, n'a pas pour objet de compenser le dommage né du retard et est normalement liquidée en fonction de la gravité de la faute du débiteur récalcitrant et de ses facultés, la cour d'appel, dont l'arrêt est motivé, a légalement justifié sa décision;

Par ces motifs, rejette.

Du 20 oct. 1959. – Ch. civ., 1re sect. civ. – MM. Battestini, 1er pr. – Holleaux, rap. – Jodelet, av. gén. – Goutet et Cail, av.

Translation

A judgment is legally justified in deciding that a provisional astreinte, *which is a measure of compulsion completely distinct from damages, and which is after all only a means of overcoming resistance to performance of a judicial order, does not have the object of compensating for harm resulting from delay and is normally fixed in terms of the seriousness of the debtor's fault and the extent of his means.* [...][8]

(Soc. X... *v.* P...) – DECISION

THE COURT; – On the sole grounds for appeal, taken in its two parts: – Given that the decision under attack (Riom, 10 December 1956, D. 1956, 101) is criticised for fixing the amount payable under an *astreinte* previously granted in order to enforce the execution of an obligation to perform a service in relation to the debtor's culpable recalcitrance rather than the harm caused to the creditor by the delay in performance, whereas, according to the applicant, in fixing the amount of an *astreinte* the judge must determine the amount of harm caused and may not order the payment of any higher sum; – But given that in deciding that the provisional *astreinte*, a remedy quite distinct from that of damages and really only a means of overcoming a refusal to obey a judicial order, is not designed to compensate for damage caused by the delay but is normally fixed in relation to the seriousness of the debtor's fault and the extent of his means, the decision of the Court of Appeal is properly reasoned and justified.

For these reasons dismisses the application for review.[9]

8 Translated by TONY WEIR, http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1194.

9 Translated by TONY WEIR, http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1194.

Case Note[10]

(1) The circumstances of the instant case make clear the pressing importance of the legal question submitted to the *Cour de cassation*: the legal nature of the *astreinte*.

A manufacturing company is ordered to change a piece of work done in violation of the rights of an individual. With a view to ensuring the execution of the decision, the court of appeal accompanied the order with an *astreinte*, calculated for every day of the delay. Nevertheless, the company did not execute the decision. The final amount of the *astreinte* was fixed by the judge and a new *astreinte* was ordered. The company continued to refuse to execute the decision. Once again the final amount of the *astreinte* was fixed by the judge, followed by the ordering of a new *astreinte*. In vain. Finally, by a new decision (the fourth), a new *astreinte*, this time for 10.000 Francs per day, was ordered for a three month period. Performance still not having been made, the beneficiaries requested payment of the *astreinte* in its full amount (900 000 Francs) and the fixing of a new more severe *astreinte*.

It was only then that the company, which up to that point seemed indifferent to the moderate payments to cover the previous, modest *astreintes*, finally became concerned. The company argued that the *astreinte* is nothing but damages and that its payment should therefore equal the damage actually suffered due to non-performance or delay in the performance of the order. And the company requested a provisional court order for an expert report to evaluate the damage.

On that note, the court of appeal clearly committed itself on the nature of the *astreinte* (Riom, 10 December 1956, D. 1956. 101; S. 1957. 112) which it considers to be a *measure of compulsion* completely unrelated to the concept of damages. And in the light of the company's stubbornness not to carry out a decision of the courts, the court of appeal complied with a request for payment of the *astreinte* in full, without making any reference to the damage.

The issue to be decided in the above case was extremely serious. The fate of the entire institution of *astreintes* was dependent upon it. After all is said and done, if the *astreinte* were to be considered only as just damages for delay in fulfilling a legal obligation, the courts would, in matters relating to decisions, the object of which is an obligation to do or to refrain from doing something, more often than not, be completely unequipped to deal with a recalcitrant litigant. Only the possibility and the threat of financial penalties of an increasing amount which can rise to a high amount, is capable of making a litigant of bad faith rethink his position.

I. – The *astreinte*, – of which one must bear in mind the specific character and field of application, which is to be a technique for assuring execution of a judicial decision and only a judicial decision –, is an institution that was created – invented, so to speak – for that purpose, by the practice of the courts at the beginning of the 19th century.

Without going further back, we find an already fully formed *astreinte* in a remarkable judgment of the *chambre civile* from 29 January 1834 (S. 34 1. 129). This judgment is of capital importance. The judgment was about an order to give back a room of which a person had unduly taken possession. This person, says the judgment, "can be ordered,

[10] Translation of French original.

in addition to the restitution of the room, to pay damages for every day of the delay, even though no harm could result from the delay in the return of the room".

The *astreinte*, used from the beginning of the 19th century, in a way, finds its legitimacy and precise definition in this judgment. Despite maintaining the name "damages", the judgment proclaims that this is actually completely different to real damages, since it is – it says – independent of the consideration of damage, independent of the *mere existence* of damage.

The nature of the *astreinte* as an "order given as a means of coercion" was confirmed a few years later by the *chambre des requêtes* (22 November 1841, S. 42. 1. 170). It was to be present in the case-law throughout the 19th century. In addition, the use of the term "damages", which the courts found hard not to employ, introduced a certain ambiguity in the idea of the *astreinte*, which is actually more apparent than real. This was already seen in the decision of 1834, on which the academic writing, however, is very clear.

This decision from 1834 is mirrored a century later by the leading case of the *chambre des requêtes* of 7 February 1922 (*Gaz. Trib.* 1922. 1. 214) that, reaffirming the nature of the *astreinte* as purely coercive, which, the decision says, "has as its sole object to put [the debtor] under a stringent obligation" to execute the decision pronounced against him, decided that the amount of the *astreinte* can accrue concurrently with damages for delay in fulfilling a legal obligation proper.

II. – This necessitates clarification of the distinction between the two categories of *astreinte*. They are: 1°*definitive astreintes* that orders – at the rate of every day of the delay in the execution of the decision, or at the rate of every breach of a decision ordered either for the accomplishment of an act or more frequently for an abstention –, payment of an amount of money already fixed as definitive by the judge and 2° *provisional astreintes* that entail at the end of the time period for which they are ordered, the revision of the amount of the *astreinte*, [...][its final amount being fixed by the judge].

[...]

IV. – According to modern academic writing, the idea of the *astreinte* as a private punishment is generally recognised. Some authors recognise the *astreinte* with regret without necessarily denying the indisputable practical utility of an institution which they consider to be an irreplacable judicial creation [...] As for the majority of modern authors, they are totally in favour of the notion of the *astreinte* as a sanction, entirely independent from the notion of damages from which it is different because of its raison d'être and function.

[...]

V. – That is exactly what the discussion was all about. The theory behind the decision by the court in Riom – the same as is professed by the majority of the courts that rule on the facts, aware of the essential character of the institution that is the *astreinte* functioning as a sanction for a recalcitrant attitude, and not to be mixed up with damages – could not be condemned without bringing down the entire institution at the same time.

No serious legal objection to this concept can be cited. This judicial invention under pressure from practical demands has its legitimacy in more than a century of practice. In particular, the *astreinte* is not contradictory to the old rule *nemo praecise potest cogi ad*

factum[11] (used in Art. 1142 of the Civil Code) because this rule only ever banned the use of coercion on a person which is contrary to personal freedom; the use of coercive measures on property has always been admissible without restrictions.

[...] In the decision reported above – which is obviously a leading authority – the civil chamber, in rejecting the application for review of the decision of the court in Riom, shows itself to be faithful to the traditional and only reasonable view of the *astreinte* in no uncertain terms. It does not consider the *astreinte* to be a method of compensation but one of compulsion and execution. Neither is it according to the harm caused or the harm that could be caused to the beneficiary of the order by the late execution by the other party that the amount of the *astreinte* should be fixed [...] Rather it should be fixed in relation to the power of resistance of the person under the order, which, as indicated in the decision, is assessed notably – however this is just one point of view – with reference to the extent of their financial resources (see Josserand, *op. cit.*, t. 2, n° 597-3; H. et L. Mazeaud, *op. cit.*, 4e éd., t. 3, n° 2499), and in a more general way by considering how culpable his refusal – always reprehensible in itself – to obey a court order was.

G. Holleaux.

4. Loi n° 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution (*Law n° 91–650 of 9 July 1991 reforming the civil procedures for execution of judgments*), consolidated version of 22 April 2006

Art. 1er

Tout créancier peut, dans les conditions prévues par la loi, contraindre son débiteur défaillant à exécuter ses obligations à son égard.

Art. 1

Any obligee may, under the conditions laid down by legislation, compel his defaulting obligor to perform his obligations.

L'astreinte[12]

Art. 33

(1) Tout juge peut, même d'office, ordonner une astreinte pour assurer l'exécution de sa décision.

(2) Le juge de l'exécution peut assortir d'une astreinte une décision rendue par un autre juge si les circonstances en font apparaître la nécessité.

Art. 33

(1) Any judge can, even without consultation, order an astreinte *to ensure the execution of his decision.*

11 "No one can be compelled to do something."

12 Translation by EG.

(2) The judge responsible for the execution of the judgment can order an astreinte *for a decision given by a different judge if it appears necessary in the circumstances.*

Art. 34

(1) L'astreinte est indépendante des dommages-intérêts.

(2) L'astreinte est provisoire ou définitive. L'astreinte doit être considérée comme provisoire, à moins que le juge n'ait précisé son caractère définitif.

(3) Une astreinte définitive ne peut être ordonnée qu'après le prononcé d'une astreinte provisoire et pour une durée que le juge détermine. Si l'une de ces conditions n'a pas été respectée, l'astreinte est liquidée comme une astreinte provisoire.

Art. 34

(1) An astreinte *is independent of damages.*

(2) An astreinte *is either provisional or definitive. An* astreinte *is to be considered as provisional unless the judge specifies it is definitive in nature.*

(3) A definitive astreinte *can only be ordered after the pronouncement of a provisional* astreinte *and only for a period of time determined by a judge. If one of these conditions has not been respected the* astreinte *is to be considered as provisional.*

Art. 36

(1) Le montant de l'astreinte provisoire est liquidé en tenant compte du comportement de celui à qui l'injonction a été adressée et des difficultés qu'il a rencontrées pour l'exécuter.

(2) Le taux de l'astreinte définitive ne peut jamais être modifié lors de sa liquidation.

(3) L'astreinte provisoire ou définitive est supprimée en tout ou partie s'il est établi que l'inexécution ou le retard dans l'exécution de l'injonction du juge provient, en tout ou partie, d'une cause étrangère.

Art. 36

(1) The amount of a provisional astreinte *is set taking into account the behaviour of the person to whom the court order is addressed and the difficulties he encountered executing the court order.*

(2) The rate of a definitive astreinte *cannot be modified during its payment.*

(3) A provisional or definitive astreinte *is cancelled, in whole or in part, if it is established that the inexecution or the delay in the execution of the court order results from an unrelated cause.*

Art. 56

(1) L'huissier de justice chargé de l'exécution fait appréhender les meubles que le débiteur est tenu de livrer ou de restituer au créancier en vertu d'un titre exécutoire, sauf si le débiteur s'offre à en effectuer le transport à ses frais.

(2) Lorsque le meuble se trouve entre les mains d'un tiers et dans les locaux d'habitation de ce dernier, il ne peut être appréhendé que sur autorisation du juge de l'exécution.

Art. 56

(1) The bailiff responsible for the execution of the judgment will seize the property that the debtor is bound to deliver or give back to the creditor except if the debtor offers to undertake transportation at his own expense.

(2) When the property is in the possession of a third party and in the latter's home, it can only be seized with the authorisation of the judge responsible for execution of the judgment.

5. KONRAD ZWEIGERT AND HEIN KÖTZ, *An Introduction to Comparative Law*, 3rd edn (transl. TONY WEIR), pp. 475–79

III.

[...] [T]he French courts have, since the beginning of the nineteenth century, developed a special coercive technique called the 'astreinte' (for full details see REMIEN, Rechtsverwirklichung durch Zwangsgeld , p. 33 ff.). On issuing a judgment requiring a debtor to perform *in natura* a court may order that for every day he remains in default the debtor must pay a specified sum of money to the plaintiff as 'astreinte'. [...]

It must not be supposed that an astreinte is available only where the statutory methods of execution are inapplicable or impractical. An astreinte may be issued to promote the delivery of a specified motor vehicle [...] or the conveyance and delivery of landed property [...], although in such cases direct execution through the huissier is perfectly possible. [...]

Nor do the courts hesitate to impose astreintes in cases where the creditor might have used the method of 'surrogate performance' offered by art. 1144 Code civil, as where a neighbour was ordered to remove a boundary wall [...] or a vendor to dismantle faulty machinery he had delivered [...]

[...]

The *astreinte* really comes into its own when there is no statutory means for executing judgments, for example, where the debtor has been ordered to do something other than pay money or deliver things, such as issue a certificate of employment (Soc. 29 June 1966, Bull. civ. 1966, IV. 534), or move his business (Com. 6 Oct. 1966, Bull. civ. 1966, III. 424). The *astreinte* is also used where the plaintiff wants to prevent the defendant from doing something, the difference here being that the amount of the *astreinte* depends on how often the debtor contravened his duty to desist rather than on how long he remained in breach. Thus, when a soft drink manufacturer was enjoined from using bottles so like those of the plaintiff as to constitute unfair competition, the *astreinte* was in the form that the defendant should pay 10 francs 'par infraction constaté' (Com. 31 March 1965, Bull. civ. 1965 III. 219).

Superficially it might seem that the *astreinte* is like the money penalties which may be imposed *in terrorem* under §§ 888 and 890 of the German Code of Civil Procedure in judgments which order the debtor to cease and desist or to co-operate in doing the requisite act. There is an important distinction, however, since the *astreintes* go into the pocket of the creditor while the monetary penalties go to the state treasury.

This significant difference becomes comprehensible if we remember that in France it was the courts which invented the *astreinte* and had to do it extra legem, 'en marge des textes', for they realized that in view of the inadequacy of the statutory methods of execution the only way of ensuring that judgments were satisfied was by threatening defaulting debtors with monetary penalties. Even if the idea that such payments might be made to the state had occurred to the French courts, they could hardly have acted on it in the absence of any statutory basis.

[...]

Although the *astreinte* is an entrenched institution of French court practice, it has constantly been criticized in legal writings, and these criticisms gain in force as its coercive and penal character is increasingly admitted by the courts. Indeed, it is not at all clear why the creditor, in addition to receiving compensation for the harm he has suffered, should also obtain the amount of the *astreinte* which is designed to overcome the debtor's reluctance to honour the judgment, especially if the *astreinte* is fixed in relation to the culpability of the debtor's behaviour and to the extent of his financial resources. [...] The actual law provides that the *astreinte* goes in full to the creditor, and also makes clear that the purpose of the *astreinte* is to put pressure on the debtor rather than to compensate the creditor (art. 33 ff. Law no. 91-650 of 9 July 1991, from Law of 5 July 1972).

[...] The astreinte has been adopted by several other European countries, such as Greece (art. 946 f. Code of Civil Procedure), Poland (art. 1050 f. Code of Civil Procedure), and Portugal (art. 829-A Civil Code), the latter with the remarkable feature that the monetary penalty is to be split equally between the state and the creditor. The UNIDROIT Principles for International Commercial Contracts allow for the sanction of an *astreinte*, payable to the creditor, if not inconsistent with mandatory rules of the *lex fori* (art 7.2.4).

V. England

1. Peter Shears and Graham Stephenson, *James' Introduction to English Law*, 13th edn, pp. 23–28

Chapter 2

The administration of the law

[...]

1 The background

A THE COMMON LAW

Our 'common law' was originally derived from the judicial precedents of the old courts of common law and it now consists of the whole body of judicial precedents. The old common law courts consisted of the Court of Exchequer, the Court of Common Pleas (or 'Common Bench') – both dating from the twelfth century – and the Court of King's (or as appropriate Queen's) Bench were royal courts set up by the Crown and they superseded a network of local courts which had existed since Anglo-Saxon times. The law which these latter courts administered was local customary law which varied in content in different parts of the country.

Naturally, when the Royal Courts, which were centralized and assumed jurisdiction over all of the country, came into being they evolved and applied a uniform system of law, common throughout the land: hence this law came to be called *'common'* in contradistinction to the older local laws.

The term 'common law' is, however, now used in several different senses as marking special contrasts. For instance, we say that England, the United States (with the exception of Louisiana) and most of the Commonwealth countries are 'common law' countries when we wish to contrast the Anglo-American systems as a whole with those of countries like France whose law ultimately derives from the Roman law: and we call these *'civil* law' countries. The expression 'common law' can also be used to denote our own 'case' law as a whole contrasted with our statute law. And within our own system 'common law', as will appear, is also contrasted with 'equity'.

Having thus explained the primary meaning of 'common law', as that system of principles which was built up by the common law courts we must now consider the basis upon which those principles were evolved. This requires a brief description of the 'Forms of Action' or the 'Writ System' as they, or it, were called.

In these days a civil action starts with the serving of a *writ of summons*: this is a formal document and the purpose of serving it is to give notice to the *defendant* (person sued) upon whom it is served that the *plaintiff* (complainant) intends to bring proceedings against him, and to warn him to defend the action. The formulation of the grounds of the plaintiff's case comes substantially, through the pleadings, at a later stage.

Under the old law the system was different. The standard machinery for starting an action at common law in any of the three common law courts was the *original writ* ('original' because it originated, or started, the action). There was nothing mysterious about a *'writ'*: writs were simply concise written orders emanating from high authority – in the case of a royal writ from the King, through the Chancery, the secretarial department of State. The use of writs for administrative purposes goes back to Anglo-Saxon times and was probably a borrowing from Frankish court practice. It echoes the 'mandates' of ancient Rome.

The 'original writs' with which we are here concerned were documents obtained (for a fee) from the administrative offices of the Chancery. There were many variations in form according to what sort of matter was involved, but the general purpose for which most of them were designed was to secure the presence of the defendant before the royal courts, usually through the agency of the sheriff (as the principal royal official) of the county in which the dispute arose. Further, and this is a vital point, each writ contained a brief statement of the plaintiff's ground of claim. If the position had invariably been for the chancery clerks or for the judge at the trial to decide whether these facts (if proved) disclosed a cause of action against the defendant the content of the writs would have been of no *general* importance. We shall see that writs could be of such a nature and that the fact was fundamental in the development of the law, but the first thing to stress is that – as is natural in any administrative system – writs rapidly became stylised. Claims concerning certain types of misconduct came to be recognized and each type of misconduct came to have its own appropriate writ.

Bringing an action at common law thus came generally to consist in selecting the writ appropriate (as he hoped to prove in court) to the facts of a plaintiff's case. For instance, there was the ancient writ of Right by which the 'demandant' (plaintiff) claimed from the 'tenant' (defendant) that the latter 'unjustly' and without a 'claim of right' deprived him of his land. There was the ancient writ of Debt, alleging that the defendant owed (*debet*) him so much money, and the writ of Detinue stating that the defendant detained (*detinet*) from the plaintiff something which was his. Into one or other of the accepted forms, such as these, the facts of the case had to fit; if they did not fit, however just the claim, the plaintiff must fail.

But though writs thus became stereotyped there had to be a means of creating new ones, otherwise the law could not have developed. The agencies of evolution varied. Sometimes Parliament would recognise a new form of action (writ), sometimes the creation would be administrative – as by the Chancery clerks – sometimes, as in the case of the all-important writ of Trespass, we think we can trace it to an innovator – in that case said to be William Raleigh, a thirteenth-century judge, and the teacher of Bracton. However, by the fourteenth century, after much hesitation and political obstruction, a practice emerged by which the *courts* upon the *facts stated*, and upon proof by the plaintiff of actual loss inflicted on him by the defendant, allowed actions *'on the case'* to succeed: in other words the courts were authorized in such circumstances to grant *new* writs. It must not be thought that this task was lightly undertaken, for the mediaeval judges never forgot that in Francis Bacon's words, they were 'lions' *under* 'the throne' and that innovation might displease the Crown. Indeed, cautiously and lawyer-like, the development of new writs through actions on the case was, at first, at least, slow and a matter of development by strict *analogy* from pre-existing writs. Yet, in this way our common law grew. The Register of Writs expanded in the course of time; and at any given

time the Register, recording the sum total of available writs, *contained* the *common law*. Within the ambit of the writs lay people's rights: no writ, no right – unless the court *would* grant a new writ.

Thus the stream of the evolution of the common law can be traced in the proliferation of the Forms of Action (writs). This evolution is a long one, extending over more than seven hundred years [...]

The modern procedure based upon the Judicature Acts now prevails and the ancient system has gone. Legal innovation (especially legislative) during the past hundred years has been prolific, so that we have cut away from the roots created by the writs; yet the framework of our civil actions is still based upon them. And it is unwise to forget Maitland's warning that 'the Forms of Action we have buried, but they rule us from their graves'. The common law, as opposed to statute law with its fits and starts, is still an evolutionary creation from its ancient fountain-heads.

It may, perhaps, be added that the principal defect of the writ system was its formalism – a besetting sin of early law paralleled by the *legis actiones* of ancient Rome. While the Forms of Action ruled it was not only true that the plaintiff had normally to find a writ to suit his case but also that if he chose the *wrong* writ his claim must fail. There was no changing of horses in mid-stream (no 'amendment' as we now know it): one rode one's writ to judgment, and if it then turned out to be the wrong writ one could only go back and try another 'horse' – assuming that one had the time, the money and the patience. Finally, it is worth remarking that the evolution of the writ system provides a stock example of the fact that law evolves by granting remedies for grievances rather than by formulating abstract 'rights'. The 'right' acquired is the result of the remedy given. [...]

B EQUITY

Before the Royal Courts of Justice were housed at their present place (in the Strand) they used to sit in Westminster Hall. The three common law courts were on one side of the Hall and the Court of Chancery was on the other. In this court *equity* was administered, and litigants who could not obtain justice in the common law courts would cross the Hall to seek the Chancellor's aid.

The office of Chancellor (more recently 'Lord Chancellor') has an ancient history. Originally the '*cancellarius*' (from Latin '*cancellus*': a bar or lattice) was an usher who served at the bar of a Roman court. In its more illustrious form the office goes back to the court of Charlemagne and had been translated to England by the time of Edward the Confessor. In this form the Chancellor became the King's right-hand man ('Secretary of State for all Departments', as the historian, Bishop Stubbs, put it) and the most powerful official in the realm. He headed the 'Chancery', the royal secretariat, and he was responsible for the use and custody of the Great Seal of the Realm. He was, moreover, closely associated with the administration of justice, for, as has been remarked, the original writs were issued from the Chancery. Further, he was an important member of the *King's Council* whose duty it became to consider and adjudicate upon petitions addressed to the Council by subjects who sought justice from it as the body most close to the king himself. Petitions might be presented for various reasons. In particular, they were often presented by people who had, in one way or another, failed to obtain justice in the common law courts. This failure was usually due to one of three causes. First, the common law was in some ways *defective*: for example, the early common law remedies for breaches of contract were grossly inadequate. And secondly, the only *remedy* which the common law courts would usually supply was the award of damages, and damages are by no means always a satisfactory form of relief. Third, although the law was adequate to meet the case, *justice might not always be obtainable* in the common law courts because of the greatness of one of the parties, who might, in mediaeval times, often be in a position to over-awe the court itself. The Chancellor could remedy these defects; he was one of the chief royal officials, and being closely associated with the King, he was bound by neither the rules nor the procedure of the common law courts; nor was he likely to be over-awed by any man.

In hearing these petitions (or 'bills' as they came later to be called when the Chancery had become a court) the Chancellors slowly began to evolve a set of rules which remedied the defects in the common law, and to grant new remedies different from, and more effective than, the common law remedies. Thus they redressed breaches of contract, for they regarded them as morally reprehensible breaches of faith; and it must be remembered that the early Chancellors were ecclesiastics. They also decreed *specific performance* and granted *injunctions*. Moreover, in the course of time, they made use of a special writ of *subpoena*, by which they could compel the attendance of parties or witnesses under threat of fine or imprisonment, should they fail to attend.

The Chancellors, therefore, came to administer justice, but at first they had no independent court; and usually acted in consultation with the Council and even with the judges themselves. By the close of the fifteenth century the Chancellor was acting in a judicial capacity upon his own initiative; so that the history of the *Court of Chancery*, as opposed to the more ancient Chancery (*ie* secretariat of State) itself, really begins then. This court continued to exist until the Judicature Acts abolished it, retaining the memory of its name in the 'Chancery' Division of the High Court of Justice.

The new rules which were thus administered in the Court of Chancery came to be known as the rules of '*Equity*' (derived from the Latin *aequitas=levelling*). [Three] points need be noted.

First, it was only gradually that equity developed into a systematic body of rules; indeed, it was not fully developed until systematised under the chancellorship of Lord Eldon (Lord Chancellor 1801–1806; 1807–1827). The early Chancellors administered it according to discretion (Cardinal Wolsey's administration seems to have been conspicuously fair); so much so that John Selden (1548–1554: lawyer, populist and antiquarian) once remarked that early equity varied 'according to the length of the Chancellor's foot'. From the chancellorship of Sir Thomas More (1529–1532), however, it became usual to appoint *legally* trained Chancellors and this, by the nineteenth century, had led the Court of Chancery to rely upon precedent almost as much as the common law. But even today the administration of equity rests upon discretion; and specific performance of a contract, for example, will not be decreed in a case in which it would be unfair to do so.

In the second place, and conversely, before Sir Thomas More's chancellorship, the Chancellors were usually not only administrative officials but also ecclesiastics and chief of the royal chaplains: it followed that in exercising their discretion, and laying the foundation of the rules of equity, they borrowed from the canon (church) and civil (Roman) law from which the former was to a large extent derived.

In the third place, by the very nature of its origin, equity *assumes the law*: it did not come to defeat the common law but to supplement it and to '*fulfil*' it. It is not a rival, but an

ancillary system of rules: as Maitland put it, it is a 'gloss or appendix' to the law. Moreover, as another maxim of equity has it, 'Equity *follows* the law', and yet another, that it 'acts *in personam*', upon the conscience (not surprisingly in view of its ecclesiastical origin) of a defendant. These considerations lead to the result that a person who has an *equitable right* to property has something of less validity than one who acquires a *legal right* to the same property ie a right protected by the common law. [...]

2. W. T. Major and Christine Taylor, *Law of Contract*, 9th edn, pp. 288 ff

SPECIFIC PERFORMANCE

22. An equitable remedy

A decree of specific performance is issued by the court to the defendant, requiring him to carry out his undertaking exactly according to the terms of the contract. Specific performance is an equitable remedy and is available only where there is no adequate remedy at common law or under a statute. Generally, this means that specific performance is available only where the payment of a sum of money would not be an adequate remedy. Specific performance is, therefore, an appropriate remedy in cases of breach of a contract for the sale or lease of land, or of breach of contract for the sale of something which is not readily available on the market, e.g. a rare book.

23. A discretionary remedy

The granting or withholding of a decrée of specific performance is in the discretion of the court. The discretion is, however, exercised on certain well-established principles:

(a) Specific performance will never be granted where damages or a liquidated demand is appropriate and adequate.

(b) The court will take into account the conduct of the plaintiff, for he who comes to equity must come with clean hands.

(c) The action must be brought with reasonable promptness, for delay defeats the equities. Undue delay sufficient to cause the court to withhold an equitable remedy is known as laches.

(d) Specific performance will not be awarded where it would cause undue hardship on the defendant.

(e) A promise given for no consideration is not specifically enforceable, even if made under seal.

(f) Specific performance will not be awarded for breach of a contract of personal services.

(g) Specific performance will not be awarded for breach of an obligation to perform a series of acts which would need the constant supervision of the court.

Thus building contracts are specifically enforceable only in certain special circumstances.

(h) Specific performance will not be awarded for breach of a contract wanting in mutuality, i.e. a contract which is not binding on both parties. Thus where a contract is voidable at the option of one party, he will not get specific performance against the other. This rule is of particular importance in connection with minors' voidable contracts.

[...]

3. Guenter Treitel, *An Outline of the Law of Contract*, 6th edn, pp. 408–16

4 SPECIFIC ENFORCEMENT IN EQUITY

A contract is specifically enforced when the court orders the defendant actually to perform his undertaking. Such an order may be positive or negative according to the nature of the undertaking. The court may (positively) order the defendant to do something, for example to convey a house, or to deliver a picture. Such an order is known as one of specific performance. Alternatively, the court may (negatively) order the defendant to forbear from doing something which he has promised not to do, for example it may restrain him from competing with the claimant. Such an order is known as an injunction.

Disobedience of an order of specific performance or of an injunction is contempt of court, and can be punished in the last resort by imprisonment of the defendant. [...]

a Specific performance

The common law did not specifically enforce obligations except those to pay money. With this exception, there was, and is, no *right* to specific performance: the remedy is equitable and (like most such remedies) discretionary. Its scope is limited in a number of ways, of which the following are the most important.

i Damages must be 'inadequate'

Specific performance will not be ordered where the claimant can be adequately protected by an award of damages. This will generally be the case where he has bought shares or generic goods which are available in the market. On the seller's default, the buyer can go into the market, get a substitute, and recover any extra cost by way of damages. Specific performance will, on the other hand, be ordered where no satisfactory substitute can be obtained: for example where the sale is of land or of a house (however ordinary), or of 'unique' goods such as an heirloom or a great work of art. Cases which formerly took a narrow view of this category are open to the question now that the courts tend to ask, not whether damages are 'adequate', but whether specific performance is the more appropriate remedy. The category of 'unique' goods has been expanded to include such 'commercially unique' things as ships or machinery for which no satisfactory substitute is available to the claimant; and specific relief has been ordered even of a contract to supply generic goods needed by the buyer for his business and not available from another source because of temporary shortage of supply. Damages may also be regarded as the less appropriate remedy for other reasons, such as the difficulty of assessing them. [...]

ii Discretion of the court

The court has a discretion to refuse specific performance even where this remedy would be a more appropriate one than damages. This discretion (which cannot be excluded by the terms of the contract) is, however, 'to be governed as far as possible by fixed rules and principles'. In particular, there are three grounds on which the remedy may be refused.

The first is undue hardship to the defendant. On this ground specific performance may be refused where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant; or where, as a result of severe financial misfortune and incapacitating illness, specific performance would cause exceptional personal distress to the defendant. But specific performance would not be refused merely because the vendor of a house was caught on a rising market and so had difficulty in buying another house with the proceeds of sale.

Secondly, specific performance may be refused because the contract itself was grossly unfair. For this purpose it is not enough for a seller to show simply that the price was too low; but the remedy will be refused if, in addition, the buyer took unfair advantage of his superior knowledge or if he exploited his superior bargaining strength by rushing the other party into the transaction. Thus where an antique dealer bought valuable china jars from a widow for a fifth of their real value it was said that he could not specifically enforce the contract. [...]

Thirdly, specific performance may be refused if the court in some other way disapproves of the claimant's conduct: [...]

iii Personal service

The court will not specifically enforce a contract of personal service. One reason for this rule was that to order the employee to work would unduly interfere with his personal liberty; and it is now provided by statute that no court shall compel an employee to do any work by ordering specific performance of a contract of employment or by restraining the breach of such a contract by injunction. [Trade Union and Labour Relations (Consolidation) Act 1992, s. 236.] [...]

iv Other contracts

Specific performance will not be ordered of a promise without consideration, even though it is binding at law because it is made by deed. The reason for the rule is that equity will not aid a 'volunteer' (ie a person who has given no consideration). [...]

v Difficulty of supervision

Specific performance is sometimes refused on the ground that the defendant has undertaken continuous duties, the performance of which the court cannot, or is unwilling to, supervise. On this ground, specific performance has been refused of a landlord's undertaking to have a porter 'constantly in attendance'; of a contract to deliver goods by instalments; and of a contract to do building work. [...]

[...]

b Injunction

Where a contract contains a negative promise (such as a promise not to build, or not to compete), the breach of that promise may be restrained by injunction. Such an order is known as a prohibitory injunction where it directs the defendant not to break the promise

in the future; and as a mandatory injunction where it directs the defendant to undo a breach committed in the past [...]

The principles governing injunctions to some extent resemble those governing specific performance. An injunction may, for example, be refused where its grant would be oppressive to the defendant and where damages could readily be assessed and would adequately compensate the claimant. An injunction will also be refused if its practical effect would be to compel the performance of a contract which is not specifically enforceable. For example an injunction will not be granted to restrain an employee from breaking his obligation to work or (normally) to restrain an employer from dismissing the employee. This would be so even if the contract contained a provision which was negative in form, such as a promise 'not to resign' or 'not to dismiss' for a given period.

A contract which is not specifically enforceable may, however, contain a narrower negative promise. In the leading case of *Lumley* v. *Wagner* the defendant agreed to sing at the claimant's theatre twice a week for three months, and she also promised not to use her talents at any other theatre during that period. She was restrained by injunction from breaking this negative promise. In such cases the effect of the injunction may be to put some pressure on the defendant to perform the positive obligation. But that is no objection to the granting of the injunction unless the pressure is so severe as to be, for practical purposes, irresistible. In one case a film actress was restrained from breaking a promise not to act for third parties: it was said that she could still earn her living by doing other work. But in a contrasting case a pop group had appointed the claimant as their manager for five years and promised not to make recordings for anyone else. An injunction to restrain the group from breaking this promise was refused as it would 'as a practical matter' force them to continue to employ the claimant. Where an employee promises not to work *in any capacity* except for the employer, an injunction to restrain the breach of that promise will normally be refused; for were it granted the only 'choice' left to the employee would be one between remaining idle and performing his positive obligation to work. The employer can, however, obtain an injunction if he undertakes that, while the injunction is in force, he will go on paying the employee and give him the opportunity of continuing to work for the employer where this is necessary to maintain the employee's skill and reputation.

[...]

4. Lord Chancellor's Court: *Lumley* v. *Wagner* (1852) De GM&G 604, [1843–60] All ER 368

LUMLEY *v.* WAGNER

[LORD CHANCELLOR'S COURT (Lord St. Leonards, L.C.), May 22, 26, 1852]
[Reported 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687]

Injunction – Contract for personal service – Undertaking not to serve any third person – Jurisdiction to grant injunction to restrain breach of undertaking – Effect to compel specific performance of contract.

The court will grant an injunction to restrain the breach of the negative part of a contract even though it cannot specifically enforce the performance of the positive part of the contract, e.g., where the positive part is an undertaking to render personal services, and the effect of the injunction is to compel the specific performance of the contract as a whole.

By a contract in writing W. bound herself to sing for three months at the plaintiff's theatre and "not to use her talents" at any other theatre.

Held: the court had jurisdiction to grant an injunction to restrain W. from appearing at a theatre other than that of the plaintiff.

Injunction – Damages – Plaintiff's right to recover damages – Jurisdiction to grant injunction.

Per LORD ST. LEONARDS, L.C. – It is no objection to the exercise of the jurisdiction by injunction that the plaintiff may have a legal remedy [i.e., a right to recover damages].

[...]

Bill filed on April 22, 1852, by the plaintiff, Benjamin Lumley, lessee of Her Majesty's Theatre, London, praying that the defendants, Johanna Wagner, Albert Wagner, her father, and Frederick Gye, lessee of Covent Garden Theatre, might be restrained from committing any breach of an agreement dated Nov. 9, 1851.

The agreement provided:

> "The undersigned Mr. Benjamin Lumley, possessor of Her Majesty's Theatre at London, and of the Italian Opera at Paris, of the one part, and Mademoiselle Johanna Wagner, cantatrice of the court of His Majesty the King of Prussia, with the consent of her father, Mr. A. Wagner, residing at Berlin, of the other part, have concerted and concluded the following contract. – First, Mademoiselle Johanna Wagner binds herself to sing for three months at the theatre of Mr. Lumley, Her Majesty's, London, to date from April 1, 1852 (the time necessary for the journey comprised therein) and to give the parts following, 1st, Romeo, Montecchi; 2nd, Fides, Prophète; 3rd Valentine, Huguenots; 4th, Anna, Don Juan; 5th, Alice, Robert le Diable; 6th, an opera chosen by common accord. [...]
>
> (Signed) JOHANNA WAGNER,
> ALBERT WAGNER."

The bill stated, that in November, 1851, Joseph Bacher met the plaintiff in Paris, when the plaintiff objected to the agreement as not containing a usual and necessary clause

preventing the defendant Johanna Wagner from exercising her professional abilities in England without the consent of the plaintiff, whereupon Joseph Bacher, as the agent of the defendants Johanna Wagner and Albert Wagner, and being fully authorised by them for the purpose, added an article in writing which was as follows:

> "Mademoiselle Wagner engages herself not to use her talents at any other theatre, nor in any concert or re-union, public or private, without the written authorisation of Mr. Lumley.
>
> DR. JOSEPH BACHER,
> For Mademoiselle Johanna Wagner,
> and authorised by her."

The bill then stated that the defendants J. and A. Wagner subsequently made another engagement with the defendant Gye, by which it was agreed that the defendant J. Wagner should, for a larger sum than that stipulated by the agreement with the plaintiff, sing at the Royal Italian Opera, Covent Garden, and abandon the agreement with the plaintiff.

[...]

The bill prayed that the defendants Johanna Wagner and Albert Wagner might be restrained from violating or committing any breach of the last article of the agreement; that the defendant Johanna Wagner might be restrained from singing and performing or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place without the sanction or permission in writing of the plaintiff during the existence of the agreement with the plaintiff; [...] The plaintiff having obtained an injunction from PARKER, V.C., on May 9, 1852, the defendants now moved by way of appeal before the LORD CHANCELLOR to discharge his Honour's order.

Bethell, Malins, and *Martindale* for the defendants.
Bacon and *H. Clarke* for the plaintiff.

LORD ST. LEONARDS, L.C. – The question which I have to decide in the present case arises out of a very simple contract, the effect of which is, that the defendant Johanna Wagner should sing at Her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal they in effect come to this, namely, that a court of equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction, being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted.

[...]

The present is a mixed case, consisting [...] of an act to be done by Johanna Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant – the one being ancillary to, and concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is [...], in effect, one contract, and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction and according to the true spirit of the agreement, the engagement to

perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. [...] Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements, and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. [...]

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant Johanna Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and, being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. [...] The injunction may also, as I have said, tend to the fulfilment of her engagement, though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me, but, after the best consideration which I have been enabled to give to the subject, the conclusion at which I have arrived is, I conceive, supported by the greatest weight of authority. [...]

[...]

Motion refused.

5. Sale of Goods Act 1979

52. (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.

(4) The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

VI. United States of America

1. Uniform Commercial Code

§ 2-716. Buyer's Right to Specific Performance [...]

(1). Specific performance may be decreed where the goods are unique or in other proper circumstances.

[...]

2. American Law Institute, *Restatement of the Law Second, Contracts*

§ 357. Availability of Specific Performance and Injunction.

(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. Effect of Adequacy of Damages.

(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. Factors Affecting Adequacy of Damages

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.

§ 366. Effect of Difficulty in Enforcement or Supervision

A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial.

§ 367. Contracts for Personal Service or Supervision

(1) A promise to render personal service will not be specifically enforced.

(2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

VII. Principles of Contract Law

1. UNIDROIT: Principles of International Commercial Contracts

Art. 7.2.2. Performance of non-monetary obligation.
Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

(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.

OFFICIAL COMMENT

1. Right to require performance of non-monetary obligations
In accordance with the general principle of the binding character of the contract (see Art. 1.3), each party should as a rule be entitled to require performance by the other party not only of monetary, but also of non-monetary obligations, assumed by that party. While this is not controversial in civil law countries, common law systems allow enforcement of non-monetary obligations only in special circumstances.

Following the basic approach of CISG (Art. 46) this article adopts the principle of specific performance, subject to certain qualifications.

The principle is particularly important with respect to contracts other than sales contracts. Unlike the obligation to deliver something, contractual obligations to do something or to abstain from doing something can often be performed only by the other contracting party itself. In such cases the only way of obtaining performance from a party who is unwilling to perform is by enforcement.

2. Remedy not discretionary
While CISG provides that "a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by [the] Convention" (Art. 28), under the Principles specific performance is not a discretionary remedy, i.e. a court must order performance, unless one of the exceptions laid down in the present article applies.

3. Exceptions to the right to require performance

a. *Impossibility*
A performance which is impossible in law or in fact, cannot be required (sub-para. (a)). However, impossibility does not nullify a contract: other remedies may be available to the aggrieved party. See Arts. 3.3 and 7.1.7(4).

[...]

b. *Unreasonable burden*
In exceptional cases, particularly when there has been a drastic change of circumstances after the conclusion of a contract, performance, although still possible, may have become so onerous that it would run counter to the general principle of good faith and fair dealing (Art. 1.7) to require it.

Illustration

1. An oil tanker has sunk in coastal waters in a heavy storm. Although it would be possible to lift the ship from the bottom of the sea, the shipper may not require performance of the contract of carriage if this would involve the ship-owner in expense vastly exceeding the value of the oil. See Art. 7.2.2(b).

The words "where relevant, enforcement" take account of the fact that in common law systems it is the courts and not the obligees who supervise the execution of orders for specific performance. As a consequence, in certain cases, especially those involving performances extended in time, courts in those countries refuse specific performance if supervision would impose undue burdens upon courts.

As to other possible consequences arising from drastic changes of circumstances amounting to a case of hardship, see Arts. 6.2.1 et seq.[13]

c. *Replacement transaction*
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.

In view of this economic reality sub-para. (c) excludes specific performance whenever the party entitled to performance may reasonably obtain performance from another source. That party may terminate the contract and conclude a replacement transaction. See Art. 7.4.5.

The word "reasonably" indicates that the mere fact that the same performance can be obtained from another source is not in itself sufficient, since the aggrieved party could not in certain circumstances reasonably be expected to have recourse to an alternative supplier.

[13] See below, **Case 7**.

Illustration

2. A, situated in a developing country where foreign exchange is scarce, buys a machine of a standard type from B in Tokyo. In compliance with the contract, A pays the price of US $100.000 before delivery. B does not deliver. Although A could obtain the machine from another source in Japan, it would be unreasonable, in view of the scarcity and high price of foreign exchange in its home country, to require A to take this course. A is therefore entitled to require delivery of the machine from B.

d. *Performance of an exclusively personal character*

Where a performance has an exclusively personal character, enforcement would interfere with the personal freedom of the obligor. Moreover, enforcement of a performance often impairs its quality. The supervision of a very personal performance may also give rise to insuperable practical difficulties, as is shown by the experience of countries which have saddled their courts with this kind of responsibility. For all these reasons, sub-para. (d) excludes enforcement of performance of an exclusively personal character.

The precise scope of this exception depends essentially upon the meaning of the phrase "exclusively personal character". The modern tendency is to confine this concept to performances of a unique character. The exception does not apply to obligations undertaken by a company. Nor are ordinary activities of a lawyer, a surgeon or an engineer covered by the phrase for they can be performed by other persons with the same training and experience. A performance is of an exclusively personal character if it is not delegable and requires individual skills of an artistic or scientific nature or if it involves a confidential and personal relationship.

Illustrations

3. An undertaking by a firm of architects to design a row of 10 private homes can be specifically enforced as the firm can delegate the task to one of the partners or employ an outside architect to perform it.

4. By contrast, an undertaking by a world-famous architect to design a new city hall embodying the idea of a city of the 21st century cannot be enforced because it is highly unique and calls for the exercise of very special skills.

The performance of obligations to abstain from doing something does not fall under sub-para. (d).

e. *Request within reasonable time*

Performance of a contract often requires special preparation and efforts by the obligor. If the time for performance has passed but the obligee has failed to demand performance within a reasonable time, the obligor may be entitled to assume that the obligee will not insist upon performance. If the obligee were to be allowed to leave the obligor in a state of uncertainty as to whether performance will be required, the risk might arise of the obligee's speculating unfairly, to the detriment of the obligor, upon a favourable development of the market.

For these reasons sub-para. (e) excludes the right to performance if it is not required within a reasonable time after the obligee has become, or ought to have become, aware of the non-performance.

[...]

Art. 7.2.4. Judicial penalty.

(1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order.

(2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.

OFFICIAL COMMENT

1. Judicially imposed penalty

Experience in some legal systems has shown that the threat of a judicially imposed penalty for disobedience is a most effective means of ensuring compliance with judgments ordering the performance of contractual obligations. Other systems, on the contrary, do not provide for such sanctions because they are considered to constitute an inadmissible encroachment upon personal freedom.

The present article takes a middle course by providing for monetary but not for other forms of penalties, applicable to all kinds of orders for performance including those for payment of money.

2. Imposition of penalty at discretion of the court

The use of the word "may" in para. (1) of this article makes it clear that the imposition of a penalty is a matter of discretion for the court. Its exercise depends upon the kind of obligation to be performed. In the case of money judgments, a penalty should be imposed only in exceptional situations, especially where speedy payment is essential for the aggrieved party. The same is true for obligations to deliver goods. Obligations to pay money or to deliver goods can normally be easily enforced by ordinary means of execution. By contrast, in the case of obligations to do or to abstain from doing something, which moreover cannot easily be performed by a third person, enforcement by means of judicial penalties is often the most appropriate solution.

3. Beneficiary

Legal systems differ as to the question of whether judicial penalties should be paid to the aggrieved party, to the State, or to both. Some systems regard payment to the aggrieved party as constituting an unjustified windfall benefit which is contrary to public policy.

While rejecting this latter view and indicating the aggrieved party as the beneficiary of the penalty, the first sentence of para. (2) of this article expressly mentions the possibility of mandatory provisions of the law of the forum not permitting such a solution and indicating other possible beneficiaries of judicial penalties.

4. Judicial penalties distinguished from damages and from agreed payment for non-performance

The second sentence of para. (2) makes it clear that a judicial penalty paid to the aggrieved party does not affect its claim for damages. Payment of the penalty is regarded as compensating the aggrieved party for those disadvantages which cannot be taken into account under the ordinary rules for the recovery of damages. Moreover, since payment of damages will usually occur substantially later than payment of a judicial penalty, courts may to some degree be able, in measuring the damages, to take the payment of the penalty into account.

Judicial penalties are moreover to be distinguished from agreed payments for non-performance which are dealt with in Art. 7.4.13, although the latter fulfil a function similar to that of the former. If the court considers that the contractual stipulation of the payment of a sum in case of non-performance already provides a sufficient incentive for performance, it may refuse to impose a judicial penalty.

5. Form and procedure

A judicial penalty may be imposed in the form of a lump sum payment or of a payment by instalments. The procedure relating to the imposition of a judicial penalty is governed by the lex fori.

6. Penalties imposed by arbitrators

Since according to Art. 1.11 "court" includes an arbitral tribunal, the question arises of whether arbitrators might also be allowed to impose a penalty.

While a majority of legal systems seems to deny such a power to arbitrators, some modern legislation and recent court practice have recognised it. This solution, which is in keeping with the increasingly important role of arbitration as an alternative means of dispute resolution, especially in international commerce, is endorsed by the Principles. Since the execution of a penalty imposed by arbitrators can only be effected by, or with the assistance of, a court, appropriate supervision is available to prevent any possible abuse of the arbitrators' power.

7. Recognition and enforcement of decisions imposing penalties

Attention must be drawn to the problems of recognition and enforcement, in countries other than the forum State, of judicial decisions and of arbitral awards imposing penalties. Special rules on this matter are sometimes to be found in national law and to some extent in international treaties.

2. Commission on European Contract Law: *Principles of European Contract Law*

Art. 9:102. Non-monetary Obligations.

(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.

(2) Specific performance cannot, however, be obtained where:
- (a) performance would be unlawful or impossible; or
- (b) performance would cause the debtor unreasonable effort or expense; or
- (c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or
- (d) the aggrieved party may reasonably obtain performance from another source.

(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

3. Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group): *Draft Common Frame of Reference*

III. – 3:302: Enforcement of non-monetary obligations

(1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money.

(2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation.

(3) Specific performance cannot, however, be enforced where:
- (a) performance would be unlawful or impossible;
- (b) performance would be unreasonably burdensome or expensive; or
- (c) performance would be of such a personal character that it would be unreasonable to enforce it.

(4) The creditor loses the right to enforce specific performance if performance is not requested within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance.

(5) The creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.

VIII. China

1. 中华人民共和国合同法 *Contract Law of the People's Republic of China*, 1999), Arts 107, 110

第七章　违约责任

Chapter Seven: Liabilities for Breach of Contracts

第 107 条

当事人一方不履行合同义务或者履行合同义务不符合约定的，应当承担继续履行、采取补救措施或者赔偿损失等违约责任。

Art. 107 Types of Liabilities for Breach
If a party fails to perform its obligations under a contract, or rendered non-conforming performance, it shall bear the liabilities for breach of contract by specific performance, cure of non-conforming performance or payment of damages, etc.

第 110 条

当事人一方不履行非金钱债务或者履行非金钱债务不符合约定的，对方可以要求履行，但有下列情形之一的除外：

（一）法律上或者事实上不能履行；

（二）债务的标的不适于强制履行或者履行费用过高；

（三）债权人在合理期限内未要求履行。

Art. 110 Non-monetary Specific Performance; Exceptions
Where a party fails to perform, or rendered non-conforming performance of, a non-monetary obligation, the other party may require performance, 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.

2. Bing Ling, *Contract Law in China*

8.071 The provision is substantially based on the UNIDROIT-Principles, article 7.2.2. The imposition of the several limitations on the right to specific performance is a significant change in the law. [...]

[...]

8.073 Secondly, the obligation is unsuitable for enforced performance. The concept of "unsuitability" is not clearly defined and leaves room for controversy. It is generally accepted that specific performance cannot be required in regard to performance of an exclusively personal character, for otherwise the personal freedom and dignity of the defaulting party may be unduly compromised. Performance that is inseparable from the distinctive skills or status of the debtor (such as performance requiring the use of individual artistic or intellectual skills) falls within this category. But obligations of forbearance and obligations undertaken by a legal person or another organisation do not involve the personal liberty concerns and are suitable for specific performance. Performance that involves routine professional or personal service (such as the service of a lawyer [...]) is delegable and is thus suitable for specific enforcement. [Footnotes with references to Chinese doctrine, to Chinese court decisions and to the UNIDROIT-Principles and their comments]

[...]

8.078 Commentators [...] state another exception to the right of specific performance. Specific performance is barred if substitute performance from another source may be reasonably obtained. The final version of the Contract Law does not include this exception, and it seems difficult to try to read it into article 110. [...] [I]t would seem unduly punitive to the defaulting party and might cause needless transaction cost if the defaulting party should be forced to perform the contract where substitute performance is reasonably available elsewhere. It would be desirable if this exception is adopted in future judicial interpretation of the Contract Law.

IX. Summary

1. Overview of the solutions according to the different legal orders and the principles of contract law

Principle: Right to receive performance in case of non-performance of contractual obligations	Principle: Right to receive damages for non-performance of contractual obligations
~~Civil Code of Quebec~~ (Art. 1590) – **Dutch Law** (Art. 3:296 I BW) – **Finnish Law** (§ 23 Kauppalaki) – **Danish Law** (§ 21 Købeloven) – **Italian Law** (Art. 1453 Codice civile) – **Austrian Law** (§ 918, 919 ABGB) – **German Law** (§ 241 BGB, §§ 883-890 ZPO) – **French Law** (Arts 1184(2), 1610 Code Civil, Act reforming the civil procedures for execution of judgments, Case law (see Cour de cass. and case note) – **CISG** (rule: Art. 46, limitation: Art. 28) – **UNIDROIT Principles** (Art. 7.2.2) – **PECL** (Art. 9:102) – **DCFR** (III. – 3:302) **Coercive measures for execution of claims for performance** – Fine to be paid to the state (e.g. § 888(1) German Code of Civil Procedure) – *Astreinte*/Judicial penalty to be paid to the creditor (Art. 33 ff. of the French Law reforming the civil procedures for execution of judgments; Art. 7.2.4 UNIDROIT Principles)	– **England** (case law, e.g. *Lumley* v. *Wagner*; see explanations in TREITEL; MAJOR and TAYLOR), – **USA** (Restatement Contracts 2nd, § 359(1))

Exceptions: – No right to receive performance for obligations to perform services under an employment contract (e.g. § 888(3) German Code of Civil Procedure) – No right to receive performance in case of breach of contract where the service is of an exclusively personal character or where the party entitled to performance may reasonably obtain performance from another source (Art. 7.2.2(c), (d) UNIDROIT Principles; Art. 9:102 (2) (c), (d) Principles of European Contract Law)	**Exception:** – Specific performance is (at the discretion of the court) available where damages are inadequate (England: see explanations in TREITEL; MAJOR and TAYLOR, USA: UCC, § 2-716(1); Restatement Contracts 2nd, §§ 359 ff.) **Counter-exception:** – No right to receive performance of personal services under an employment contract or where the service is of an exclusively personal matter (*Lumley* v. *Wagner*; Restatement Contracts § 367(1))

2. Further reading

HUGH BEALE *et al.* (eds), *Cases, Materials and Text on Contract Law* (Ius Commune Casebooks for the Common Law of Europe), Oxford: Hart Publishing, 2002, Ch. 6.2, Enforcement *in natura*, 674–722.

ALLAN FARNSWORTH, *Contracts*, 3rd edn, New York: Aspen Publishers, 2004, 734–57 (USA).

JUAN CARLOS LANDROVE AND JAMES JOHN GREUTER, "The Civil *Astreinte* as an Incentive Measure in Litigation and International Arbitration Practice in Switzerland: Is There a Need for Incorporation?", in Christine Chappuis, Bénédict Foëx and Thomas Kadner Graziano (eds), *L'harmonisation internationale du droit*, Zurich: Schulthess, 2007, 523–552.

RONALD J. SCALISE JR, "Why No 'Efficient Breach' in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract", 55 (2007) *Am. J. Comp. L.* 721–66.

KONRAD ZWEIGERT AND HEIN KÖTZ, *An Introduction to Comparative Law*, 3rd edn, Oxford: Oxford University Press, 1998, 470–85.