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to the 1994 UNIDROIT Principles of  
International Commercial Contracts

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## A. Introduction

'Specific Performance and Damages' have re-emerged as a topic of discussion in the Germanic legal systems in the 20th century only by way of comparative law. However, in the 19th century this topic had already been the subject of much controversial debate.<sup>1</sup> Two sets of problems have to be distinguished that are not always kept properly separated in the literature.<sup>2</sup> First, there is the question whether the creditor may ask for specific performance, that is whether he or she can insist that the contract is performed correctly, and where necessary enforce this right to specific performance against the debtor, or whether he or she has to accept a sum of money as damages instead. Secondly, there is the question whether the creditor has to claim performance first or whether he or she may claim damages immediately.<sup>3</sup> In effect the latter question is whether or not the debtor has to attempt to cure initial non-performance and under what circumstances the contract can be avoided by the creditor. This second set of problems will not be discussed in this article. The subsequent analysis will be limited to the right of the creditor to enforce performance, respectively his or her duty to accept damages instead.

As the reader may be aware, the question whether or not a creditor has a right to and can enforce specific performance is dealt with rather differently in the different

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<sup>1</sup> See Markus Müller-Chen, 'Der Erfüllungsanspruch – primärer Inhalt der Obligation' in *Armin* (Willingnam et al. (eds.)), (Jahrbuch Junger Zivilrechtswissenschaftler 1996, Stuttgart 1997) at pp. 23, 30; Reinhard Zimmermann *The Law of Obligations* (Cape Town 1992) at p. 770 et seq.

<sup>2</sup> See Markus Müller-Chen *supra* note 1 at p. 9.

<sup>3</sup> See Markus Müller-Chen *supra* note 1 at p. 32; Guenter H. Treitel, *Remedies for Breach of Contract* (Oxford 1988) at p. 47 et seq.

law was inadequate because it could not provide satisfactory relief.<sup>11</sup> This principle was originally adopted to minimize conflict between courts of equity and courts of common law.<sup>12</sup> The separate administration of common law and equity no longer exists today, but the relationship between specific performance and damages has essentially remained the same.

Even though the approach taken in these legal systems is obviously very different, the differences in practice are smaller than one would suppose.<sup>13</sup> On the one hand, in the Germanic legal systems the right to specific performance under substantive law is sometimes counteracted by procedural law, which has no coercive means to enforce performance for certain claims.<sup>14</sup> On the other hand, the Anglo-American legal systems (especially the United States) acknowledge actions of specific performance more and more. The necessities of commercial trade blur the distinction further. No reasonable creditor in the Germanic legal systems will choose the costly and time consuming action for specific enforcement if he or she can obtain the promisor's performance from someone else on the market. He or she will therefore give the debtor a notice requiring him or her to perform within a fixed time. If the debtor does not perform within that time he or she will proceed to a covering transaction and liquidate the arising costs by way of damages. Therefore, specific performance is generally only of interest to the creditor where the debtor alone is capable to perform. In those cases, however, the Anglo-American legal systems also grant an action for specific performance.<sup>15</sup>

Keeping this background in mind it is interesting to examine how the Principles of International Commercial Contracts, 1994 Unidroit (the UNIDROIT Principles) see the relationship between specific performance and damages and how the different dogmatic points of view are kept in balance in order to make the Principles acceptable for lawyers from all over the world.

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<sup>11</sup> See Guenter H. Treitel *supra* note 3 at p. 64; Dan B. Dobbs *supra* note 10 at § 12.8(2) p. 808; E. Allan Farnsworth, *Contracts* (Boston/Mass. 1990, 2nd ed.) at p. 857 et seq.; Bernd Peukert *supra* note 4 at p. 182 et seq.

<sup>12</sup> See Guenter H. Treitel *supra* note 3 at p. 62.

<sup>13</sup> See Guenter H. Treitel *supra* note 3 at p. 71.; Michael P. Furmston, 'Breach of Contract' in (1992) 40 *Am. J. Comp. L.*, at pp. 671, 674; Alejandro M. Garro, 'The Gap-filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG' in (1995) 69 *Tul. L. Rev.*, at pp. 1149, 1186.

<sup>14</sup> See Konrad Zweigert and Hein Kötz *supra* note 4 at p. 471 et seq.; Adolf Baumbach, Wolfgang Lauterbach and Peter Hartmann, *Zivilprozessordnung* (München 1996, 54th ed.) at §§ 887/888 No. 1 et seq.

<sup>15</sup> See Dan B. Dobbs *supra* note 10 at § 12.8(2), at p. 808; E. Allan Farnsworth *supra* note 11 at p. 860.

fori.<sup>22</sup> That means that, at least in regard to arbitration, uniformity may be promoted to some extent provided that the UNIDROIT Principles contain universally acceptable solutions. Whether this is the case will be subsequently discussed in regard to the different types of obligations.

## **II. Monetary Obligations**

Article 7.2.1 of the UNIDROIT Principles only states: 'Where a party who is obliged to pay money does not do so, the other may require payment.' This rule contains no exceptions to enforced performance.

At first sight this rule seems reasonable. The constellations which require an exception concerning all the other obligations are of no practical relevance to monetary obligations. Monetary obligations are hardly impossible in law or in fact, nor is performance or enforcement unreasonably burdensome or expensive, nor is obtaining performance from another source an option, and, last but not least, performance of monetary obligations is never of an exclusively personal character. At first sight comparative law also seems to be of that opinion since even old English law acknowledged the right to performance in its action of debt.<sup>23</sup> Thus, what could reasonably be said against a right to performance concerning monetary obligations?

Contracts in commercial trade are usually reciprocal. For reciprocal contracts, the right to performance of the creditor of the monetary obligation is only justified if he or she has already fully performed his or her own obligation to deliver goods or to do some work. In such a case there is practically no difference between the right to performance and the right to claim damages. However, that is not the case, if the creditor of the monetary obligation has not fully performed yet. In that case the granting of the right to performance compels the creditor of the obligation to deliver to fulfil the contract without taking into account whether the disadvantages that arise for him or her are justified by any advantages of the creditor of the monetary obligation. The example of a contract for works or services can illustrate this point. Before the contractor has started with the work, the employer realizes that he or she will not be able to use the work according to his or her initial expectations and wants to free himself or herself from the contract. Should the contractor be able to insist on the fulfilment of the contract by way of demanding specific performance, even though he or she is able to use his or her material and working power in another profitable way?

A look at national law shows that the question can only be answered in the negative.

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<sup>22</sup> See *Staklinski v. Pyramid Electronic Co.* (1995) 160 N.E. 2d 78, 80, N.Y.

<sup>23</sup> See Konrad Zweigert and Hein Kötz *supra* note 4 at p. 553; Paul Neufang *supra* note 4 at p. 9 et seq.

right to performance.<sup>33</sup> However, this right is really an action for damages, an argument which is supported by the fact that compensation is reduced by investments which can be saved, and that there is a duty to mitigate.

In short, there can be no doubt that a claim to unlimited performance of the monetary obligation can lead to unjustified results in cases where the delivery of the goods has not yet been made or where the work or service has not yet been completed. These results are not supported by the national laws. Consequently the draft of the European Principles of Contract Law (the European Principles)<sup>34</sup> states that the creditor of the monetary obligation can only proceed with the performance of his or her own obligation and enforce the performance of the monetary obligation, when he or she cannot make a cover transaction or where the performance would not be unreasonable under the circumstances.

But how can these thoughts be harmonized with the unlimited right to performance (of the creditor) of the monetary obligation as stated in Article 7.2.1 of the UNIDROIT Principles? A first possible interpretation would seek to apply the duty to mitigate as stated in Article 7.4.8 paragraph 1 of the UNIDROIT Principles to the right to performance as well. However, in that context there are dogmatic hurdles which cannot be easily overcome. Virtually all legal systems apply the duty to mitigate only to damages but not to the right of performance.<sup>35</sup> Similarly, in the UNIDROIT Principles the duty to mitigate is found in the section on 'Damages' and not in the section on 'Non-Performance in General'. Hardly any national judge would therefore limit the right to performance by a duty to mitigate. The only solution is to apply a usage (Art. 1.8 UNIDROIT Principles), which requires the seller to resell goods which are neither accepted nor paid for by the buyer.<sup>36</sup> Last but not least, recourse could be taken to the general principle of good faith (Art. 1.7 para. 1 UNIDROIT Principles).<sup>37</sup> Given the vagueness of these principles, there will certainly be differences in their interpretation caused by the different backgrounds of the national lawyers. Therefore, in that respect, no uniformity can be reached by the UNIDROIT Principles.

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<sup>33</sup> Above all by the German law, see Othmar Jauernig and Peter Schlechtriem, *Bürgerliches Gesetzbuch* (München 1994, 7th ed.) at § 649 comment 3b.

<sup>34</sup> See Art. 9.101 of the European Principles.

<sup>35</sup> See Guenter H. Treitel *supra* note 3 at p. 179 et seq.; for the German law: Frank Peters, 'Der Einwand des Mitverschuldens gegenüber Erfüllungsansprüchen' in (1995) *JZ* at p. 754 et seq.; for the CISG: Amy Kasteley *supra* note 20 at p. 621 et seq.

<sup>36</sup> As it is explicitly stated in the comment concerning Art. 7.2.1.

<sup>37</sup> Only in rare exceptions where hardship is given, the debtor of the monetary obligation can be freed of his actual obligation, that is not only of his obligation to perform, see Art. 6.2.2 et seq. UNIDROIT Principles.

this case to discharge the debtor from his or her duty to perform, but nevertheless have him or her pay damages.

The fact that the enforcement of performance is excluded where it is unreasonably burdensome can only be understood in the light of Anglo-American legal thinking. In Anglo-American law, specific performance is often denied for long-term contracts not aiming at the achievement of a certain result.<sup>41</sup> As recently as May 1997, the House of Lords dismissed an action for specific performance in a case where the respondent had explicitly bound himself in a contract with a shopping centre to run his Safeway store in the usual manner during the 35 years of the lease but then decided to shut it down because of heavy losses.<sup>42</sup> The reason for the dismissal of the action of specific performance in such cases is the concern that a right to performance forcing somebody to carry on a business will presumably lead to never-ending disputes between the parties. This, in turn, will be an unnecessary burden to the legal system. By merely awarding damages, the litigation between the parties can be resolved once and for all.

Such thoughts are not completely unfamiliar to the civil lawyer and, therefore, will not be immediately rejected. Swiss law states, for example, that an employee who has been unfairly dismissed has no right to further employment but only a right to claim damages.<sup>43</sup>

#### (C) COVER

In practice, the most important case of performance exclusion refers to the situation where the creditor can reasonably obtain performance from another source, that is make a cover transaction.

This is the case in fungible goods or standard services. If the creditor is able to obtain performance through another source, his or her interests are sufficiently protected by an award for damages. It is typical for Anglo-American law to deny specific performance in such cases.<sup>44</sup> However, even Continental law regulates those cases in a particular manner. As a rule, the obligee can be authorized by the court to effect performance to the expense of the obligor in the case of fungible goods or standard services.<sup>45</sup> Even though effecting performance to the expense of the obligor

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<sup>41</sup> See Gareth Jones and William Goodhart *supra* note 19 at p. 44 et seq.; Dan B. Dobbs *supra* note 10 at § 12.8(3), p. 809.

<sup>42</sup> *Co-operative Insurance Society Limited v. Argyll Stores*, [1997] WLR 895 (House of Lords).

<sup>43</sup> See Art. 336a OR.

<sup>44</sup> Gareth Jones and William Goodhart *supra* note 19 at p. 32; Guenter H. Treitel *supra* note 3 at p. 64; E. Allan Farnsworth *supra* note 11 at p. 860; Dan B. Dobbs *supra* note 10 at § 12.8(2), p. 808; Steven Walt, 'For Specific Performance Under the United Nations Sales Convention' in (1991) 26 *Tex. Int'l LJ*, at pp. 211, 224 et seq.

<sup>45</sup> Germany: § 887, para. 1 Zivilprozessordnung (ZPO) for fungible goods or standard services; Austria: § 353, para. 1 Exekutionsverordnung concerning standard services; Switzerland: Art. 98, para. 1 OR; France: Art. 1144 CC.

The question is, however, how 'performance of an exclusively personal character' is interpreted. The national legal systems diverge considerably on this issue. In Anglo-American law specific performance is generally denied in relation to services,<sup>52</sup> irrespective of the nature of the services, i.e. whether they are standard services or not. The Germanic legal systems, however, grant specific performance even to non-generic obligations. German law denies specific enforcement only with respect to non-generic obligations out of a service contract.<sup>53</sup> A similar position prevails in French law. Obligations 'to do' which are of a personal character can be enforced indirectly with the aid of the *astreinte*, unless they are of a scientific or artistic nature.<sup>54</sup> The authors of the UNIDROIT Principles seem to follow this narrow Continental opinion. However, it seems doubtful whether this point of view will also be supported by Anglo-American lawyers.

#### (E) REQUEST WITHIN REASONABLE TIME

The last exception to specific performance concerns the failure to request performance within a reasonable time. According to Article 7.2.2 lit. e of the UNIDROIT Principles the obligee loses his or her right to require performance if he or she does not require performance within a reasonable period of time after he or she has, or ought to have, become aware of the non-performance.

This exception is mainly familiar to Anglo-American law (theory of *laches*).<sup>55</sup> Some elements of it, albeit not with the same rigor, can also be found in other legal systems. Under CISG law, seller and buyer cannot require performance if they have resorted to a remedy which is inconsistent with this requirement.<sup>56</sup> The buyer has to request either delivery of substitute goods or repair within a reasonable time after notice for lack of conformity is given.<sup>57</sup> Under German law, if the obligee has set a time limit for subsequent performance including a waiver of performance in case of default, he or she cannot require performance after the expiry of this limit.<sup>58</sup> Under all Germanic legal systems, in commercial trade where performance is due on a fixed date, specific performance has to be claimed immediately. Otherwise it is excluded.<sup>59</sup> Thus, in the various national legal systems the exclusion of specific performance after a reasonable period of time is generally accepted, and any differences appear as a mere matter of detail.

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<sup>52</sup> See Dan B. Dobbs *supra* note 10 at § 12.8(3), p. 808 et seq.; Gareth Jones and William Goodhart *supra* note 19 at p. 169 et seq.

<sup>53</sup> See § 888 Abs. 2 ZPO.

<sup>54</sup> See *Juris Classeur civil* (J. Cl. civil) Arts. 1136–1145, Fasc. 10, No. 115.

<sup>55</sup> See Dan B. Dobbs *supra* note 10 at § 2.4(4), p. 75 et seq.; Gareth Jones and William Goodhart *supra* note 19 at p. 109 et seq.

<sup>56</sup> See Art. 46 paras. 1, 62 CISG.

<sup>57</sup> See Art. 46 paras. 2, 3 CISG.

<sup>58</sup> See § 326 para. 1, 1st sentence BGB.

<sup>59</sup> Germany and Austria: § 376, para. 1, 2nd sentence HGB (Handelsgesetzbuch); Switzerland: Art. 190, para. 2 OR.

#### IV. Repair and Replacement

The rules concerning the right to performance of monetary and non-monetary obligations also apply to defective performance, that is to the right to require repair and replacement or other remedy (Art. 7.2.3 of the UNIDROIT Principles).

This rule also applies to the defective performance of monetary obligations. In cases where the debtor of a monetary obligation, for example, pays in the wrong currency or to a wrong account, the creditor shall have the unlimited right to require performance under Article 7.2.1 of the UNIDROIT Principles and not only the right to compensation in money for the additional costs that arise due to the defective performance of the monetary obligation.<sup>65</sup> It is doubtful, however, whether such a solution is reasonable from an economic point of view. Therefore, the European Principles refer to the remedy of a defective performance only in the context of non-monetary obligations.<sup>66</sup>

The right to remedy a defective performance is mostly relevant to obligations 'to deliver' or obligations 'to do'. The remedy can consist of replacement, repair, or any other measure, such as a court order terminating the property right of a third party on a certain object.

Continental law offers a colourful picture with respect to the right to remedy defective performance. Whereas replacement can be demanded without any exceptions in a contract of sale involving generic goods,<sup>67</sup> because of historic reasons, there is no right of repair for goods that are not generic. The worker in a contract for work and services is bound to repair, if in doing so no undue costs arise.<sup>68</sup> The CISG also takes into account whether a remedy is reasonable under the circumstances.<sup>69</sup> Opinions differ with respect to the existence of a right to remedy for obligations 'to do'.<sup>70</sup>

Since the UNIDROIT Principles, like the Anglo-American law, apply the same rules to original performance and the right of cure, satisfying solutions can be found in most cases. The limitations of the right to remedy will be of practical relevance in cases where there is an unreasonable burden for the debtor. The choice between different remedies cannot be made by the creditor alone, but has to be made on the basis of 'reasonableness' for both parties. This means that the creditor has to be satisfied with the repair and the compensation of any devaluation when replacement

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<sup>65</sup> See Art. 7.2.3 UNIDROIT Principles Comment 2.

<sup>66</sup> See Art. 9.102(1) European Principles 1997.

<sup>67</sup> See Germany: § 480 para. 1 BGB; Switzerland: Art. 206, para. 1 OR; France: Art. 1184, para 2 CC, see Jacques Ghestin and Jérôme Huet, *Traité de droit civil, les principaux contrats spéciaux* (Paris 1996) at No. 11365 et seq., p. 291 et seq.

<sup>68</sup> See Germany: § 633, para. 2 BGB; Switzerland: Art. 368, para. 2 OR; France: see Murad Ferid and Hans Jürgen Sonnenberger, *Das französische Zivilrecht, Vol. 2, Schuldrecht: Die einzelnen Schuldverhältnisse, Sachenrecht* (Heidelberg 1986, 2nd ed.) at No. 2K 127 p. 289.

<sup>69</sup> See Art. 46, para. 2,3 CISG.

<sup>70</sup> In the negative Switzerland, cf. Manfred Rehbinder *supra* note 62 at Art. 321e OR No. 12.



be derived.<sup>75</sup> In contrast to this, the UNIDROIT Principles admit judicial penalties indiscriminately in order to secure all kinds of obligations. On top of that, the UNIDROIT Principles contain no criteria for the calculation of the penalty. Here French law differentiates much more. It distinguishes between the *astreinte provisoire* which is only a provisional penalty and the *astreinte définitive*. In the latter case, it is mainly the conduct of the debtor that has to be taken into account in order to make a final evaluation.<sup>76</sup> A corresponding rule for the protection of the debtor is completely unknown to the UNIDROIT Principles.

Thus, the rule of the judicial penalty, as it is contained in the UNIDROIT Principles, has to be rejected and one cannot expect that it will be followed outside the French legal systems.

### C. Final Remarks

The relationship between damages and specific performance as stated by the UNIDROIT Principles creates mixed feelings. It is certainly positive that a first attempt has been made to harmonize the various approaches of the national legal systems into a common denominator. As stated above, the CISG has not dared take that step yet, but follows the tradition of Continental law by stating a general right to require performance while leaving possible exceptions to the *lex fori*.<sup>77</sup>

From an economic point of view there can be no doubt that the general priority of the right to require performance is not justified, at least concerning international settings.<sup>78</sup> The right to require performance has to be excluded where the creditor's interests can be sufficiently safeguarded through the award of damages. This position is supported by the fact that an award of damages is a much more flexible instrument than the right to require performance. Specific performance follows the principle of 'all or nothing'. Damages, by contrast, allow results that are suitable in view of the specific circumstances of each particular case, since the judge has a certain discretion to assess the amount of damages and there exists a duty to mitigate damages.

As the above analysis has shown, it is doubtful whether the UNIDROIT Principles have found a great deal of acceptable solutions. Therefore, chances to reach more uniformity via the Principles must not be overestimated in this sector. The European Principles, which contain more appropriate solutions for certain specific questions, may one day help to overcome the concerns pointed out above.

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<sup>75</sup> See Tribunal de Commerce de la Seine 16 December 1919, D.H. 1920.33 and Cour d'Appel Besançon, 1re, 4 December 1946, Gaz. Pal. 1947.20.

<sup>76</sup> See Art. 36 Statute Nr. 91-650 of 9 July 1991.

<sup>77</sup> See Art. 46, 62 CISG, Art. 28 CISG.

<sup>78</sup> See E. Allan Farnsworth, 'Damages and Specific Relief' in (1979) 27 *Am. J. Comp. L.*, at pp. 247, 249 et seq.