Enforced performance of commercial sales contracts in the Netherlands, Singapore and China

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1 Introduction

[P]eople can understand each other even if their legal-cultural backgrounds are quite different. Understanding has to do with knowledge, and here it does not mean the same as acceptance, which is an attitude. We can understand without accepting and accept without understanding – such is the epistemic constitution of homo sapiens.[1]

1.1 Introduction

1. This research is dedicated to determine the availability of enforced performance of commercial sales contracts in the Netherlands, Singapore and China. More specifically, the focus is on the differences in the enforceability of positive non-monetary obligations in a commercial sales context and what this divergence means for the protection of the parties' performance interests. To rephrase this in more practical terms: this research deals with the ability of the courts to provide the parties to a commercial sales contract with the very thing they bargained for by ordering the promisor to specifically perform its obligations. In this regard, a multitude of non-monetary obligations (*e.g.* the seller's obligation to deliver certain documents) and potential non-actionable duties (*e.g.* the buyer's duty to take delivery) are discussed in order to reveal the dogmatic underpinnings of the key differences, particular points of concern for legal practice, and to what extent solutions can be found in international sales and contract law principles.

The main focus of this comparative research is on the enforceability of the seller's delivery obligation, because it is the most clear and common positive non-monetary obligation in a commercial sales context. Moreover, it is a useful tool to place the (diametrically opposed) civil and common law academic concepts for enforced performance of non-monetary obligations in the real world of commercial sales contracts. For example, an international retailer (buyer), located in a civil law jurisdiction, enters into a commercial sales contract with a wholesaler (seller), located in a common law jurisdiction, for the delivery of 100,000 custom-produced goods. The wholesaler refuses to deliver the goods and offers monetary compensation. The aggrieved buyer declines the offer and claims for enforced performance because it has a special interest in delivery of the goods. While civil law provides the buyer with a right to enforced performance in this situation, the common law tradition only allows for enforced performance of the seller's delivery obligation in specific circumstances and in the absence of counter-exceptions.

1 Jaako Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015) 36.

Disagreement between the two legal traditions generally causes issues where a commercial sales contract is governed by civil law but the nature of the contract clauses is predominantly common law, or vice versa.[2] This may occur where parties use a standardised international commercial contract and where the strongest party, located in a common or civil law jurisdiction, 'forces' the other party to use a contract model that is not based on principles of the same nature as the law governing the contract.[3] For the purpose of bringing about new insights to bridge the gap between the two major legal traditions in this regard, the present study focuses exclusively on commercial sales contracts to reveal the main challenges in the realm of enforceability of non-monetary obligations to bring about a certain state of affairs.[4] The reason for the exclusive focus on one particular contract type is that it provides a better tool for analysing the multiplicity of interests in upholding the sanctity of a commercial contract, a reasoned examination of the applicable rules, and the varying results of the legal limitations to enforced performance.

2. Within the legal system of the Netherlands, Singapore and China, the current status of availability of enforced performance is influenced by statutes, court rulings, authoritative opinions and respective histories. These legal sources have been taken into account in ascertaining whether the available performance remedies have common features and also if there are variations requiring special awareness when dealing with international sales transactions governed by national sales and contract law or (domesticated or by choice of applicable law) international sales and contract law, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG).[5] Consideration must thereby be given to the non-exclusive character of the CISG, which provides an opening for domestic courts dealing with international sales transactions to apply their own domestic contract and sales law principles,[6] although it instructs the courts to look beyond their national borders and apply principles from other jurisdictions if this serves a common interpretation

2 Rieme-Jan Tjittes, *Commercieel Contractenrecht: Deel I: Totstandkoming en inhoud* (Boom juridisch 2018) 32–33, 378–384.

3 Tjittes 2018 (n 2) 32, 33.

4 Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract: International Studies in the Theory of Private Law* (Hart Publishing 2005) 50, 49.

5 The CISG came into effect on 1 January 1988. As of 15 February 2017, 85 States have adopted the CISG. Singapore and China (and the US) have made the so-called 'both parties' reservation, which means that a contract is only covered by the CISG if both parties are from a member state unless parties have agreed to 'opt-out' the Convention (the Netherlands does not have such a reservation). Thus, a sale between a Singaporean company and a Chinese or Dutch company is covered by the CISG. However, a sale between a Singaporean or Chinese company and a UK company is not covered by the CISG because the UK is not a member state. In case a Dutch company concludes a contract with a company from a non-member state, the CISG applies if the law of the Netherlands is appointed or the rules of international private law result in the application of Dutch law.

6 Art 7(1)(2), 28 CISG.

of the CISG. As a consequence, application of the CISG may result in unexpected decisions of courts who are not inclined to award a performance remedy if this is not in accordance with their own domestic sales law.[7] A key factor in this regard is that an international commercial sales contract falls under the sphere of the CISG if both parties have a place of business in a member state,[8] such as the Netherlands, Singapore or China.[9] It must, however, be noted that the contract law of Singapore is historically founded on the English common law model and England is not a member state.[10] Nonetheless, English common law principles and English case law may come into play when enforced performance of a non-monetary obligation arising from a CISG-contract (initially governed by Singapore law) is demanded.[11]

The CISG could also apply if only one of the parties to a commercial sales contract is from a member state.[12] Note, however, that Singapore and China have rejected the application of the CISG in cases where one of the parties does not have its place of business in a member state.[13] In this situation, the CISG does not apply if the parties designate the law of Singapore or China as governing the contract. That said, Singapore is currently considering withdrawing the reservation of applicability of the CISG, which would bring Singapore into line with the Netherlands, which has adopted the CISG without any declarations or reservations.[14]

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7 See for a diametrically opposed viewpoint: E Allan Farnsworth, 'A Common Lawyer's View of His Civilian Colleagues' (1996) 57 Louisiana Law Review 227, 231. Professor Farnsworth holds the view that art 7(2) CISG provides the court with the option to apply the law that would govern the contract under the choice of law; Howard Hunter, *Law of Sales in Singapore* (Singapore Academy of Law, Academy Publishing 2017) para 10.16.

8 Art 1(1)(b) CISG.

9 The Netherlands has been a participating country since 1 January 1992 and has made no declarations or reservations. In 1996, Singapore adopted the CISG by enacting the Sale of Goods (United Nations Convention) Act (Cap 283A, 1996 Rev Ed) with the reservation that the Government of the Republic of Singapore will not be bound by sub-paragraph (1) (b) of article 1 of the Convention and will apply the Convention to the Contracts of Sale of Goods only between those parties whose places of business are in different member states. The CISG entered into force in PRC China on 1 January 1988 with a similar reservation.

10 In other areas, Singapore has also adopted principles which do not derive from the English common law system, such as the Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed).

11 Arts 28, 30, 46(1) and 62 CISG.

12 Art (1)(1)(b) CISG.

13 In accordance with art 95 CISG, Singapore and China have declared that they will not be bound by sub-paragraph (1) (b) of art 1 CISG; Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (Oxford University Press 2012) 18; George T L Shenoy and Loo Wee Ling (eds), *Principles of Singapore Business Law* (2nd edn, Cengage Learning 2013) para 22.4.

14 Gary F Bell, 'Why Should Singapore Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2005) 9 Singapore Year Book of International Law 55–73; Shenoy and Loo 2013 (n 13) para 22.4.

3. It may be said that difficulties arising from the disagreement between the subject legal systems can be circumvented if the parties opt for a uniform principle that harmonises the approaches taken by the civil and common law traditions. This argument, however, fails to acknowledge that the main principles for determining the enforceability of non-monetary obligations under a commercial sales contract are integral to balancing the interest of the parties in actual performance and protecting the interest of the parties against abuse, from the moment the parties enter into the contract (and even before) until a judgement for enforced performance and judicial back-up measures are put in place. In other words, the mere implementation of a harmonised principle shall have a detrimental effect on the way a legal system balances the interests of contracting parties within its system.

Another point to consider when determining the effectiveness of a uniform principle is that cultural notions and legal traditions are (unconsciously) embedded in the understanding of academics and legal practitioners evaluating the best legal solution to overcome the disagreement between both major legal families to protect the parties' performance interest, and their view on the contract law regime that brings about the best legal practice. Nonetheless, a unification instrument which takes these points into consideration and does not encompass an escape route for interpretation or application of domestic contract law principles may provide the required relief on the matter for those involved in international commercial sales contracts. From a practical perspective, this solution would most likely only work if a supranational (*i.e.* not merely European) commercial court for global sales disputes is established. This seems inconceivable, as the commercial courts in the Netherlands, Singapore and China are feeding on their evolving positions as regional and international trading hubs. It also appears that the reluctance to accept an opt-out unification instrument as described above is also motivated by economic reasons, because favouring one system over another might affect the demand for domestic legal services. In other words, economic competition between the jurisdictions could play a role in the fact that the most important unification instrument for commercial sales contracts allows the domestic courts to seek recourse to their own national principles when confronted with a claim for enforced performance of a non-monetary obligation. The intricacies of this issue will be discussed later.

4. The distinct national perspectives on the question of whether enforced performance should be available makes it interesting to assess the three contract law regimes in view of the approaches taken by the CISG and the UNIDROIT Principles of International Commercial Contracts (PICC), which qualify as opt-out and opt-in codes respectively.[15]

15 The fact that the PICC is subject to mandatory domestic sales law indicates that relying solely on the operation of the CISG or the inclusion of the PICC into the choice of law is not sufficient to prevent the

In view of the goal of bringing about new insight to narrow the gap between traditional civil and common law views on enforced performance by ordering the promisor to do what it had promised to do, this research also takes into consideration the approaches taken by the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR) and the draft of the Principles of Asian Contract Law (draft PACL).[16] For the sake of comprehensiveness, the legal instruments and model rules mentioned above are hereinafter addressed as unification instruments, unless otherwise specified.

To provide a complete picture, the mirroring function of the unification instruments is supported by a sprinkling of various legal case studies throughout this work. The examples used derive mostly from the database of international case law on the CISG and PICC,[17] but have been modified and adjusted to highlight specific problems that are worth thinking about when confronted with questions related to the availability of enforcing performance of a commercial sales contract across civil and common law borders. Notwithstanding these general considerations, the main reason for including the unification instruments as a mirror for the approaches taken by the three investigated jurisdictions follows from their transnational character, which (at various levels) reflect civil and common law values, their potential usage as a neutral legal regime and their incidence in national sales and contract law principles. The latter applies in particular to Dutch and Chinese contract law, which are both (indirectly) influenced by the CISG.[18] The relationship between the unification instruments, their fundamental traits and the incidence of the unification instruments in national contract law are illustrated below.[19] Interestingly, elements of the

application of purely domestic legal principles for commercial parties engaged in cross-border trade transactions.

16 The PACL is a private academic initiative by scholars from South-Eastern and Eastern Asian jurisdictions to harmonise contract law in Asia, and aims, *i.a.*, to serve – in the future – as a soft law instrument for cross-border transactions. The draft articles on performance and non-performance are inspired by CISG, PICC and PECL; Schwenzer, Hachem and Kee 2012 (n 13) para 2.135; Young June LEE (ed), *A Study on Draft Articles Principles of Asian Contract Law: Performance & Non-Performance II* (Asia Private Law Review No. 7 special 2016) 5; Francisco de Elizalde (ed), *Uniform Rules for European Contract Law?: A Critical Assessment* (Hart Publishing 2018), 192 *ff.*

17 www.unilex.info.

18 Although the incidence of the CISG in the contract law of the Netherlands and China is extensive, there are material differences. *E.g.,* the CISG adopted the requirement of a fundamental failure in performance for avoidance of the contract (arts 25 and 49 CISG). This requirement has not been adopted in the Netherlands and China. In contrast, Dutch contract law has adopted the principle that every failure in performance of one of its obligations gives the other party the right to set aside the contract in whole or in part, unless the failure, given its special nature or minor significance, does not justify the setting aside of the contract and the consequences flowing therefrom. As for China, art 94(4) CCL stipulates that parties to a contract may terminate the contract if the other party delays performance of its obligations, or breaches the contract in some other manner, rendering it impossible to achieve the purpose of the contract.

19 Sonja A Kruisinga, 'The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law'(2009) 13(2) Electronic Journal of Comparative Law <https://www.ejcl.org/132/art132-2.pdf> accessed on 2 January 2019; Stefan Vogenauer (ed) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, Oxford University Press 2015) 11 paras

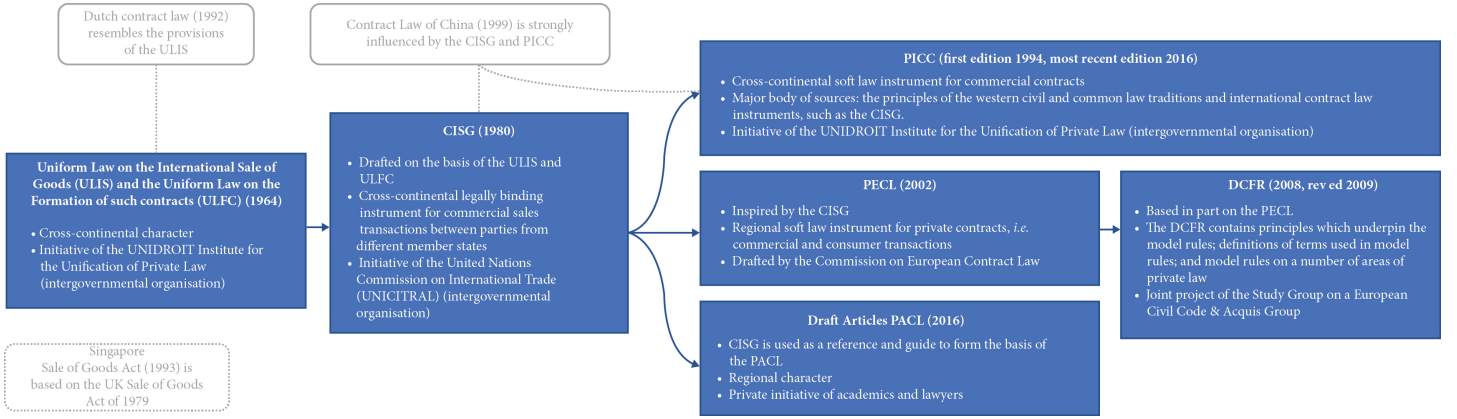
sales law provisions under Dutch and Singapore contract law also share a common source, to wit, the 1999 EC Directive on the Sale of Consumer Goods and Associated Guarantees.[20] This shared foundation is restricted to consumer sales (which is not governed by the present research), but it would be interesting to monitor how these European principles develop in Singapore in view of the fact that a business purchasing an item incidental to its business may be regarded as a consumer [14], and the discretionary power of the courts to take into account local circumstances.[21]

23, 24; André Janssen and Samuel CK Chau, 'CCL and Unidroit Principles' in Larry A DiMatteo and Lei Chen (eds), *Chinese Contract Law, Civil and Common Law Perspectives* (Cambridge University Press, 2017) 447, 466; Lee 2016 (n 16) 1–6; Hunter 2017 (n 7) 11; Harriët Schelhaas (general ed), Danny Busch, Ewoud Hondius, Hugo van Kooten and Wendy Schrama (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (Kluwer Law International 2002) 13–19.

20 Commission Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (1999) OJ, L171/12; Alexander F H Loke, 'The Lemon Law and the Integrated Enhancement of Consumer Rights in Singapore' (2014) Singapore Journal of Legal Studies 285–306.

21 <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview> accessed on 14 March 2019.

Figure 1 Relationship between the unification instruments and the three subject legal systems



1.2 Research questions

5. Much has been written about the dogmatic qualification of enforced performance of non-monetary obligations (*i.e.* right *vs* remedy), the scope and potential forms of a claim for enforced performance, and the 'better law' in this regard.[22] However, to date there is no comparative work analysing the actual implementation of the universal *pacta sunt servanda* principle in relation to the operation of the common law bargain principle, and how both archaic principles influence the thresholds for establishing enforceable obligations under a commercial sales contract and the protection of each party's expectation of performance. The *pacta sunt servanda* rule embodies the fundamental principle, underlying most legal systems, that agreements that are legally binding must be performed.[23] Generally speaking, it is on the basis of this notion that most civil and common law jurisdictions have adopted the principle that enforced performance of a monetary obligation is generally available, provided that all other requirements are met.[24] However, in common law jurisdictions, this approach is typically not adopted for an action enforcing the promisor to do exactly what it has promised to do. This is because enforced performance of non-monetary obligations is considered an exceptional remedy that lies at the discretion of the court. The legal dogmatic justification is that the common law acts on the notion that the universal *pacta sunt servanda* rule interacts with the bargain principle, which encompasses the notion that an aggrieved party must be placed in an 'as good as position', as if the bargain had been performed. In this regard, a bargain is considered a reciprocal transaction in which each contracting party considers the promised performance as the price of the performance undertaken by the other.[25] Seen from this perspective, it is said that commercial parties to a sales contract primarily bargain for the monetary outcome of the transaction and not for obtaining the actual goods, which means in effect that an aggrieved party should be placed in the position as if the contract had been properly performed (*i.e.* the expectation measure). This proposition, however, is not as straightforward as it seems.[26] From a common law perspective, it is taken as axiomatic that a non-excused failure in performance should be remedied by monetary damages on the basis of the expectation measure. Only when damages are not adequate might an aggrieved

22 Cohen and McKendrick (n 4) 51, 222, 225.

23 Schwenzer, Hachem and Kee 2012 (n 13) para 45.87.

24 Schelhaas in Vogenauer 2015 (n 19) art 7.2.1 paras 1–3.

25 Melvin Aron Eisenberg, 'The Bargain Principle and Its Limits' (1982) 95 Harvard Law Review 741, 742.

26 Eisenberg 1982 (n 25) 798; J Dennis Hynes, 'Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency.' (1997) 54(2) Wash & Lee L Rev 439, 444; Mindy Chen-Wishart, 'Contractual Remedies: Beyond Enforcing Contractual Duties' (2017) 85(6) George Washington Law Review 1617–1624.

party be entitled to claim for actual performance.[27] An analysis of the bargain principle from this viewpoint in the light of the *pacta sunt servanda* principle has already resulted in extensive discussions about the justifications for imposing limits on the application of the expectation measure.[28] In view of the proposition that the objective of a commercial contract is to bring about its monetary value, the primary status of damages is further substantiated with the argument that contracting parties are entitled to change their minds.[29] This is the same freedom underlying the ability to enter a contract and is also intricately interwoven with the doctrine of efficient breach. The bargain principle can also be addressed from a civil law angle.[30] That is to say, the idea that the bargain principle implements the internationally recognised legal concept of *pacta sunt servanda*. This approach seems logical because an order for enforced performance is more likely to provide the exact thing parties have bargained for, in contrast to damages, which are merely a legal relief measure.[31] Accordingly, the central premise of the present research is that a sales contract is the outcome of the effort the parties undertake to lay down certain rules for maintaining a good relationship rather than an instrument for obtaining a monetary benefit.

6. In view of the above, the main research questions are: to what extent does Dutch, Singapore and Chinese contract law balance out the interests of parties to a commercial sales contract in the principles surrounding the enforceability of performance obligations, and how do the domestic solutions relate to the approaches taken by the unification instruments? In order to answer these questions, attention is paid to the availability of enforced performance of non-monetary obligations available under the default contract law regime and to what (if any) extent enforced performance is limited.[32] Where the contract law system allows only for enforced performance in specific situations, it is considered to what extent enforced performance is affected by counter-exceptions.[33] The assessment of limitations and counter-exceptions is particularly helpful for determining the degree of flexibility by which a claim for enforced performance of non-monetary obligations of parties to a commercial sales contract, can be granted and given effect in the subject legal systems. This comparative inquiry goes beyond the primary understanding of the disagreement between civil and common law traditions because it adopts a holistic

27 Eisenberg 1982 (n 25) 799; Subha Narasimhan, 'Of Expectations, Incomplete Contracting, and the Bargain Principle' (1986) 74(4) California Law Review 1123.
28 Eisenberg 1982 (n 25) 799; Narasimhan 1986 (n 27); Chen-Wishart 2017 (n 26).
29 Chen-Wishart 2017 (n 26); Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2018) 98–126.
30 Eisenberg 1982 (n 25) 741.
31 Melvin Aron Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law' (2005) 93 California Law Review 975, 977.
32 Chs 2–4.
33 Chs 5–7.

approach by looking at the larger framework of principles related to performance obligations arising from a commercial sales contract. This is necessary in order to determine the degree to which the investigated legal systems are able to safeguard the performance interest of the aggrieved party and to protect the non-performing party against unjustifiable consequences of an order for enforced performance. The interests of these parties are balanced against the understanding of party autonomy and protection of public interest in the subject legal systems. The principle of party autonomy also brings about the question as to whether the parties may protect their performance interest by including a clause providing for an explicit right to enforced performance of the agreed obligations. This work examines the extent to which such clauses will be upheld and enforced by the courts. Another important feature of party autonomy that requires attention is the validity of provisions that encourages the promisor to do exactly what it has promised to do under the contract. This work only discusses the direct method of agreed sums payable upon a failure in performance, but indirect ways to encourage the seller to deliver the goods in accordance with the agreed terms should not be overlooked by contracting parties. For example, the contractual stipulation that the delivery of non-conforming goods entitles the buyer to terminate the contract without notice. This provision (if allowed) may give sellers an incentive to do what is agreed, because termination of the contract could diminish the seller's monetary benefits following from the bargain struck between the parties. A termination clause can, therefore, be considered as an indirect way of enabling the buyer to protect its performance interest.[34]

1.3 Relevance

7. This comparative work may be considered relevant for several reasons. The first reason is that the present comparative research provides an evaluation as to whether the investigated national sales and contract law principles are able to accommodate commercial parties engaged in cross-border contracting by providing a framework of legal enforcement rules that is sufficiently flexible for the limitless types of international sales transactions. Secondly, this research could potentially support the courts in the investigated jurisdictions when they are confronted with an enforcement claim concerning a commercial sales transaction across civil and common law borders. The final reason concerns the fact that, when adjudicating a commercial sales dispute, the CISG provides domestic courts with the right to limit the operation of a claim for enforced performance of a non-monetary

34 An analysis of the permissability of termination clauses goed beyond the scope of this work, which is focussed on direct ways to protect one's party's performance interest in performance of a commercial sales contract by ordering the other party to do what it has promised to do under the contract.

obligation if such court would not be bound to allow the claim under its own law. This effectively means that the CISG does not provide a solution for the intractable legal issue the different perspectives of the civil and common law traditions have on the availability of enforced performance of non-monetary obligations arising from a commercial sales contract. Hence, the danger exists that commercial parties to a CISG-contract are confronted with purely national contract and sales law principles. This work, therefore, could provide insights for determining the bindingness of non-monetary obligations under a commercial sales contract and to what extent the availability of enforced performance is best protected.

The findings provided in this study could be helpful for legal professionals, academics and national legislators who are seeking a new approach (at national and international levels) to overcome differences in the availability of enforced performance of non-monetary obligations under a commercial sales contract. The results are particularly relevant for commercial parties located in the three investigated jurisdictions, and more generally, for those involved in commercial sales contracts across civil and common law borders. This is because a close examination of the numerous international non-binding codes and model rules reveal that the drafters of these unification instruments have not managed to bring about consistent and universally recognised principles. This is especially true when taking into account the seemingly insurmountable divergence between the traditional civil and common law views on the thresholds for establishing an enforceable commercial sales contract, the dominant understanding of the availability of enforcing the obligations arising therefrom and the rules for giving effect to enforced performance.

1.4 Approach

8. This comparative research is built on the belief that a mere functional approach to contract law does not account sufficiently for the doctrinal differences between the concepts and terminology utilised in the three investigated jurisdictions and the unification instruments identified. This proposition follows from the focus of a functional approach on the effects of a rule and is not necessarily concerned with the underlying principles.[35] It is therefore submitted here that a functional method does not suffice to fully comprehend the approach taken by the various legal systems, how they operate and how their viewpoints relate to the development of international contract law. The reason for this is that concepts that might seem similar could actually operate quite differently due to their origin and domestic understanding. This premise applies in particular when comparing jurisdictions from the same legal tradition, when civil law is compared to common law and when the

35 Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 3.

approaches taken by systems that are on qualitatively different levels are taken into account. The present study, therefore, employs a horizontal and vertical analysis of the subject legal systems.[36] The horizontal dimension of this research is concerned with a comparison of Dutch, Singapore and Chinese contract law. The vertical dimension analyses the similarities and differences at the national level by looking at the approaches taken by the unification instruments identified. In view of these considerations, chapter 2 starts with an analysis of the historical and contemporary fundamentals of the contract and sales law of the Netherlands, Singapore and China. The key focus of this chapter concerns the degree to which the contract and sales law of the three investigated jurisdictions are rooted in legal and cultural traditions. The second step regards the ambit of a commercial sales contract in the investigated three jurisdictions and, where appropriate, to what extent they each restate the principles laid down in the unification instruments identified (chapter 3). The following topics are given special attention: the concept of sale, goods subject to sales law and the requirements for establishing an enforceable sales contract. The latter aims to reveal the overarching influence of the traditional civil and common law doctrinal principles, and to identify some of the theoretical and historical justifications for the existence and non-existence of judicial means to enforced performance in the national systems. The third step aims to identify the available judicial instruments to order the promisor to do exactly what it has promised to do, and to what extent the law relating to these actions has been influenced by their history (chapter 4). The fourth step encompasses an examination of three non-performance situations which are very common in commercial sales transactions (chapter 5). This concerns non-delivery, failure in taking delivery and discrepancies in quantity and quality of the delivered goods. The findings are used to determine the differences and commonalities, and to what extent the performance remedial regimes of the three investigated legal systems are in line with the approaches takes by the unification instruments.

9. A complete answer to the question as to when enforced performance of non-monetary obligations arising from a commercial sales contract is available also requires an examination of the legal principles and doctrines militating against enforced performance. Therefore, the influences of the traditional bars to obtain a court order for enforced performance are assessed in chapter 6. To determine the true value of a court order for enforced performance, it is also of paramount importance to examine the available enforcement measures to protect the parties' performance interest. In this context, chapter

36 Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Hart Publishing 2014) 59; Ugo Mattei, 'Comparative Law and Critical Legal Studies' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 12.

7 examines two specific issues: first, the way in which the investigated legal systems provide the aggrieved party with measures to execute a judgement for enforced performance other than straightforward enforcement proceedings; secondly, the admissibility of agreed sums to compel the promisor to perform as required by the law and the contract. Lastly, it is important to investigate the extent to which commercial parties are able to influence the availability of enforced performance by derogatory agreements, which (explicitly) allow or prohibit the aggrieved party to obtain a court order for enforced performance by way of ordering the promisor to do exactly what it has agreed to do. The possibility that such a contractual provision will be upheld and enforced under the law of the three investigated jurisdiction is discussed in chapter 8.

10. The selection of Dutch, Singapore and Chinese contract law, for this comparative study, is motivated by three considerations. Firstly, the three investigated jurisdictions represent an interesting foundation for exploring differences between a jurisdiction with strong roots in the French civil law tradition (*i.e.* the Netherlands), an English common law-based jurisdiction which is moving towards a more autonomous legal system (*i.e.* Singapore), and a jurisdiction which has combined socialist principles with German civil law, common law elements, and international sales and contract law principles (*i.e.* China).[37] Consequently, contract law in the Netherlands, Singapore and China differs fundamentally when considering the allocation of responsibility for safeguarding the actual execution of a commercial sales contract between the state and the contracting parties, and the protection offered by law against abuse. In this comparative study, the phrase 'contract law' is used to address the statutory principles and doctrines in the law of the Netherlands, Singapore and China, which form the legal framework for commercial sales contracts. This means in effect that the present work takes into consideration the Dutch Civil Code, the Singapore Sale of Goods Act, the Contract Law of the People's Republic of China as well as overarching legal doctrines and (uncodified) principles deriving from national case law. The second argument for comparing Dutch, Singapore and Chinese contract law follows from the fact that these jurisdictions all qualify as regional and international trading hubs, and each have ambitions to expand through building positions as regional and international legal hubs. The third motivating factor is closely related to this as it concerns the jointly shared ambitions of the three investigated jurisdictions to (i) develop trade-friendly domestic contract law systems, which stimulate economic growth by accommodating business-friendly contract law mechanisms;[38] (ii) by supporting the development of

37 See for the characterisation of Chinese contract law, Lutz-Christian Wolff, 'Impossibility of Performance and Contract Validity' in DiMatteo and Chen 2017 (n 19) 280.

38 NLD: *De toekomst van de nationale rechtsstaat* [The future of the national rule of law], Scientific Council for Government Policy Rapport nr. 270, 2002b and *Nederland Handelsland: het perspectief van de transactiekosten* [The Netherlands a trading country: the perspective of transaction costs], Scientific Council

overarching regional contract law;[39] and (iii) by adopting a court and arbitration system specialised in dealing with international trade disputes.[40]

11. Analysis and discussion of each topic are organised in the following manner. First, in the context of the civil law system of the Netherlands and the Singapore common law system, which are both based on Western notions of a sales contract, and then in the context of the Chinese contract law principles, which are influenced by various national and international legal traditions. The findings are contrasted against the relevant principles adopted by the unification instruments identified. This sequence is based on the premise that the civil law framework of the Netherlands and the common law regime of Singapore arise from opposing Western legal principles, whereas the contract law of China operates between cultural and social values, politics and (more recently) a mixture of civil and common law principles. One of the most striking features of Chinese contract law is the distinction between the elements of establishing a sales contract and the requirements for obtaining effectiveness. This means in effect that it first needs to be determined whether a legally enforceable contract is concluded by the parties by means of an assessment of the constitutional elements of the formation of a contract (offer and acceptance). Next, it needs to be ascertained whether the contract has gained effectiveness.[41]

In anticipation of a discussion of the formation of a contract and its effectiveness, it may be noted that in ancient China, a contract *(He Tong*) was only seen as evidence of an agreement *(Qi Yue*) between parties and, consequently, a written contract *(Qi Ju*) was

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for Government Policy Rapport 2003 nr 66, 103, 194, 216; Kamerstukken II 2015–2016, nr. 1553; SGP: <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-1> accessed on 21 October 2015; On 25 March 2015, Singapore signed the Hague convention of 30 June 2005 on Choice of Court Agreements, and the parliament has subsequently approved the Choice of Court Agreements Act to ratify the international pact. Briefly, if under the convention an exclusive choice is made for the Singapore court, the hearing has to be held in Singapore; CHN: In 1981, the Chinese government passed the Economic Contract Law (n 159 below) to regulate contracts between wholly foreign-owned enterprises and Chinese business entities, In 1985, the Foreign Economic Contract Law was promulgated to govern joint ventures between non-Chinese and Chinese parties; Chuan Feng, Leyton P. Nelson and Thomas W Simon, *China's Changing Legal System, Lawyers & Judges on Civil & Criminal Law* (Palgrave Macmillan 2016) 129, 135; Zhong Jianhua and Yu Guanghua, 'China's Uniform Contract Law: Progress and Problems' (1999) 17(1) Pacific Basin Law Journal <http://escholarship.org/uc/item/97t9s6th> accessed on 9 May 2016.

39 *E.g.,* the DCFR and the draft PACL as an answer to the efforts to establish one European contract law and the establishment of the ASEAN Economic Community (ASEC) respectively.

40 *E.g.,* the Singapore International Arbitration Centre (SIAC), the Singapore International Commercial Court (SICC), the Netherlands Arbitration Institute (NAI), the International Chamber of Commerce (ICC) for commercial disputes, the Permanent Court of Arbitration for investment disputes, the Netherlands Commercial Court (NCC) and the China International Economic and Trade Arbitration Commission (CIETAC).

41 Mo Zhang, *Chinese Contract Law: Theory and Practice* (Martinus Nijhoff Publishers 2006) 111.

regarded as the formal record of this agreement.[42] The Western definition of a contract – an agreement is, in essence, a contract – was only introduced in China in the 1970s and is reflected in article 2 of the Contract Law of China.[43] It should be further noted that in the legal system of China, the notion of embodiment of a combination of civil and common law principles is more accessible if the underpinnings of the civil and common law approaches are first discussed.

12. This work is based on an understanding of comparative research as a means of enhancing the understanding of domestic and international sales law principles, and not to determine the 'better law'.[44] The premises underlying this viewpoint are that diametrically opposed doctrinal perspectives may provide similar results, that identical legal principles may lead to diverging solutions, and that their appropriateness depends on the situation. The comparative approach adopted in this work also encompasses the idea that legal concepts can have different functions in different legal systems.[45] In other words, a certain legal phrase, term and label is not necessarily sufficient to determine the actual legal response. Therefore, the structure of the present research is based on practical situations that are not driven by specific civil or common law concepts. These situations are compared in the light of domestic and international contract and sales law principles, doctrines, literature, case law and discussions with academic researchers and legal practitioners. The inclusion of historical context is founded on the view that a legal system derives from experience, and on the reasoning that knowledge of the development of a legal system is essential to understanding the content of rules, principles, and doctrines in that legal system.[46] To clarify the operation of the findings, and because a mere theoretical undertaking is hardly sufficient to fully grasp the complexities of enforcement issues, the domestic legal responses are mapped out against specific cases.

1.5 Terminology

13. *Preliminary* – This study aims to use neutral terms that are descriptive in nature, without, in any way, prejudicing the various terminologies used in the three investigated

42 This could also explain why contract law in China adheres to the evidentiary theory, which means that violation of a mandatory requirement that a certain contract must be made in writing, does not lead to a void, voidable or undeterminable contract; Zhang 2006 (n 41) 113.

43 Zhang 2006 (n 41) 25, 34.

44 Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2017) 1 Comparative Law Methodology 127.

45 Husa 2015 (n 1) 137.

46 Pierre Legrand, 'Comparative legal Studies and Commitment to Theory' (1995) 58, 2 Modern Law Review 262, 265; Husa 2015 (n 1) 123, 155.

jurisdictions and unification instruments identified (*i.e.* CISG, PICC, PECL, DCFR and the draft PACL). In view of this, it is important to bear in mind that the terms used in the following chapters should not be axiomatically interpreted based on their traditional meanings (*e.g.* the common law term 'specific performance'). Furthermore, the choice of certain terms in this work does not indicate that the civil law interpretation of a legal concept is prioritised over the common law notion and vice versa.

14. *Commercial sales* – The enforceability of a sales contract is inextricably linked to the need to protect the divergent interests of the different parties involved in the transaction. Generally, this assessment depends on the type of transaction. That is to say, 'business to business transactions', 'business to consumer transactions' and sales between private individuals. However, the way the investigated jurisdictions make a distinction between commercial sales and consumer sales differ significantly. Moreover, as shown below, a transaction between two commercial parties is not always qualified as a non-consumer sales. Determining the boundaries put in place by the respective jurisdictions requires some attention due to the impact of the differing viewpoints on, for example, determining the availability of enforced performance to put a defect right (section 5.4).

Dutch contract law entails the principle that a consumer sale means the sale of a movable thing, entered into by a seller acting in the conduct of a profession or business with a buyer who is a natural person not acting in the conduct of a professional business.[47] The standard of interpretation for determining the nature of the transaction is subjective. It is said that this approach may significantly curtail the seller's interest where the latter, in light of the given circumstances, could reasonably have assumed that the buyer acted in the conduct of a profession or business.[48] A similar reasoning may apply when considering a commercial sales transaction between a self-employed buyer and a large international company and the former is the weaker party due to a significant imbalance in power. Only in exceptional circumstances, this may give cause to judicial protection of the self-employed professional buyer. Singapore courts also focus on the way parties have acted, but they deploy a different assessment for determining as to whether a transaction qualifies as a commercial or consumer sale. The starting point is the Singapore Unfair Contract Terms Act: a party deals as a consumer in relation to another party if 'he neither makes the contract in the course of a business nor holds himself out as doing so and 'the other party does make the contract in the course of a business'. This definition allows for a broad interpretation of a consumer sale when considering the Singapore Court of Appeal case *Koh Lin Yee v Terrestrial Pte Ltd* [2015] SGCA 6. The Court of Appeal decided that the phrase 'in the

47 Art 7:5(1) DCC.

48 J Hijma, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht 7-I* Bijzondere overeenkomsten: Koop en ruil* 8th edn (2013) 77.

course of business' brings about the principle that a transaction qualifies as a commercial sale when it is clearly an integral part of the company's business, as opposed to being merely incidental to such business. In addition, a 'degree of regularity' is needed before a particular transaction could be considered a 'clearly integral' part of the business. This, in effect, means that a business may claim for enforced performance to put a defect right under the Singapore Consumer Protection (Fair Trading) Act when the purchase of certain goods is merely incidental and there is no evidence pointing to the regularity required to constitute a course of business (section 5.4). In China, the distinction between 'business' and 'consumer' transactions follows a different path due to a positive notion of a consumer (it does not mention the intention to use the goods for business or trade purposes) and limiting the coverage to daily consumption needs.[49] This premise follows from article 2 of the Consumer Protection Law which stipulates that 'when a consumer purchases or uses goods or receives services for the needs of daily consumption, their rights and interests are protected by this Law'. Although this definition offers the courts a high degree of flexibility to deal with the specific contemporary context of China, it is also said to introduce an increased level of uncertainty for small businesses.[50]

15. *Sales contracts and the concept of goods* – The present study discusses the legal framework of commercial sales contracts (excluding consumer transactions); however, it is difficult to provide an accurate definition of this undertaking, taking into consideration the common law distinction between an agreement to sell and the conclusion of a valid sale (section 3.2). Nonetheless, in this research, a sales contract is perceived as 'a reciprocal exchange of goods against an agreed purchase price'. Although this concept is adopted by the investigated legal systems,[51] the variegated definitions of goods that are found at the national and international levels require a case-by-case assessment of whether a commercial contract is governed by sales law legislation (section 3.3). At this point, it must be mentioned that most civil law jurisdictions adopt a broad notion of the concept of goods (section 3.3), whereas most common law jurisdictions restrict the definition to tangible goods.[52] Furthermore, various legal systems (civil and common law) make a distinction between movable and immovable goods.[53] In this research, goods are perceived as movable at the moment of delivery and include those that are either not attached to or detached from an

49 Art 2 Law of the People's Republic of China on the Protection of Consumer Rights and Interests, promulgated on 31 October 1993, amended on 27 August 2009 and on 25 October 2013, effective as of 15 March 2014.

50 Kristie Thomas, 'Analysing the Notion of 'Consumer' in China's Consumer Protection Law' (2018) Vol 6 n 2 The Chinese Journal of Comparative Law 294, 318.

51 NLD: art 7(1) DCC; SGP: SGP: SGA, s 2(1); CHN; Art 130 CCL; Schwenzer, Hachem and Kee 2012 (n 13) para 7.01.

52 Schwenzer, Hachem and Kee 2012 (n 13) paras 7.03, 7.04.

53 Schwenzer, Hachem and Kee 2012 (n 13) para 7.06.

immovable object. While it is not possible to provide an exhaustive list of items that are considered movable goods, money as a payment method is explicitly excluded. This approach is in line with the viewpoint adopted by the CISG.[54]

16. *Non-monetary obligations and payment of the purchase price* – The investigated (supra)national legal systems are all familiar with a judicial action to facilitate the enforced performance of non-monetary obligations under a commercial sales contract (*e.g.* the seller's obligation to deliver the goods in conformity with the contract, the handing over of ownership documents or safety certificates, and the delivery of spare parts). The process of enforced performance of such actionable non-monetary obligations should be distinguished from a monetary compensation for failure in performance, as this instrument does not provide the aggrieved parties with the very thing for which they bargained.[55] Similar reasoning applies for the remedies of the refusal of an aggrieved party to hold up its end of the contract (in civil law terms: *exceptio non adimpleti contractus*) and to put an end to the contract through the termination of the contract. The process of obtaining enforced performance of non-monetary obligations is also distinct from a claim for an agreed sum. The reason behind this is that actions for an agreed sum are normally not subject to the limitations that most legal systems place on the availability of enforced performance.[56]

17. *Actionable contractual rights and obliegenheiten* – Despite the broad scope of the concept of non-monetary obligations mentioned above, it does not relate to obliegenheiten, which are characterised by their non-actionability.[57] The term 'obliegenheit' originates in German and Swiss law and, in contrast to actionable contractual rights to performance, cannot be subject to a judicial order for enforced performance. Nonetheless, non-performance of a non-actionable duty is not without its consequences, because the non-performing party may lose its right to claim for enforced performance or damages. For example, a timber company located in country X and an importer of goods for barbeque events located in country Y conclude a contract for the sale of birch and juniper chips to be delivered at the premises of the buyer. The question arises whether the buyer is subject to an enforceable obligation to take delivery, and if not, if the buyer can be required to cooperate in order to enable the seller to make delivery, by providing information about the exact location of the premises and the times at which the seller can make the delivery.

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54 Art 2(d) CISG.

55 GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press 1998) 43; Cohen and McKendrick (n 4) 227.

56 Treitel 1998 (n 55) 45.

57 See section 5.3 for a more detailed discussion.

18. *Enforced performance* – For the process of enforced performance of a positive obligation to do or convey something,[58] different terminology is used under the investigated (supra)national legal systems, which may cause confusion. The terms referring to a claim for enforced performance of non-monetary obligations are 'right of action' (the Netherlands), 'specific performance' (Singapore, PECL, DCFR),[59] 'continuance of performance' (China) and 'right to require performance' (CISG, PICC and the draft PACL).[60] In the present comparative study, the neutral terminology 'enforced performance' is used to address a claim for enforced performance of positive non-monetary obligations arising under a commercial sales contract, in order to avoid unnecessary confusion. In this regard, two issues are of specific interest: first, the common law remedy of (interim) mandatory injunctions is sometimes issued to enforce positive obligations [147-149]; secondly, the term 'enforced performance' is not used to lump together all substantive legal measures to bring about a performance remedy in the form of repair and replacement (section 5.4). This is because the availability of a claim for enforced performance does not necessarily require a failure in performance.[61] By contrast, it is axiomatic that a claim for repair and replacement is a response to a non-performance of the seller's obligation to deliver the goods in accordance with the terms of the contract. It is, therefore, separately discussed to what extent the investigated legal systems envisage the availability of enforced performance of a claim for repair and replacement in order to remedy a non-conforming delivery.

19. *Non-performance* – In addition to the differences in terminology to address an action carried out to obtain enforced performance, there is also a significant variance in the terms used for an infringement of a contractual obligation, in translations of domestic contract law as well as in the unification instruments. For example, 'non-performance' is used in the PICL, PECL, DCFR, the draft PACL,[62] and in the translation of the Dutch Civil Code.[63] The CISG is less consistent by using the phrase 'failure to perform' (this phrase is also used in the translation of the Contract Law of the People's Republic of China),[64] and 'breach of contract' for all situations where a contract is not properly performed.[65] The usage of the

58 *E.g.,* delivery of the goods, payment of the price and ancillary duties which enable the parties to fulfill their obligations.

59 SGA, s 52; Art 9:102 PECL; Art III–3:302 DCFR.

60 Art 6(1) CISG; Art 7.2.2(1) PICC; Art 7 Amendment Draft on Non-Performance PACL, see Lee 2016 (n 16) 198.

61 S 4.3.

62 Art 7.1.1 PICC; Art 8:101 PECL; Art III.-3:101 DCFR; Art 1 Draft on Non-Performance PACL.

63 *E.g.,* Section 3 Special Consequences of Non-Performance of the Obligations of the Seller in Warendorf Dutch Civil and Commercial Law Legislation.

64 *E.g.,* art 107 CCL for the right to enforced performance.

65 See for a failure in performance: arts 45 *ff,* 61 *ff,* 79 and 80 CISG; See for breach of contract: arts 25, 74, 77 CISG.

term 'breach' in the CISG may cause confusion because in common law jurisdictions, such as Singapore,[66] it is used to address a situation where the non-performing party is liable for damages due to a disturbance of a contract. To eliminate any uncertainty about what is intended in the present research, the neutral phrase 'non-performance' is used (in line with the PICC) in its most expansive form, without implying anything about the fault, attributability of the cause or liability for the failure in performance. Thus, the term 'non-performance' is also used for situations where a failure in performance is excused for damages under the law of the three investigated jurisdictions and the unification instruments.

20. *Parties to a commercial sales contract* – A variety of terminology and definitions is used in (supra)national contract law and literature to describe parties to a commercial (sales) contract, including 'promisor', 'promisee', 'obligator', 'obligee', 'debtor', 'creditor', 'non-performing party', 'aggrieved party' etc. In order to avoid ambiguity, the expressions 'promisor' and 'non-performing party' are used throughout this text to identify a party to a commercial sales contract who promised (and failed) to do or convey something. For example, the seller who promises to deliver certain goods and the buyer who promises to take delivery of the goods. The term 'promisee' is used to address the beneficiary of the obligations and duties arising from the contract. The above may cause confusion, as the promisee under a commercial sales contract is also the promisor of its own obligations. For example, the buyer is the promisee of the seller's delivery obligation and the promisor of its obligation to pay the purchase price. To provide the necessary clarity in this regard, the expressions 'seller' and 'buyer' are used in cases in which the type of obligation or duty is central to the discussion.

21. *Standard of reasonableness, fairness*, *good faith*, *fair dealing and honesty* – At the national and international level, different terms are used to address the standards regulating the legal duties owed by the parties to a commercial contract. The importance of providing clarity on the matter follows from the fundamental differences at a dogmatic and structural level between the views adopted by the subject legal systems. That said, the purpose of this paragraph is restricted solely to clarification of the main implications of the division. The starting point is that Dutch and Chinese contract law are familiar with a broad general principle in the form of the 'standard of reasonableness and fairness' and the 'principle of honesty and good faith' respectively (subjective and objective standard in both jurisdictions). There are, however, marked differences between the terms. Dutch contract law distinguishes between the 'principle of good faith' (which may apply, for example, to the seller of a

66 *E.g.,* SGA, s 52(1) for the availability of obtaining an order for enforced performance.

property containing asbestos), and the 'standard of reasonableness and fairness'.[67] The latter entails the notion that contracting parties are obliged to observe reasonable commercial standards of fair dealing.[68] The contract law of China takes a different approach by first stipulating that parties are obliged to adhere to the 'principle of fairness' when determining their rights and obligations.[69] This statutory standard is followed by the principle that parties are obliged to observe the principle of 'honesty and good faith' in exercising their rights and performing their obligations.[70]

In contrast to the approach adopted by Dutch and Chinese contract law, Singapore contract law follows the English law position, in the sense that it only recognises the principle of reasonableness for specific duties,[71] such as a reasonable price where a commercial sales contract is silent on the matter.[72] In other words, Singapore as a common law jurisdiction is not familiar with a formal and abstract duty of contracting parties to act in good faith. In view of the preceding considerations, it must be noted that the contract law of the Netherlands and China also encompasses a specific standard of reasonableness for the instance where there is no agreement on the price or the price is unclear.[73] This special principle, however, does not detract in any way from the fact that the agreement and conduct of contracting parties are also subject to the previously mentioned overarching expectation of general reasonableness and fairness, and the good faith standard. At the international level, the PICC, PECL, DCFR and the draft PACL have taken the same approach by adopting a broad general principle to act in accordance with good faith and fair dealing.[74] There are, however, differences in the scope of the obligation to act in accordance with good faith and fair dealing. The most pronounced example is that the PICC solely employs (1) autonomous, (2) international, (3) commercial, and (4) objective standards of good faith and fair dealing.[75] Under the PECL, 'good faith' is considered a subjective standard (*i.e.* good faith in mind), with 'fair dealing' (*i.e.* fairness in fact) being an objective standard.[76] The drafters of the DCFR have defined 'good faith' and 'fair dealing' as an objective standard of conduct.[77] Nonetheless, 'good faith' on its own may refer to a subjective mental attitude, often characterized by an absence of the knowledge of something that, if known, would adversely affect the morality of what is done. The draft PACL suggests

67 Arts 3:11, 3:12, 6:2, 6:248 DCC.
68 Para 53.
69 Art 5 CCL.
70 Art 6 CCL.
71 Para 54.
72 SGA, s 8(2)(3); What is a reasonable price is a question of fact dependent on the circumstances of each particular case.
73 Art 7:4 DCC; Art 6(2) CCL.
74 Art 1.7(1) PICC; Art 1:201 PECL; Art III.-1:103 DCFR; Art 1(2) Amendment Draft on Performance PACL.
75 Vogenauer 2015 (n 19) art 1.7 paras 14–16.
76 Arts 1:201 Comment E, 5:102, 5:101(1)(3) PECL; C Mak in Schelhaas 2002 (n 19) 47.
77 Art I.-1:103 and Annex 1 to the DCFR; Arts II.-8:101(1)(3)(a), II.-8:102 DCFR.

that the drafters envisage a subjective-objective standard.[78] That having been said, the imposition of a broad general duty to act in good faith by the unification instruments mentioned above, stands in stark contrast to the approach taken by the CISG, which only refers to the standard of good faith for the interpretation of the Convention and the (subjective) standard of reasonableness for the interpretation of the statements of contracting parties.[79]

78 Lee 2016 (n 16) 99–101.

79 Arts 7(1), 8(2) CISG; Tjittes 2018 (n 2) 377.