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

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4 General availability of enforced performance

4.1 Introduction

78. Dutch, Singapore and Chinese contract law each act on the notion that the promise of a commercial party should be performed in accordance with the terms of the contract (*pacta sunt servanda*). These legal systems, however, differ greatly in their approach to the judicial instruments available to make parties to a commercial sales contract indifferent between the voluntary performance of the obligations arising from the contract and the availability of enforced performance (indifference principle).[488] This issue traditionally results in a comparison between the impact of enforced performance and monetary compensation which, however, until now has provided unsatisfactory answers because one cannot compare apples and oranges. The rationale of the proposition advanced here is that a judicial action for enforcement of performance and damages have a completely different objective. To put this in the context of commercial trade transactions: enforced performance aims to give the buyer the goods for which it bargained. The objective of monetary compensation is to put the buyer into the same financial position as it would have been in had the seller delivered the goods in accordance with the contract, and applicable legal rules and principles. A frequently discussed issue is that the two major legal families have adopted diametrically opposed views on whether the aggrieved party is entitled to performance or merely the remedy of damages. By moving away from this typical divergence between the civil and common law traditions, and analysing the way the idea of *pacta sunt servanda* operates, and the indifference principle in performance remedy schemes, the present section provides an opportunity to take stock of new insights and the achievements to date by lawmakers in the realm of commercial sales law.

79. The question regarding whether the availability of enforced performance is in accordance with the idea of *pacta sunt servanda* and the indifference principle is best ascertained in light of non-monetary obligations of contracting parties due to the absence of a distinguishable difference between voluntary performance of an obligation to pay money

488 As a practical matter, it should be noted that the costs of litigation and the distribution of these costs between the parties is not taken into account. This topic is more closely related with a comparison between the ability to claim actual performance and to obtain damages.

and a judicial decree for payment of the agreed purchase price.[489] By contrast, non-performance of non-monetary obligations can be remedied via a variation of performance remedies (and damages). As the most pronounced issues for commercial parties follow from distinguishing between the voluntary performance of a non-monetary obligation under a sales contract and a judicial decree to enforce performance, section 4.3 only briefly touches on the intricacies of the ability to obtain actual performance of monetary obligations. Section 4.4 provides a more in-depth examination of the availability of enforced performance of non-monetary obligations and the extent to which this is consistent with the broadly accepted legal concept that contracting parties should comply with promises they have made and the view of the subject legal systems concerning the indifference principle.

80. A commercial sales contract may also bring forth non-monetary obligations on the basis of the idea that parties should behave in accordance with the notion of good faith and best efforts. The central issue is that most civil and common law jurisdictions have a completely different view on the scope and ability to claim for the actual performance of ancillary duties arising from the notion of good faith, best efforts or a variation of it. Nonetheless, these typical legal sources for ancillary non-monetary duties are frequently used in international commercial contracts due to their flexibility.[490] Therefore, the principle of good faith and best efforts are analysed and contrasted against the rules adopted by the unification instruments in order to improve understanding of the different approaches (section 4.5).

4.2 Historical and contemporary underpinnings of enforced performance

4.2.1 Introduction

81. The present section seeks to lay out the historical and contemporary underlying principles of the availability of a claim for enforced performance of obligations arising from a commercial sales contract subject to the contract law of the Netherlands, Singapore and China and how the approaches taken by these legal systems relate to the nature of enforced performance in the unifications instruments. The premise advanced here is that the conceptual differences underlying the availability of enforced performance in the subject legal systems may be summarised, albeit in an oversimplified manner, as a basic

489 The costs of litigation are not taken into account.

490 *E.g.,* transboundary oil and gas industry and infrastructure contracts.

right to enforced performance on one hand (civil law), and on the other hand as a remedy (common law). The common assumption is that the dogmatic divergence between the two major legal traditions is caused by the distinct valuations of a contractual promise, which result in opposing viewpoints on the most suitable action to achieve the objective (*i.e.* purpose) of a contract. The following analysis of the approaches taken by the three subject jurisdictions demonstrates, however, that the ideological, statutory and practical differences are in reality multi-faceted.

4.2.2 Primary status of performance in the Netherlands

82. In 1798, preparation for the Civil Code in the Batavian Republic commenced with the establishment of a 'Committee of Twelve'.[491] Johannes Lodewijk Farjon (1766–1824) was appointed to prepare the general part of the Law of Obligations.[492] In his draft, Farjon followed the Early Modern Natural Law principle that all obligations should be performed.[493] Therefore, Farjon's draft stated that in the case of a failure in performance of a contractual promise, the aggrieved party was entitled to enforced performance or to set the contract aside; which consequently meant that the aggrieved party was not entitled to claim damages and thus basically forced to claim enforced performance.[494] In the case where the aggrieved party decided to set aside the contract, all actions had to be undertaken to restore the situation to as it was before the parties entered into the contract.[495] Farjon also held the view that a party in default was entitled to a second chance and therefore, an aggrieved party, choosing to set aside the contract rather than claiming enforced performance of the contract, was obliged to inform the non-performing party about its decision by means of a notarial writ.[496] On receipt of the writ, the party who failed to fulfil its obligations was entitled to undertake performance on the condition that the obligations must be performed

491 Oosterhuis 2011 (n 80) 199.

492 Oosterhuis 2011 (n 80) 199.

493 Oosterhuis 2011 (n 80) 221, 222.

494 Oosterhuis 2011 (n 80) 199, 222. In contrast to Oosterhuis, this author uses the term 'setting aside of a contract' instead of rescission, because of the common law view on the term rescission. The principal remedy for misrepresentation is rescission, which involves setting the contract aside an restoring the parties to the pre-contractual position. Instances where the representation is made fraudently, the aggrieved party could also opt to claim damages at common law for the tort of deceit (fraudulent misrepresentation). Rescission differs significantly from the process of termination of a contract for repudiatory breach.

495 Oosterhuis 2011 (n 80) 199; This principle is still present in art 6:271 DCC which states that in case a promisee chooses to set aside the contract, because his counterparty is in default, an obligation arises to reverse the performance of the obligations which contracting parties have already received.

496 Oosterhuis 2011 (n 80) 199.

within the shortest time possible and providing compensation for any damages incurred by the aggrieved party.[497]

83. In 1806, after the transfer of power over the Batavian Republic to the brother of Napoléon, the preparation of the Law of Obligations by Farjon was continued by Van der Linden, who held the view that in the case of a failure in performance of a contractual promise, the aggrieved party was entitled to enforced performance or to claim damages.[498] Importantly, Van der Linden held the view that a non-performing seller must be provided with a second chance to deliver the goods before a sales contract can be set aside by the aggrieved buyer. In the case of a personal act, Van der Linden followed an approach that for true personal obligations, such as an engagement, and for obligations not to do something, the Code Civil and English common law approach *nemo ad factum praecise cogi potest* applied, meaning that no one could be forced to perform such obligations against their will. This humanistic approach, that no one can be forced to perform, stems from the concept that the freedom of an individual is primary and therefore, a non-performing party cannot and should not be actually forced to perform.[499] Based on this viewpoint, Van der Linden upheld the opinion that in the case of non-performance of an obligation not to do something, the aggrieved party was only entitled to claim damages, while the use of civil custody and imprisonment was rejected.[500]

84. In 1809, the efforts to develop a Dutch Civil Code resulted in the promulgation of the Code (*wetboek*) Napoleon for the Kingdom of Holland, which significantly differed from the principles of Farjon and Van der Linden since it stipulated that the object of obligations could be an act or a good, and that all obligations had to represent a monetary value.[501] Therefore, it can be said that in 1809 the Kingdom of Holland upheld a view on non-performance, which is similar to the general principle in English common law and the current Singapore common law-based system – being that damages are the preferred remedy.[502] The Code Napoleon included a contradictory principle, since it stated that in the case of a failure in performance of a reciprocal agreement the aggrieved party was

497 Oosterhuis 2011 (n 80) 199; In the current Dutch Civil Code, the principle of a second change, and as such the preference for specific performance as a primary remedy for a breach of contract, can be found in art 6:81(1) 1 DCC providing the conditions for default of a party in breach.

498 Oosterhuis 2011 (n 80) 222.

499 Oosterhuis 2011 (n 80) 203, 222.

500 Oosterhuis 2011 (n 80) 227; Art 3:296(1) DCC stipulates that the right to bring claim to court for enforced performance can be excluded if this flows from the nature of the obligation. It follows that true personal obligations cannot be enforced.

501 Oosterhuis 2011 (n 80) 204.

502 See the English case *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1070E; JD Mayne and H McGregor, *Mayne and McGregor on Damages* (18th edn, Sweet & Maxwell, 2009) paras 1–1001; Phang et al 2012 (n 112) paras 20.049, 20.050.

entitled to enforced performance or to set aside the agreement and to claim for damages.[503] It was also remarkable that the Code Napoleon adopted the Civil Code principle that a buyer is entitled to setting aside of the contract and to claim enforced performance if the seller fails to deliver the goods within the agreed time.[504] Interestingly, the principle that a promisor could not be physically compelled to do something did not apply to certain highly personal obligations.

In 1810, the Kingdom of Holland became a part of the French Empire, resulting in 1811 in the promulgation of the Code Civil in the Kingdom of the Netherlands and the introduction of the principle that in situations of non-performance of the seller's delivery obligation, the aggrieved buyer was entitled to choose between enforced performance, setting aside of the contract and to pay damages.[505] In the period 1811–1838, however, case law shows that enforced performance was seen by the courts as the primary remedy for non-performance of a contract.[506] With regard to determining the status of a claim for enforced performance under the subsequent Dutch Civil Code 1838; all obligations to do something or not to do something could be conferred into an obligation to compensate costs, damages and interest (article 1275 DCC 1838).[507] In this respect, it is noteworthy that, prior to 1870, it was believed that an obligation to pay damages could not be seen as the object of the contract, but merely as a substitute for the initially agreed performance. Therefore, damages could only be awarded on a subsidiary claim.[508] It may, therefore, not come as surprise that a promisee was primarily entitled to enforced performance or to bring a claim to court for termination of the contract.[509] In contrast to enforced performance, a request for termination of the contract could be combined with a claim for compensation of costs, damages, and interest.[510] The enforced performance of an obligation and termination of a contract, including a claim for damages, were regarded as

503 Oosterhuis 2011 (n 80) 205, 206.

504 It was believed impossible to force an unwilling promisor to physically do something. Oosterhuis 2011 (n 80) 207, 208.

505 Oosterhuis 2011 (n 80) 208, 216, 381.

506 Oosterhuis 2011 (n 80) 216, 218, 219, 381.

507 Art 1275 DCC 1838: *Alle verbintenissen om iets te doen, of niet te doen, worden opgelost in vergoeding van kosten, schade en interessen, ingeval de schuldenaar niet aan zijne verpligting voldoet.*

508 Oosterhuis 2011 (n 80) 450; District Court Amsterdam 20 June 1876, W. 4212; Dutch Court of Appeal Amsterdam 19 October 1877, W. 4200.

509 Art 1276 DCC 1838 stipulated that, in addition to a primary claim for specific performance, a promisee was entitled to claim termination of the contract in combination with a claim for compensation of costs, damages and interest (art 1276 DCC 1838). Art 1276 DCC 1838: *Niettemin heeft de schuldeiser het regt om de vernietiging te vorderen van hetgeen strijdig met de verbindtenis verrigt is, en hij kan zich door den regter doen magtigen om, ten koste van den schuldenaar, het gedane te doen vernietigen; onverminderd de vergoeding van kosten, schaden en interessen, indien daartoe gronden bestaan.*

510 Art 1308 DCC 1838: *Degene te wiens opzigte de verbindtenis niet is nagekomen, heeft de keus om of de andere partij, indien zulks mogelijk is, tot de nakoming der overeenkomst te noodzaken, of derzelver ontbinding te vorderen, met vergoeding van kosten, schaden en interessen.*

exclusive legal instruments.[511] These legal instruments had the awkward effect that, for example, a claim for the payment of arrears (enforced performance) or non-performance of long-term contracts could not be combined with a claim for termination of the contract for the future, including compensation of costs, damages, and interests.[512] Subsequently, interest over arrears could only be claimed if the promisor chose to claim for termination of the contract including a claim for damages.

85. After 1870, the Dutch Supreme Court held the view that the Dutch Civil Code of 1838 did not exclude a primary claim for damages or that a claim for damages had to be accompanied by a claim for termination of the contract.[513] Further, it was explicitly held that enforced performance could be combined with a claim for damages.[514] It was also considered that a claim for compensation of costs, damages, and interest could only be awarded if the promisor did not perform his obligation after he became in default (art 1274 DCC 1838),[515] if performance was impossible or in case of non-performance of an obligation not to act (art 1279 DCC 1838).[516] In this respect, it is relevant to note that the non-performance of an obligation was regarded as an implicit or explicit (inserted into the contract) resolutive condition which could not automatically lead to termination of the contract.[517] This principle was substantiated by the argument that contracting parties entered into a contract under the assumption that the other party would perform his part of the agreement.[518] In contrast to the current Dutch Civil Code, termination of a contract required a lawsuit,[519] even if the terms of the contract stipulated that non-performance was penalised with the termination of the contract.[520] Further, in the case of

511 Oosterhuis 2011 (n 80) 484.

512 Oosterhuis 2011 (n 80) 483, 484.

513 Art 1303 of the DCC 1838.

514 Oosterhuis 2011 (n 80) 496.

515 Art 1274 DCC 1838: *De schuldenaar wordt in gebreke gesteld, het zij door een bevel of andere soortgelijke akte, hetzij uit kracht der verbintenis zelve, wanneer deze meebrengt dat de schuldenaar in gebreke zal zijn, door het enkel verloop van een bepaalde termijn.*

516 Art 1279 DCC 1838: *Vergoeding van kosten, schaden en interessen, voortspruitende uit het niet nakomen eener verbindtenis, is dan eerst verschuldigd, wanneer de schuldenaar, na ingebreke te zijn gesteld, nalatig blijft om die verbindtenis te vervullen, of indien hetgeen de schuldenaar verpligt was te geven of te doen, slechts kon gegeven of gedaan worden binnen zekeren tijd, welken hij heeft laten voorbij gaan.*

517 Art 1302 Dutch Civil Code 1838; Oosterhuis 2011 (n 80) 214.

518 CL Schüller, *Het Burgerlijk Wetboek, met Aanteekeningen* (Utrecht, Schultze en Voerman 1841) 279.

519 Art 6:267(1)(2) DCC entails the principle that the termination of a contract shall be effected by a written declaration of the person entitled to do so, or via electronic means if the contract is concluded by electronic means. Further, termination of the contract may also be pronounced by the court on the demand of such person.

520 Art 1302 DCC 1838: *De ontbindende voorwaarde wordt altijd voorondersteld in wederkeerige overeenkomsten plaats te grijpen, in geval eene der partijen aan hare verpligting niet voldoet. In dat geval, is de overeenkomst niet van regtswege ontbonden, maar moet de ontbinding in regten gevraagd worden. Deze aanvraag moet ook plaats hebben, zelfs indien de ontbindende voorwaarde wegens het niet nakomen der verpligting in de*

non-performance of an obligation to not act, the promisee could only claim compensation for costs, damages, and interest.[521] However, an exception was made for certain obligations, such as an obligation of non-disclosure.[522] The provisions of the Dutch Civil Code 1838 mentioned above were founded on the principle that all obligations should be performed. Therefore, a claim for termination of a contract and damages, contrary to enforced performance, could only be awarded if the party in breach was in default,[523] or performance was impossible, and the non-performance was attributable.[524] Another indication that enforced performance under the former Dutch Civil Code was regarded as the primary legal instrument to remedy a non-performance follows from the principle that it was at the discretion of the court to award an additional period if the promisor failed to deliver the goods in time.[525]

The flowchart below provides an overview of the position of the right to enforced performance in relation to remedies for non-performance under the Dutch Civil Code 1838. This overview shows that before and after 1870 the Dutch Civil Code upheld the principle that all obligations must be performed, but it also shows that after 1870, important doctrinal principles were imported to overcome certain injustices and omissions which negatively affected contractual relationships. For instance, it became possible to claim damages solely or to combine a claim for damages with a claim for enforced performance.[526] Nevertheless, it may be said that the core civil law principle that all obligations must be performed remained the primary overriding view since a claim for damages and termination of a contract was subject to the overall barrier of default and the inextricably linked second chance concept. In other words, under the Dutch Civil Code 1838, a contractual promise was primarily valued as an absolute obligation to perform and only after preconditions were met and barriers overcome, could the contract be set aside and damages awarded.

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overeenkomst mogt zijn uitgedrukt. Indien de ontbindende voorwaarde niet in de overeenkomst is uitgedrukt, staat het den regter vrij om, naar gelang der omstandigheden, aan den vervreemder, op deszelfs verzoek, eenen termijn te gunnen om alsnog aan zijne verpligting te voldoen, welke termijn echter den tijd van ééne maand niet mag te boven gaan.

521 Art 1278 DCC 1838: *Indien de verbindtenis bestaat in iets niet te doen, is degene die daartegen handelt, uit hoofde van die overtreding alleen, gehouden tot vergoeding van kosten, schaden en interessen.*

522 Schüller (n 518) 274.

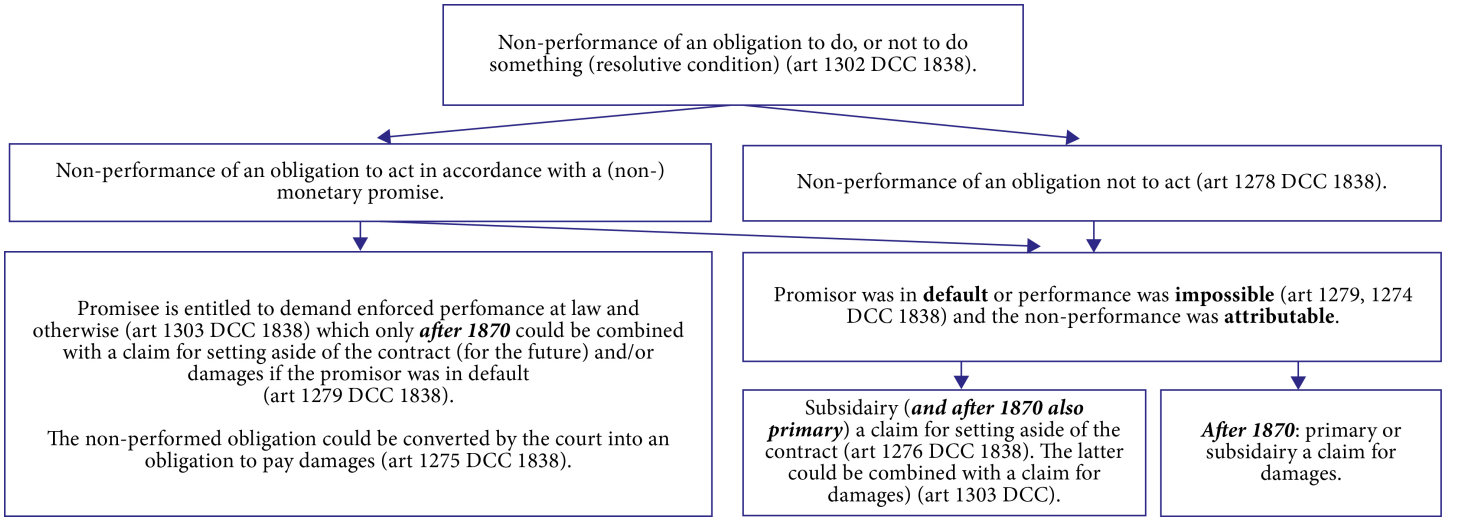
523 Oosterhuis 2011 (n 80) 346.

524 Dutch Parliamentary History Book 6, 1002; The Dutch Civil Code does not require attributability for awarding a claim for non-performance; Art 6:265 paragraph 1 DCC.

525 Art 1303 DCC 1838.

526 Oosterhuis 2011 (n 80) 481–484.

Figure 9 Historical underpinnings of enforced performance in the Netherlands



86. In the current Dutch Civil Code (hereafter Dutch contract law), the civil law principle of *pacta sunt servanda* prevails,[527] encompassing the view that by the act of promise making, contracting parties have voluntarily given up a part of their freedom and they are, therefore, bound to provide the actual performance.[528] Accordingly, it is considered that the substantive right to enforced performance of a contractual promise stems directly from the nature of the bindingness of a contractual promise,[529] and does not stem from the wrongdoing of a promisor.[530] These principles are laid down in the statutory right to demand enforced performance.[531] The only substantive requirements are sufficient interest of the promisor in obtaining an order for enforced performance and that performance is due (*i.e.* 'opeisbaar') according to the contractual stipulations.[532] In instances where the performance is not yet due and the contractual stipulations are clear about the time for performance, the court may order performance subject to the condition that actual enforcement is only available when the obligation is due and the promisee has sufficient interest in obtaining an order for enforced performance.[533] These considerations reveal that the time for performance does not necessarily have to be due when a claim for enforced performance is initiated. The above portrayed favourable look on the right to enforced performance is strengthened by specific requirements for damages. That is to say, Dutch contract law act upon the notion that establishing the civil liability of a non-performing party to pay damages demands additional legal justification. For example, the right to claim damages is only available in the case of an attributable failure in performance, or if the promisee has good reasons to fear that the promisor will fail in its performance and such an anticipatory failure is attributable to the latter.[534] For the liability of the promisor, it is important to take into account that the latter is only obliged to repair the damage for delay in performance for the time that it has been in default.[535]

527 V Mak, *Performance-Oriented Remedies in European Sale of Goods Law* (Studies of the Oxford Institute of European and Comparative Law, Hart Publishing 2009) 8.

528 Sieburgh, *Asser 6-III* 2018 (n 203) 41; Mak (n 527) 30.

529 Sieburgh, *Asser 6-III* 2018 (n 203) 43; Sieburgh, *Asser 6-I* (n 363) paras 322, 380; Mak (n 527) 8.

530 AW Jongbloed, 'commentaar op artikel 296 Boek 3 BW' para 3 in J Hijma (ed), *Groene Serie Vermogensrecht* (Wolters Kluwer 2018).

531 Art 3:296 DCC.

532 Arts 3:296(1), 3:303, 6:39 DCC; CH Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte* (Wolters Kluwer 2017) para 343.

533 Art 3:296(2) DCC; Sieburgh, *Asser 6-II* (n 532); Sieburgh, *Asser 6-I* (n 363) paras 32, 246; Mak (n 527) 31; Books 3 and 6 of the DCC include the general part of the law of obligations and separate provisions for torts and breach of contract. Book 7 of the DCC provides separate provisions for specific contracts. A claim for specific performance shall not be awarded for non-performance of obligations with a personal character and if performance has become impossible.

534 Arts 6:74(1), 6:80(1)(c) DCC.

535 Art 6:85 DCC; see also arts 6:74(2), 6:81 *ff* DCC; In general, default commences when the promisor is given written notice of default granting the latter a reasonable period for the performance and there is no

87. The considerations above presuppose that the Dutch Civil Code places great emphasis on the importance of actual performance of obligations by making a claim for enforced performance readily available.[536] The requirements for damages and setting aside of the contract, as well as the statutory provision for a situation of *force majeure* supports this view. The latter stipulates that the promisee is entitled to obtain what is due to him or her by execution or termination of the contract, even if the performance of the contractual promise is prevented by a cause not attributable to the promisor.[537] Another argument to substantiate the presumption that actual performance of the contract is primarily encouraged under Dutch law by the measure of enforced performance derives from the cases *Verheijen Seeds v Rijk Zwaan* (1990) and *Intres v Walt Disney Company* (1995).[538] In both judicial proceedings, the Dutch Supreme Court considered that, although the infringement of an intellectual property right was stopped, the aggrieved party remained entitled to claim the performance of the contract in the form of an infringement injunction under pain of a financial penalty. Besides these arguments, there is also the statutory right of the promisee to convert the right to performance into an obligation of the promisor to pay damages. This principle demonstrates that the right to enforced performance is the starting point and that it can be converted in damages upon the demand of the aggrieved party.[539]

88. The strong focus of Dutch contract law on the importance of performance of the contract by the promisor is also reflected in the statutory provision that the right to substantive damages and termination of a contract is secondary to a reasonable offer by the promisor (made by the promisor after the commencement of his or her default) to

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performance within such period (art 6:82(1) DCC); Where performance is temporarily unavailable, or it is evident from the behaviour of the promisor that a warning notice would serve no purpose, the promisor may be put in default by a mere written liability notice (art 6:81(2) DCC); Default commences without the formality of putting in default in instances of the expiration of time limits, where the obligation arises from tort or relates to reparation of damages and the obligation is not immediately performed, and where the promisee may assume that the promisor will fail to perform (art 6:83 DCC).

536 MM Stolp 2007, 'Ontbinding, schadevergoeding en nakoming. De remedies voor wanprestatie in het licht van de beginselen van subsidiariteit en proportionaliteit' (DPhil thesis Radboud University Nijmegen 2007) 263 *ff*.

537 Art 6:79 DCC; Jongbloed (n 530) para 5.

538 *Verheijen Seed v Rijk Zwaan* Dutch Supreme Court 23 Februari 1990, ECLI:NL:PHR:1990:AD104, NJ 1990, 663; *Intres v Walt Disney Company* Dutch Supreme Court 1 December 1995, ECLI:NL:HR:1995:ZC1899, NJ 1996, 510.

539 Art 6:87(1) DCC entitles the promisor to convert his primary right to performance of a contractual obligation into a secondary legal obligation of the promisor to repair the monetary damages of the promisee; The following high thresholds apply when demanding damages instead of actual performance of a contractual promise: (i) promisor is in default; (ii) parties are connected through a continuing contract; (iii) it is not in the interest of the promisee to perform his obligation; (iv) the failure relates to the primary obligation of the promisor; (v) the failure in performance does not justify termination of the contract but is serious enough to justify conversion.

perform the contractual obligations and where applicable, to pay any additional damages and costs which in the meantime become due.[540] This shows that the Dutch Civil Code is primarily focussed on promises made by contracting parties and the certainty that the act of promise making results in an enforceable contract.[541] This approach aligns with the principle that a promise is binding because parties have commenced in the act of promise making which is believed to invoke expectations and trust.[542] Following this line of thinking, it is said that a contractual promise imposes an obligation on the promisor not to compromise the right of the promisee to enforced performance of the contract.[543] In view of these considerations, it is important to note that a claim for enforced performance can be brought to court for unilateral and reciprocal obligations deriving from private law (*e.g.* [intellectual] property law), public law (*e.g.* criminal law,) and, less obviously, obligations which are based on unwritten law such as the obligation to cooperate with a paternity test if it is likely that the person in question is the father of an unborn child.[544] A claim to progress negotiations can also be brought to court in the form of a claim for enforced performance by the promisee if there is no justification on the side of the counterparty of the aggrieved party to terminate the negotiations.[545] Moreover, obligations to which the Dutch government is a contracting party can be subject to a claim for enforced performance. Hence, the action for enforced performance covers a wide range of applications.

89. It appears that under Dutch contract law, the Dutch courts are entitled to enforce the promisor, on the demand of the promisee, to do exactly what it promised to do because,

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540 Arts 6:86, 6:58, 6:61(1), 6:266(1), 6:265 DCC; In a recent case about the right of a supplier of clothes to remedy its failure in performance (*i.e.* delayed delivery), the Dutch Supreme Court considered that a refusal of the buyer to accept the seller's offer to deliver the goods with a discount, did not entitle the seller to unilateral terminate the contract, Dutch Supreme Court 7 December 2018, ECLI:NL:PHR:2018:692, NJB 2018, 2302; AJ Feenstra, 'Het aanbod tot betaling van schadevergoeding en kosten in art 6:86: harmonie- of conflictmodel?' (1998) WPNR 6319; Stolp (n 536) 122 *ff*.

541 This reflects the so-called 'promise-principle'; Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press 2015).

542 Fried (n 541); Dori Kimel, 'Neutrality, Autonomy, and Freedom in Contract' (2001) 21 OJLS 473; Dori Kimel, *From Promise to Contract: towards a liberal theory of contract theory of contract* (Hart Publishing 2003).

543 Mak (n 527) 59.

544 *Vaderschapsactie* Dutch Supreme Court 22 September 2000, ECLI:NL:HR:2000:AA7204, NJ 2001, 647.

545 *Baris v Riezenkamp* Dutch Supreme Court 15 November 1957, ECLI:NL:PHR:1957:AG2023, NJ 1958, 67; *Van Oosterom v Majoor* Dutch Supreme Court 16 January 1981, ECLI:NL:PHR:1981:AG4132, NJ 1981, 426; *Stuyvers' Beheer v Eugster* Dutch Supreme Court 15 May 1981, ECLI:NL:HR:1981:AG4190, NJ 1982, 85; *Plas v Valburg* Dutch Supreme Court 18 June 1982, ECLI:NL:PHR:1982:AG4405, NJ 1983, 723; *VSH v Shell* Dutch Supreme Court 23 October 1987, ECLI:NL:PHR:1987:AD0018, NJ 1988, 1017; *Vogelaar v Skil* Dutch Supreme Court 31 May 1991, ECLI:NL:HR:1991:ZC0255, NJ 1991, 647; *Beliën v provincie Noord-Brabant* Dutch Supreme Court 24 March 1995, ECLI:NL:HR:1995:ZC1674, NJ 1995, 569; *ABB v Staat* Dutch Supreme Court 4 October 1996, ECLI:NL:HR:1996:ZC2158, NJ 1997, 65; *De Ruijterij v MBO Ruiters* Dutch Supreme Court 14 June 1996, ECLI:NL:HR:1996:ZC2105, NJ 1997, 481; *CBB v JPO Projecten* Dutch Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7337, NJ 2005, 467.

amongst other elements, a failure in performance is not required for granting a claim for enforced performance. This proposition accords with the statutory principle that voluntary performance of a contractual promise and an enforced performance have the same juridical effect (*i.e.* ownership is transferred and the buyer obtains possession of the thing sold).[546] However, it may also be said that in certain cases it is not possible for the courts to deliver a judgement for enforced performance which would provide the aggrieved party exactly what it bargained for because, for example, materials are no longer available, or the promisor can only be forced to repair the defects.[547] Further, the nature of the obligation can make it impossible for a court to provide an order for enforced performance of the initially agreed obligations.[548] Moreover, any such order can include a sanction for non-compliance, although this obligation was initially not a part of the contract. Based on these arguments it may be said that an order for enforced performance may not, in every circumstance, compel the promisor to perform exactly what it promised to do, and in these situations it is, therefore, merely a substitute for the initial promise – like damages, repair, and replacement.

90. An action to persuade enforced performance of a contractual promise in the civil law system of the Netherlands is regarded as a positive security measure to ensure the performance of contractual promises. Therefore, the statutory actions discussed below to enforce performance of a contract are based on the promises made by the contracting parties, in contrast to remedies of damages and (extra)judicial termination of a contract, which are regarded as remedies for failure in performance of a contractual promise in Dutch contract law.[549] For that reason, it is not unsurprising that in the layered structure of the Dutch Civil Code, the right of action to obtain enforced performance precedes the provisions for damages and termination of a contract. To put this into context: the action to obtain enforced performance of a contractual promise by the promisor is a statutory principle which follows from the General Provisions on Patrimonial Law,[550] applying to all legal duties to bring about a certain effect, such as the seller's and buyer's non-monetary obligations and rights resulting from the act of concluding a commercial sales contract.[551] The statutory provision for the right of action entails the rule that the person obliged to give, to do or not to do something, may be subject to an order for enforced performance, on demand by the person to whom the obligation is owed, in accordance with the agreed

546 Art 3:297 DCC.
547 *E.g.,* contracts entailing the sale of goods or construction of works.
548 *E.g.,* obligations with a personal character.
549 Haas 2009 (n 206); Floris Bakels, 'Ontbinding van wederkerige overeenkomsten' (Dphil thesis, Leiden University 1994) 27–28.
550 Book 3 Patrimonial Law in General.
551 S 3.2.

terms.[552] A claim for enforcement of a contractual promise, entailing the obligation to perform a positive or negative act,[553] may be combined with a *lex specialis* if applicable, which can be found in subsequent chapters of the Dutch Civil Code. In addition, the earlier mentioned General Provisions on Patrimonial Law, preceding the *lex specialis*, entail the instrument of authorisation of the promisee by the court to perform the thing the promisor promised to do (section 7.3).[554] The second instrument is the replacement of the promised act by a decision of the court or by the act of a court-appointed representative.[555] The aforementioned instruments replace the act of the promisor with the objective to provide the promisee with the thing which would have resulted from the performance. However, as shown below, these instruments are not available as of right to the promisee and, moreover, the judicial instrument of authorisation of the promisee is only available after a failure in performance by the promisor.

91. The primary focus on the right to performance of a contractual promise under the contract law of the Netherlands is reflected in the statutory provision that it is not at the discretion of the court to deny a claim for enforced performance unless it otherwise follows from the law, the nature of the obligation (*e.g.* a personal obligation), and a juridical act (*e.g.* derogatory agreements).[556] In other words, the court must award a claim for enforced performance except where one of the exceptions (*i.e.* non-actionable obligations) applies.[557] As mentioned earlier, for situations where an enforceable obligation is not yet due, the court may order its performance subject to the condition that enforcement is allowed only after lapse of the time of performance and the promisor failed to act in accordance with this stipulation.[558] These statutory provisions result from the notion that contractual promises are binding. This favourable view to protecting performance interest is also embedded in the principle that damages and setting aside of the contract is only available when the non-performance is caused by an attributable failure in performance by the promisor, and the latter is in default.[559] It follows from the rules on default and inextricably linked statutory limitations that damages and setting aside of the contract are subject to

552 Art 3:296(1) DCC; one example of an order not to do something can be found in the provisions for misleading and comparative advertising, which entails the right of the promisee to demand the promisor to cease making such information public or from causing it to be made public and also, if appropriate, to order the promisor to publish a correction of the unpermitted advertising (read art 3:296(1) DCC in conjunction with arts 6:194,6:196 of the DCC).

553 Sieburgh, *Asser 6-I* (n 363) para 21.

554 Art 3:299(1)(2) DCC; Sieburgh, *Asser 6-I* (n 363) para 20.

555 Art 3:300(1) DCC; Sieburgh, *Asser 6-I* (n 363) para 20.

556 Art 3:296(1) DCC.

557 De Jong, Krans and Wissink 2018 (n 194) 9, 12.

558 Arts 3:296(2), 6:39(1) DCC; De Jong, Krans and Wissink 2018 (n 194) 222; Sieburgh, *Asser 6-I* (n 363) para 246.

559 Arts 6:74(2), 6: 87(1) DCC.

specific thresholds.[560] This does not mean that a promisee is forced to opt first for enforced performance. Initially, it may claim for other judicial actions, such as damages and setting aside of the contract, provided that the applicable requirements are fulfilled. Nonetheless, the preference for performance of obligations is embedded in various principles such as the statutory right to demand performance (within a reasonable time) of a contractual performance in the case no term has been set for performance,[561] and the provision that an aggrieved party may only refuse performance offered by the promisor after commencement of its default when the offer does not include payment of damages.[562] It may, therefore, be said that the notion of performance as the preferred remedy for a failed performance goes both ways. There are, however, numerous exceptions which considerably affect the status of enforced performance, and hence also the right of the aggrieved party to choose enforced performance over damages and termination of the contract. It may be said that these exceptions are based on the principle of adequacy, in the sense that an order for enforced performance is not available if this instrument is not capable of curing the non-performance.[563] This may occur, for example, when performance is impossible in law or fact when it is evident from the attitude or notice of the promisor that it will not perform, and where a contractual or statutory time limit for performance has expired.[564] A court may also refuse a claim for enforced performance when enforcement would result in a disproportionate burden.[565] The proportionality principle may be invoked on the account of the statutory principle that an aggrieved party is not entitled to exercise its right to require enforced performance to the extent that its exercise constitutes an abuse,[566] and on the basis of the statutory principle that parties are bound to act in accordance with the requirement of reasonableness and fairness.[567] Case law has interpreted the latter as an obligation of the aggrieved party to take into account the justified interest of the promisor when selecting the appropriate judicial action.[568] This effectively means that the freedom of the aggrieved promisee to choose for a remedy can be limited to damages. From the interplay between the principle of abuse of right, the standard of reasonableness and fairness, and the applicable case law, it follows that the performance interest of the promisee

560 Read arts 6:74(2), 6:265(2) in conjunction with art 6:81 DCC *ff*; Stolp (n 536) 263; See n 535 for the rules on the promisor's default.

561 Dutch Parliamentary History Book 6 (n 207) 170; Art 6:38 DCC.

562 Art 6:86 DCC.

563 Stolp (n 536) 264.

564 Ss 7.2.2 and 7.2.3.

565 S 7.2.3.

566 Art 3:13(1) DCC.

567 Arts 6:2(1), 6:248(1) DCC.

568 *Baris v Riezenkamp* (n 545); *Mulitvastgoed v Nethou* Dutch Supreme Court 5 January 2001, ECLI:NL:PHR:2001:AA9311, NJ 2001, 79, para 3.5; MBM Loos in Schelhaas 2002 (n 19) 355; MAMC van den Berg, 'De keuze tussen nakoming, schadevergoeding of ontbinding en de belangen van de crediteur' (2001) 6439 WPNR 299; M Veldman, 'Grenzen aan het recht op nakoming' (2001) 6455 WPNR 736.

must be balanced against the seriousness of the failure of performance, the availability of guarantees and the possibility that a less far-reaching remedial measure could also serve the purpose of the contract.[569] As a consequence, a claim for enforced performance may be refused if judicial enforcement would impose an unreasonable burden on the promisor and enforced performance is not more beneficial to the aggrieved party than another remedial measure. However, due consideration should be given to the principle that consent of the aggrieved party is required for an alternative method of performance, even where the offered alternative is equal or even greater in value than the initially agreed performance.[570] In this light, a promisor cannot ignore the performance interest of the aggrieved party by paying mere damages instead of performing the contract.[571] Based on the findings above, it may be said that the difference in impact between the right to require performance in the civil law system of the Netherlands, and the exceptional nature of an order for enforced performance in common law jurisdictions is lessened by the interplay in the Dutch contract law system between the numerous statutory limitations on the right to require performance and the reciprocal basis of the freedom of both parties to select specific remedial measures to cure a failed performance.[572] It must be added that the latter should be considered in light of the restricted discretionary power of Dutch judicature which does not allow the court to determine on its own motion the appropriateness of a judicial action in a given situation.[573]

As for the internal hierarchy between the available performance remedies for commercial sales, the contract law of the Netherlands adopted the principle that where the thing delivered does not conform to the contract, the aggrieved buyer may require delivery of that which is missing, repair of the thing delivered, provided that the seller can reasonably comply therewith, and replacement unless the variance from that which was agreed is too insignificant to justify this.[574] This statutory provision may be seen as an application of the principle of proportionality, in the sense that it requires a balancing of costs and benefits of the selected performance remedy. Moreover, it appears that the overarching subsidiarity principle applies to the extent that it requires a balancing of the impact of the entire remedial arsenal in this context, that is: repair, replacement and damages.

569 Sieburgh, *Asser 6-I* (n 363) para 240 in conjunction with the considerations T Hartlief and RPJL Tjittes, 'Kroniek van het vermogensrecht' (2001) v 76 Nederlands Juristenblad 1459, 1464; Mak (n 527) 94.

570 Art 6:45 DCC; District Court Gelderland 18 December 2015, ECLI:NL:RBGEL:2015:8280.

571 *Meegdes v Meegdes* Dutch Supreme Court 21 December 1956, NJ 1957, 126; Mak (n 527) 92.

572 See for support of this view Hartlief and Tjittes (n 569) 1464.

573 *Mol v Meijer* Dutch Supreme Court 4 February 2000, ECLI:NL:PHR:2000:AA4728, NJ 2000, 562 para 6.c annotation JBM Vranken.

574 Art 7:21(1) DCC.

4.2.3 Exceptional nature of enforced performance in Singapor

92. This section attempts to unravel the complexities surrounding an action for enforced performance of an obligation (monetary and non-monetary) arising from a commercial sales contract governed by the contract law of Singapore. The starting point is an introductory discussion of the underpinnings of the approach taken by the English common law system, because this is the foundation of Singapore contract law. The history of English contract law starts with the development of a *writ of covenant* which was only available for specific contractual obligations laid down in a deed (*e.g.* obligations concerning the conveyance of real property).[575] This ancient document was the source for an action to enforce performance and not the act of promise making, which explains that even today a grant or gift agreement must be laid down in a deed. Aside from the writ of covenant, common law also acknowledged a *writ of debt* which was used to enforce payment of a monetary debt and the delivery of designated goods if an action for a *writ of debt* was brought to court.[576] However, this would not lead to enforcement of a non-monetary obligation as the common law courts followed the adage that a party in breach might lose his property, but not his liberty.[577] Thus, if a promisor did not obey an order to deliver the goods, the common law court would order the sale of the goods instead of enforcement of the contract. For this reason, it is said that the maxim in civil law jurisdictions, *nemo ad factum praecise cogi potest*, which means nobody can be forced to a specific act, is similar to the English common law principle that a non-performing party might lose his property, but not his liberty.[578] Due to procedural and practical issues with a writ of debt, the writ of *assumpsit* (founded on the writ of trespass), as a measure for an unlawful act, became the foundation of an action to claim damages for failure in performance of a contractual promise.[579] The nature of this instrument explains that default and a second chance for performance are not required when seeking relief for failure in performance of a contract (the gist of the action being tort, and not breach of contract).

93. In time, the common law courts came to be seen to be too strict when concerned with disputes regarding a breach of a contractual obligation not laid down in a deed because they did not take into account the specific circumstances of the cases in question and could

575 Zwalve (n 448) 481.

576 F Pollock and FW Maitland, *The History of English Law before the Time of Edward I* (2nd edn, Liberty Fund 2010) 79; JH Baker, *Introduction to English Legal History* (4th edn, Oxford University Press 2007) 18; Mercantile Law Amendment 1856; HS Bowen, *Outlines of Specific Performance* (HeinOnline legal classics library, William S. Hein & Company 2018); Zwalve (n 448) 487.

577 *Hill v CA Parsons Ltd* [1971] 3 All ER 1345 at 1359.

578 Sir Fry Edward, *A Treatise on the Specific Performance of Contracts, Including Those of Public Companies* (2nd edn, W.C. Little 1861) 572.

579 Zwalve (n 448) 493 *ff.*

not order enforced performance of non-monetary obligations.[580] As a result, the Court of Chancery became concerned with individual cases to correct injustice and to soften and reduce the extremity of the law by providing equitable remedies, such as specific performance (enforcement of non-monetary performance obligations) and injunction orders (to refrain from doing something).[581] However, equitable remedies only fulfilled a supplementary or a corrective role when it was determined necessary.[582] It was recognised that this line of thought could lead to inequality if no consistent rules were followed. Therefore, a system of principles for awarding equitable remedies was developed.[583] In the nineteenth century, the work of the Court of the Chancery and the courts of Common Law overlapped to a great extent, eventually leading to the consolidation of these courts, by the Judiciary Act of 1873, into the Supreme Court of Judicature.[584] With the abolition of the Chancery and the common law courts, the Supreme Court became empowered to administer law and equity.[585] A Chancery Division of the High Court was empowered to handle contracts relating to land; even if the plaintiff claimed damages in the Common Law court and the defendant brought a counterclaim to this court for enforcement of a non-monetary obligation under a contract of lease, the whole procedure could be transferred to the Chancery Division.[586] However, in the overall framework of English contract law, a claim for enforcement of non-monetary contractual obligations remained a secondary remedy for non-performance due to the notion that such a claim is not available where damages are adequate.[587]

94. Singapore courts are only entitled to grant or deny a claim for enforced performance of non-monetary obligations within the boundaries of precedent and the applicable principles.[588] Despite these boundaries, the Singapore Court of Appeal considered in *Tay Ah Poon and another v Chionh Hai Guan and another* that the right of the court to award or deny a claim for enforced performance of non-monetary obligations exists independently of any contractual provision because it is at the discretion of the court to decide whether such a claim should be awarded or not.[589] As said before, this discretion is limited by

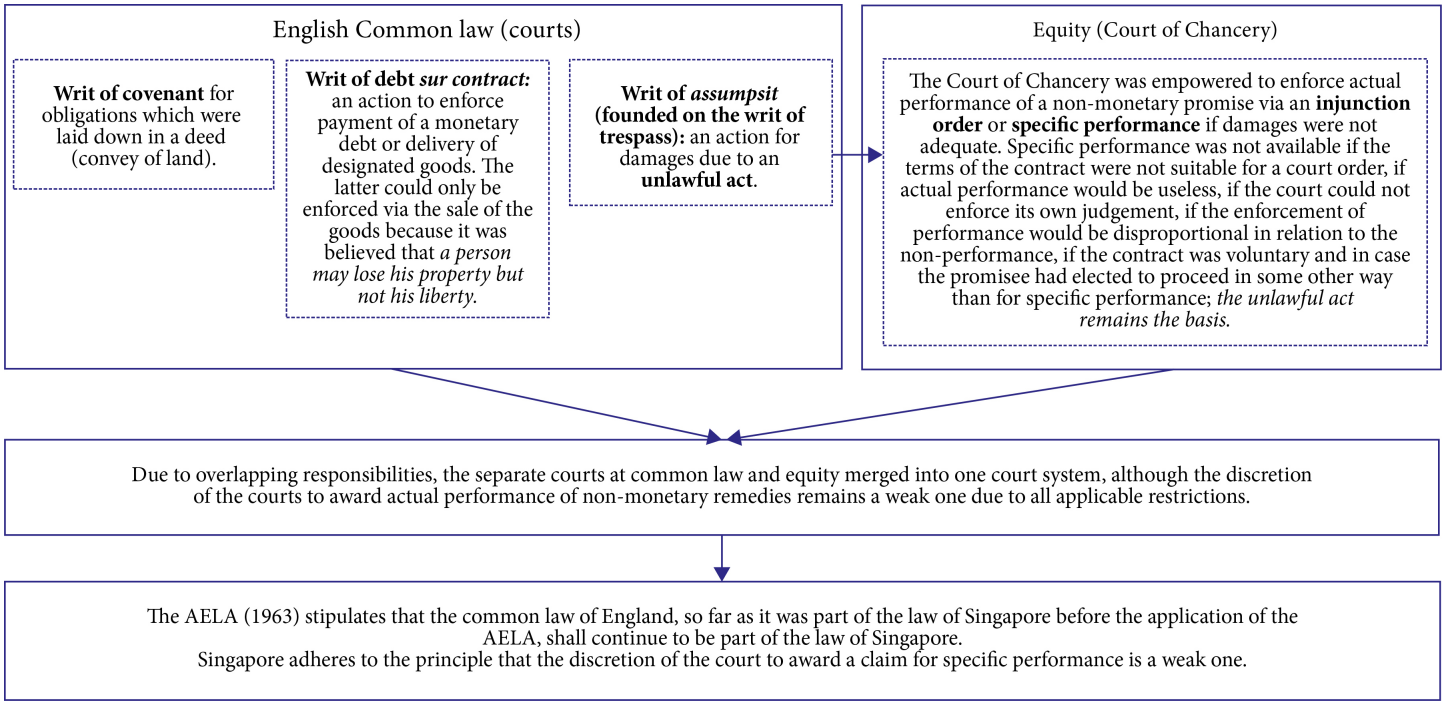
580 Zwalve (n 448) 617.
581 Baker (n 576) 106.
582 Zwalve (n 448) 48.
583 Baker (n 576) 106, 109–111.
584 Supreme Court Judicature Act 1873 36 & 37 Vict c. 66. Also, note that the Supreme Court of Judicature was subdivided into the High Court of Justice and the Court of Appeal.
585 Baker (n 576) 114–115.
586 *Ibid.*
587 Fry (n 578) 572; Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20(1) Oxford Journal of Legal Studies 20.
588 Phang et al 2012 (n 112) para 20.005; It is also suggested that the Court of Appeal is not bound by precedent, judicial custom and decorum, as well as the practical impact of an all too regular disregard of prior precedent.
589 *Tay Ah Poon and another v Chionh Hai Guan and another* [1997] 1 SLR(R) 596 [13] (SGCA).

existing rules and principles, and[590] therefore it may be said that – as with the English common law system – in Singapore also the discretion of the court to award a claim for enforced performance of non-monetary obligations is a weak one.[591] For the sake of efficiency, the flowchart in Figure 10 below provides a brief summary of the discussed historical foundations.

590 *Koek Tiang Kung v Antara Bumi Sdn Bhd* [2005] 4 MLJ 525 [16].

591 *Lee Chee Wei v Tan Hor Peow Victor* [2007] SGCA 22, (2007) 3 SLR(R) 537 [52]-[53].

Figure 10 Historical underpinnings of specific remedies in Singapore



95. The following builds further on the findings set out above by analysing the modern view of the contract law of Singapore on the ability of commercial parties to enforce a contractual promise by means of specific remedies, entailing an action for an agreed sum (common law measure) and the discretionary (equitable) instrument to provide an order for enforced performance of a non-monetary promise.[592] The latter encompasses the judicial action of specific performance and (mandatory) injunction. The term specific performance applies where the aggrieved party claims for enforced performance of a non-monetary act to do something – for example, the obligation to deliver the goods in accordance with the agreed terms. An injunction order is appropriate where the aggrieved party brings an action to court for the obligation of the other party not to do something (*e.g.* a supplier of commodity goods is ordered to not cease supplying the goods it has promised [148]).

96. Before tapping into the intricacies of the legal tools available to enforce performance of non-monetary obligations arising from a commercial sales contract governed by the contract law of Singapore, the relationship between a contractual promise and specific remedies shall first be discussed. In the English case (which is to this day of influence in Singapore) *Photo Production Ltd v Securicor Transport Ltd* it was held by Lord Diplock that a commercial sales contract 'is the source of primary legal obligations upon each party to it to procure whatever he has promised will be done is done'.[593] It was further held that contractual promises are regarded as morally binding,[594] but they do not entitle the promisee to enforce performance of the contract.[595] This notion is also embedded in the principle of *neminem laede.* This so-called harm principle represents the view that the state is not entitled to restrict the personal freedom of contracting parties if there is no (expected) failure in performance of a contractual promise.[596] An infringement of the obligation not to harm the other contracting party does not entitle the aggrieved party to claim for enforced performance, but the aggrieved party may sue for any harm caused by an order for damages or specific remedies,[597] provided that applicable preconditions are fulfilled.[598] Importantly, only a non-excusable failure in performance (in common law terms: a breach of contract) allows the promisee to seek protection of its performance interest by means of a judicial

592 Phang et al 2012 (n 112) para 23.002.
593 [1980] AC 848 (HL).
594 *Ibid.*
595 Fried (n 541) 17; Kimel 2003 (n 542) 22 *ff, 30*; Mak (n 527) 48.
596 SA Smith, *Contract Theory* (Oxford University Press 2004) 69; J Raz, *The Morality of Freedom* (Clarendon Press, 1986) 400–401.
597 Mak (n 527) 51.
598 S 4.3.3 for monetary obligations and s 4.4.3 for non-monetary obligations.

claim for damages or specific remedies.[599] A failure in performance may be lawfully excused where performance is frustrated, where a contractual *force majeure clause* applies,[600] or on the basis of a subsequent agreement between the parties.[601] Thus, an action for a specific remedy may be invoked on a non-excused failure in performance of a contractual obligation.[602] As presented earlier, this approach historically originates in the English common law writ of trespass, which is basically an action for an unlawful act.

97. Furthermore, it should be observed that under the contract law of Singapore, a contractual promise can entail promissory and contingent obligations, which are reflected in the terms of a contract. A term of the contract is qualified as contingent if it stipulates that a certain event must arise before the contracting parties are obliged to perform their obligations under the contract.[603] For example, the obligation to acquire the approval of a third party before the parties become obliged to enforced performance of their contractual promises.[604] A contractual term is also considered as contingent if the clause stipulates that the obligations of the contracting parties, which arise from their promises, end at the moment the described situation occurs.[605] The aforementioned conditions precedent or subsequent to the initially agreed contractual promises cannot be breached under Singapore contract law and are, therefore, not subject to an action for enforced performance, damages, or termination.[606] In contrast, where parties fail to perform the promissory terms of a contract, the aggrieved party may bring an action to court for damages or, where appropriate, for specific remedies.[607] Aside from a failure in performance of a promissory term, renunciation of a contract, before or after the due date,[608] may also invoke an action for relief by means of damages or specific remedies. A situation of renunciation arises in

599 D Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 193, 201; Phang et al 2012 (n 112) para 17.003.

600 See s 6.2 for an in-depth discussion about the distinction between the doctrine of *force majeure* and the doctrine of frustration; see for the application of a clause of *force majeure Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* [1996] 2 SLR (R) 316 [60] (SGHC), affirmed in *China resources (S) Pte Ltd v Magenta Resources (S) Pte Ltd* [1997] 1 SLR (R) 103 (SGCA); *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR (R) 413 [53], [54] (SGCA); Phang et al 2012 (n 112) paras 18.004, 18.005.

601 Phang et al 2012 (n 112) paras 17.002, 18.001 *ff*, 18.042 *ff*.

602 See the English cases *Scott v Corp of Liverpool* [1885] 1 Giff 216, 65 E.R. 851, affirmed in *Scott v Corp of Liverpool* [1885] 3 De G & J 334, 44 E.R. 1297; *Abbot v Blair* [1860] 8 WR 672 and *Douglas v Sidmouth Rly & Harbour Co* [1866] 14 WR 361; this position is affirmed for Singapore in Phang et al 2012 (n 112) para 23.070.

603 Phang et al 2012 (n 112) paras 17.084, 17.085.

604 *Chiang Hong (Pte) Ltd v Ong Boon Pok Realty (Pte) Ltd* [1983–1984] SLR (R) 481 [17] (SGCA); Phang et al 2012 (n 112) para 17.085.

605 *Loh Wee Tin v Transvic Investment Pte Ltd* [1995] 2 SLR (R) 251 [15], [16]; Phang et al 2012 (n 112) para 17.085.

606 Phang et al 2012 (n 112) para 17.004.

607 Phang et al 2012 (n 112) paras 17.004, 17.087.

608 Phang et al 2012 (n 112) para 17.005.

the event the promisor expressly or implicitly states that it is not willing to (fully) perform the contract in accordance with the agreed terms.[609] In a situation where the promisor fails to perform a contractual obligation on the basis of alleged financial impossibility, the aggrieved party may also seek recourse to specific remedies.[610] It may, however, not be tacitly assumed that an action for enforced performance of non-monetary obligations (*i.e.* specific remedy/performance) is readily available in the aforementioned situations – in fact quite the opposite; an order of enforced performance of non-monetary obligations is only available as a subsidiary remedy in relation to damages. See section 4.4.3 for an in-depth discussion about this barrier for obtaining enforced performance of non-monetary obligations to do something under a commercial (sales) contract.

98. In the case of a failure in performance of a contractual obligation arising from a commercial sales contract, the aggrieved party may choose between an action for a specific remedy (provided that the preconditions are met) and damages and/or setting aside of the entire contract. The fundamental notion is that the aggrieved party may claim for enforced performance at the outset and during the procedure. This means in effect that where the aggrieved party selects a remedy at the commencement of the judicial proceeding,[611] the court is obliged to give leave if the promisee first demanded enforcement of performance and subsequently terminates the contract and claims damages.[612] By contrast, if the promisee makes an unmistakable choice for termination of the contract because of a failure in performance, it loses the right to bring a claim to court for enforced performance and is, accordingly, only entitled to damages.[613] For example, in a case where a contract had been brought to an end by one of the contracting parties, the Singapore Court of Appeal considered that the contracting parties could not thereafter insist on enforced performance of the contract.[614] Having said that, the argument of the promisor that the promisee has terminated the contract and is, therefore, only entitled to damages, is not easily accepted; it has to be ascertained that the promisee has made an unequivocal choice.[615] In the Singapore High Court case, *Lim Beng Cheng v Lim Ngee Sing* it was argued that an order for enforced performance could not be provided because the plaintiff demanded, before

609 Phang et al 2012 (n 112) para 17.005.

610 See s 4.3.3 for monetary obligations and s 4.4.3 for non-monetary obligations.

611 *Indian Overseas Bank v Cheng Lai Geok* [1991] 2 SLR (R) 574 [54] (SGHC), affirmed in part in *Indian Overseas Bank v Cheng Lai Geok* [1993] 1 SLR (R) 32 (SGCA) and *Lee Chee Wei* 2007 (n 591) SLR (R) 537 [66]; See the English case *Johnson v Agnew* [1980] AC 367 at 392–394.

612 Phang et al 2012 (n 112) paras 23.078 (footnote 135), 23.079.

613 In the absence of any contradicting Singapore rulings, it is believed that this English common law principle applies in Singapore. See Phang et al 2012 (n 112) para 23.079 and the English case *Johnson v Agnew* (n 611).

614 *Lee Christina v Lee Eunice and another (executors of the estate of Lee Teck Soon, deceased)* [1993] SGCA 56, 2 SLR(R) 644; [1993]; see also the English case *Johnson v Agnew* (n 611) AC 367 [392].

615 *Lim Beng Cheng v Lim Ngee Sing* [2016] SGHC 282, (2015) 1 SLR 524.

the commencement of the trial, via email, SGD $200,000 plus losses. The court did not adopt this view and considered that the plaintiff was at wit's end and just wanted to settle the dispute. As a result, the court considered that the plaintiff did not unequivocally choose to waive his rights to claim enforced performance of the contract.[616] In contrast, in *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* the buyer brought a claim to court for enforced performance. However, the court granted damages in lieu of an order for enforced performance because the property was already sold to a third party. The parties agreed that the seller was obliged to deposit the damages pending the appeal. The court considered that by demanding and accepting the deposit of damages, the buyer elected to be relieved via damages.[617] Subsequently, the buyer was precluded from claiming enforced performance.[618] The election for damages could not be reversed by an appeal against the court order for monetary compensation without causing any injustice to the sellers.[619] Having said that, a dissenting judge held, briefly put, that it was difficult to see any firm basis for the conclusion that insisting on the deposit had induced the seller to believe that the buyer had relinquished its claim to enforced performance of the contract.[620]

99. Since the contract law of Singapore makes a fundamental distinction between an action for enforcement of specific remedies and damages, it is interesting to look at the preconditions for the freedom to choose between the available judicial actions. The starting point is the principle that a promisee has a right to choose between the termination of the contract and damages or to insist on performance and claim the agreed sum.[621] This principle is developed in the English case *White and Carter (Councils) Ltd v McGregor*,[622] which equally applies in Singapore contract law.[623] This case concerned a contract for advertisements on litter bins. The plaintiffs sold advertising on litter bins, and the defendant was a garage who agreed to an advertisement contract for three years. The same day the contract was drawn up, the garage terminated the contract, which made it an anticipatory breach. The advertiser did not accept the termination and affirmed the contract (if the advertiser had accepted the breach, all outstanding obligations would have been discharged and, as a result, the advertiser was only entitled to nominal damages).[624] After three years, the advertiser had fulfilled its part of the contract and claimed the price. The court ruled

616 *Ibid.*
617 *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1983-1984] SGCA (Privacy Council) 24 [20, 21 28, 29, 33], (1984) 6 SLR (R) 668.
618 *Meng Leong Development* (n 617) SGCA 24 [21, 33].
619 *Ibid.*
620 *Ibid* [37, 39].
621 See the English case *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL).
622 *Ibid.*
623 *MP Bilt Pte Ltd v Oey Widarto* [1999] 1 SLR(R) 908 (SGHC); Phang et al 2012 (n 112) paras 17.234 - 17.241.
624 Phang et al 2012 (n 112) para 17.229.

that the garage has breached a conditional term, and therefore, the advertiser was allowed to terminate the contract and claim damages or to insist on performance and claim the agreed price for its performance.[625] In addition, the court considered that the advertiser was not obliged to mitigate its losses because it claimed the performance of the contract instead of damages.

100. What is noteworthy and consistent with civilian law systems is that this case shows a strong focus on protection of the performance interest.[626] Another interesting aspect of this case is that the advertiser was not obliged to mitigate its losses, and could affirm the contract. It was further considered that the garage could not force the advertiser to accept its breach; that the advertiser was entitled to perform the contract and claim the price at the end of the contractual period as long as the advertiser fulfilled its obligations. The controversy, in this case, was that performance of the contract made no commercial sense and, therefore, was considered a waste of time and money because the advertiser knew from the beginning of the contract that the garage did not want to be a part of the contract and that it was not willing to pay the agreed price. To mitigate this side-effect of the right to claim the price of the contract, the following three limitations were formulated. First, a claim for a contractual price can only be awarded if the plaintiff has a legitimate interest in the performance of the contract.[627] Secondly, that a promisee is only entitled to claim the price of the contract or damages if the promisor can render its performance without cooperation of his counterpart. The final requirement for the assertion of the right to claim the contractual price by the promisee follows from the so-called doctrine of reciprocity, which can be used by the courts to deny a claim for enforced performance of non-monetary obligations. The doctrine of reciprocity entails the principle that the court shall not order the promisor to do what the latter had promised under the contract if the counterparty did not, cannot, or will not, render performance of its own obligations.[628] This means that the latter is obliged to show that it shall perform its part of the contract. The first two

625 See in the same vein, JW Carter, Andrew Phang and Sock-Yong Phang, 'Performance Following Repudiation: Legal and Economic Interests' (1999) 15(2) The Journal of Contract Law 97, 99.

626 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 13.

627 However, a commercial interest can already be enough to be qualified as legitimate interest. In comparison, under Dutch law, the promisee is obliged to show that it has sufficient interest in claiming specific performance if the contractual obligation is not yet due.

628 *Indulge Food Pte Ltd v Torabi Marashi Bahram* [2010] 2 SLR 540 (SGHC); Compare art 6:263(1) DCC stipulating that the party who is obliged to perform first, is nevertheless entitled to protect its interest by suspension of performance if, after entering the contract, circumstances occur which give rise to the suspicion that the other party will not perform its part of the bargain. Art 6:52(1) DCC is the lex generalis of aforementioned art 6:262 DCC. The former entails the basic right of a promisee to suspend an obligation, which is exigible against the promisor, until the latter has performed his obligation. The promisee is only entitled to suspension if there is sufficient connection between the claim and the obligation.

requirements are said to impose very limited restrictions on the right to claim the contractual price (enforced performance) and therefore,[629] it could be held that the strong focus on performance interest of monetary obligations remains unaffected. Nonetheless, the case *White and Cartner* demonstrates a balancing of interests of contracting parties by taking into account the legitimate interest of the aggrieved party in obtaining an order for enforcement versus the fairness of subjecting the non-performing party to unnecessary losses or burdens. Although *White and Cartner* concerned a claim for the agreed price, the courts may draw inspiration from the aformentioned balancing of interest of contracting parties when confronted with a claim for enforced performance of non-monetary obligations deriving from a commercial sales contract. However, on account of the case law today it is not possible to assess the restrictive implications of this premise.

4.2.4 A compromise of principles in China

101. The development of the right to claim enforced performance of a sales contract under Chinese contract law can be divided into three distinct stages. Firstly, the introduction of the civil law in ancient China due to the pressure from western countries. Secondly, the extreme emphasis on performance of a contract under the centrally planned economy and, thirdly, the gradual movement towards a market economy and with it a more balanced approach towards the right to actual performance of a contract.

From 1929 until 1949, the Civil Code of the Republic of China (CCRC) was in force in Mainland China. This civil code stipulated, in line with the civil law adage that a contractual promise is binding, that every person is bound to perform his obligations and that the promisor is responsible for his acts, even if they are unintentional or due to its fault.[630] To enforce this obligation, the CCRC stipulated that execution of actual performance and additional damages could be claimed by the promisee if the promisor fully or partially failed to perform his obligation. In line with the civil code tradition, the promisor had to be in default before the promisee could enforce these rights.[631] In 1949, after the CCRC was discarded, a period of contractual legal nihilism followed due to China's objective of establishing a planned economy [30]. Nonetheless, from 1949 until 1959 a number of contractual regulations were still in force due to the gradual implementation of a planned economy framework. In the 1950s, for example, the Trade Ministry of the Central People's Government introduced a rule that in certain situations of non-performance, damages are

629 D Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156).

630 Arts 219 and 220 Civil Code of the Republic of China (1929).

631 Art 229 Civil Code of the Republic of China (1929) *ff*.

available to the promisee.[632] Further, contracting parties were entitled to modify and terminate a contract, and moreover, the promisee had the right to reject the entire performance of a supplier.[633] From 1956 onwards, more emphasis was put on developing a centrally planned economy which encompassed the belief that all contracts should serve, and were a part of, the overarching plan of the state.[634] This meant that contracting parties were obliged to perform the contract, even if damages were paid, and the contract could not be modified or terminated without the permission of the authority.[635] The former also applied if the state plan was no longer in line with the purpose of the contract.[636]

102. In the centrally planned economy, there was also no need for an award for damages because there was no market where an alternative could be purchased,[637] which meant that the promisee could not be placed in the position it would have been in if the contract was properly performed.[638] From 1978 onwards, this system of extreme emphasis on the performance of a contract gradually changed due to economic reforms. In 1982, this led to the promulgation of the Economic Contract Law of China (ECL), which was introduced to regulate domestic contracts.[639] In 1985, the Law of the People's Republic of China on Economic Contracts involving Foreign Interest came into force (FECL).[640] In 1986, the General Principles of Civil Law (GPCL) came into force, which governed contracts which were not subject to these special regulations, such as civil contracts.[641] The introduction of the ECL, FECL and GPCL led to a distinction between economic and civil contracts, whereby economic contracts were said to serve the state plan, and therefore, more emphasis

632 Trade Ministry of the Central People's Government, *The Decision on the Careful Signing and Strict Enforcement of Contract,* 13 October 1950.

633 Corporation of China, *The Common Terms of Supply Contract in General Merchandise,* 1 July 1960.

634 Kimel 2016 (n 224) 18, 19; Bing Ling 2002 (n 229) para 8.065.

635 Han Shiyuan, 'The Performance Interest in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 23; Liming 2016 (n 224) 18, 19; Heavy Industry Ministry, *Interim Basic Stipulations of Contract on Supply Goods*; Art 2 *The Notice about Strictly Following the Procedure of Project Contract and Strict Enforcement for Economic Contract,* issued on 10 December 1960.

636 Wang Liming, 'Specific Performance in Chinese Contract Law: An East-West Comparison' (1992) 1(2) Asia Pacific Law Review 18, 19; State Planning Committee, State Economic Committee, The First Industrial Ministry, *Decree No 985,* 8 June 1962. See State Planning Committee and State Economic Committee *Decree No 1204,* 29 June 1962 and State Economic Committee *Provisional Regulations Concerning the Basic Provision of Contract for the Ordering of Factory and Mining Goods,* 30 August 1963.

637 Liming 1992 (n 636) 19.

638 Han Shiyuan, 'The Performance Interest in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 23.

639 (n 159).

640 (n 160).

641 (n 163).

was put on the performance of these contracts.[642] In 1999, the Contract Law of the People's Republic of China replaced the ECL and the FECL.[643]

103. Under the ECL, a distinction was made between contracts subject to mandatory and to instructive (guidance) State plans. A contract which was subject to a mandatory plan and/or included important productive means had to be performed.[644] However, if a contract was subject to an instructive plan (a so-called economic contract) the aggrieved party was entitled to choose to sue for actual performance or damages, or both.[645] The mandatory provision in the ECL stipulated that when a party fails to perform an economic contract, it is obliged to pay the liquidated damages and if the monetary loss exceeds the liquidated damages, it is also obliged to pay the excess. However, if the aggrieved party demanded actual performance of the contract, the latter was obliged to perform in accordance with the contract.[646] The right to request actual performance was basically unrestricted.[647] Consequently, the later discussed obstacles in the form of impossibility at law or in fact, the suitability of the subject matter of the contract, costs of performance and the time within which the aggrieved party has requested performance, were not present in the ECL.[648] This lack of restrictions for claiming actual performance of an economic contract is also reflected in the Supreme People's Court Opinion on the Implementation of the ECL, which indicates that payment of (liquidated) damages does not remove the right to claim delivery of the goods (or services) in accordance with the terms of the contract.[649]

The emphasis on the right to demand actual performance under the ECL is also expressed in the principle that an economic contract could only be terminated if it did not harm the interest of the state or the public if *force majeure* made performance impossible and if the contract was not performed within the agreed time limit.[650] Also, the Civil Procedure Law shows the preference of China for the actual performance of a contract. The principles described above reflect the idea, which prevailed under the previous policy of the centrally planned economy, that monetary compensation is an inadequate remedy if the availability of alternatives is limited and,[651] moreover, that a failure in performance

642 Liming 1992 (n 636) 21.
643 N 167.
644 Art 11 ECL; Liming 1992 (n 636) 26.
645 Art 31 ECL; Shen 1996 (n 140) 253–306.
646 Zheng Xiaochuan and Lei Mingguang, 'Reconsideration of Continuous Performance' (2003) iss 3 Habei Law Science 67 (郑小川，雷明光. 对"继续履行"的再思考. 河北法学).
647 *Ibid*.
648 Art 110 CCL introduces these restrictions; Zheng and Lei (n 646).
649 Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the Civil Procedure Law in Economic Trials (最高人民法院关于在经济审判工).
650 Art 26 (1) – (3) ECL.
651 Liang HuiXing, 'On Contract Liability' (1982) 1 Study and Inquiry 62.

of an economic contract could affect the state plan and should, therefore, be restricted.[652] The former is explicitly recognised in the ECL for construction contracts and in the provision for the delivery of defective goods due to the lack of a mature market economy which provides adequate alternatives.[653]

Nonetheless, it is argued that damages were the preferred remedy for economic contracts because the ECL made it simple to determine the loss and, moreover, to execute a court order for damages since the courts and arbitrators were entitled to issue a notice to the promisor's bank, including directions that the sum of awarded monetary damages must be transferred from the account of the promisor to the account of the promisee.[654]

The discretion of the court to award damages instead of enforcing performance played an increasing role when it became easier for contracting parties to obtain an adequate alternative on the market.[655] Yet, it is also held that the courts and arbitrators were willing to deviate from the judicial measures of the ECL if this was required by the circumstances of the case. For example, if the state-prices were significantly higher or lower than the actual market price.[656] Based on all the considerations above, it could be said that under the ECL, the civil law principle of *pacta sunt servanda* remained of great importance for economic contracts because of the impact on the state planned economy.

104. The FECL governed contracts concluded between domestic and foreign companies. The FECL does not include a verbatim principle which entitles the promisee to claim the actual performance of the contract.[657] In the Judicial Interpretation on the FECL it was even stipulated that, apart from actual performance, the non-performing party shall compensate the suffered monetary damages, as well as the benefits which could have been received if the contract was properly performed (*e.g.* the interest in the case of an international sales transaction involving commodity goods).[658] This could point in the

652 Bing Ling 2002 (n 229) para 8.065; Gu Ming, vice-chairman of the NPCSC Legal Affairs Commission stated about the 4th sessions of the 5th NPC: *'Compensatory damages cannot be substituted for performance of contract. To have such a provision is mainly for the purpose of ensuring the implementation of state plans. As many economic contracts in our country are concluded in accordance with state plans, non-performance of economic contracts will affect the fulfilment of state plans. This principle of performance in kind is an important characteristic that distinguishes the socialist economic contract law from the capitalist economic contract law'.*

653 Liming 1992 (n 636) 25, 26.

654 Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the Civil Procedure Law in Economic Trials (see the Opinion under six) (最高人民法院关于在经济审判工); Liming 1992 (n 636) 23.

655 Liming 1992 (n 636) 31.

656 Liming 1992 (n 636) 23, 24, 26, 27; Liang HuiXing, 'Problems on Changes of Circumstance in Contract Law' (1988) in 6 Studies in Law 40.

657 Shen 1996 (n 140); Zhen and Lei (n 646).

658 Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Law [Expired], Effective date: 19 October 1987.

direction that the Chinese government weighted the bindingness of contractual promises between foreign and Chinese parties significantly differently from that of contracts between domestic parties with their place of business in China. Nevertheless, article 18 of the FECL left an opening for contracting parties to demand actual performance of a contractual obligation by stipulating that, in a case of failure in performance of the contract, the promisee will have the right to ask the promisor to compensate for damages or to take other remedial measures.[659] It is held that the latter refers to the right of the promisee to claim the actual performance of a contractual obligation.[660] The view that the FECL recognised the right to claim actual performance also followed from the statutory principle under the FECL that a contract is binding and that the parties are obliged to fulfil their obligations.[661] In addition, it was stipulated that neither party shall make unauthorised changes to or terminate the contract.[662] In this respect, it is argued that performance was a statutory obligation under the FECL,[663] which, in turn, indicates that a promisee was primarily entitled to claim actual performance.

Nonetheless, it is said that the unrestricted choice for damages and actual performance under the FECL followed from the idea that the sole purpose of foreign entities is to obtain monetary profit and, therefore, in all cases, damages can provide complete relief.[664] In other words, non-performance was believed not to affect the implementation of the state's plan and, therefore, there was no need to prescribe actual performance as a mandatory default remedy.

105. In the framework of the GPCL, the civil law concept that a contractual promise provides contracting parties a substantive right to performance is reflected in the principle that if a party fails to fulfil its contractual obligations or fails to perform in accordance with the terms of a contract, the promisee shall have the right to demand performance of the contract or remedial measures and to claim compensation for its losses.[665] This freedom of the promisee to choose between a claim for the actual performance of the contract and damages derived from the idea that civil contracts were not a part of the planned economy, and therefore more leeway was provided to contracting parties.[666] Nevertheless, it is held

659 Art 18 FECL; Shen 1996 (n 140).
660 Shen 1996 (n 140).
661 Art 16 FECL.
662 *Ibid.*
663 Shen 1996 (n 140).
664 Zheng and Lei (n 646).
665 Arts 111, 134 GPCL.
666 Liming 1992 (n 636) 30; Bing Ling 2002 (n 229) para 8.065.

that enforced performance was always available to the promisee if the subject of the contract was ascertained as a specific thing,[667] such as a contract involving the purchase of a house.[668]

Overall, it could be said that the development of the instrument of enforced performance under the ECL, FECL and GPCL is inextricably linked with the state plan policy of China to the extent that a contract is regarded as an instrument to serve the overarching plan. However, the ECL's predominant role of enforced performance was weakened by the shift towards a market economy, which provided plentiful alternatives to buy on the market.[669] Further, the provisions under the ECL, FECL and GPCL suggest that a claim for actual performance is only available to the promisee in the event of non-performance, albeit that the Chinese law also indicates that contractual promises are legally binding.

106. As mentioned previously [102], in 1999, the ECL and the FECL were replaced by the currently applicable Contract Law provisions of China, which, under the influence of the CISG and the PICC, continue to follow the principle that the right to demand the actual performance of a contract derives from a failure in the performance of contractual obligations.[670] Returning to the historical underpinnings, the flowchart presented in Figure 11 below provides a summary of the introduction of the instrument of enforced performance in Chinese law.

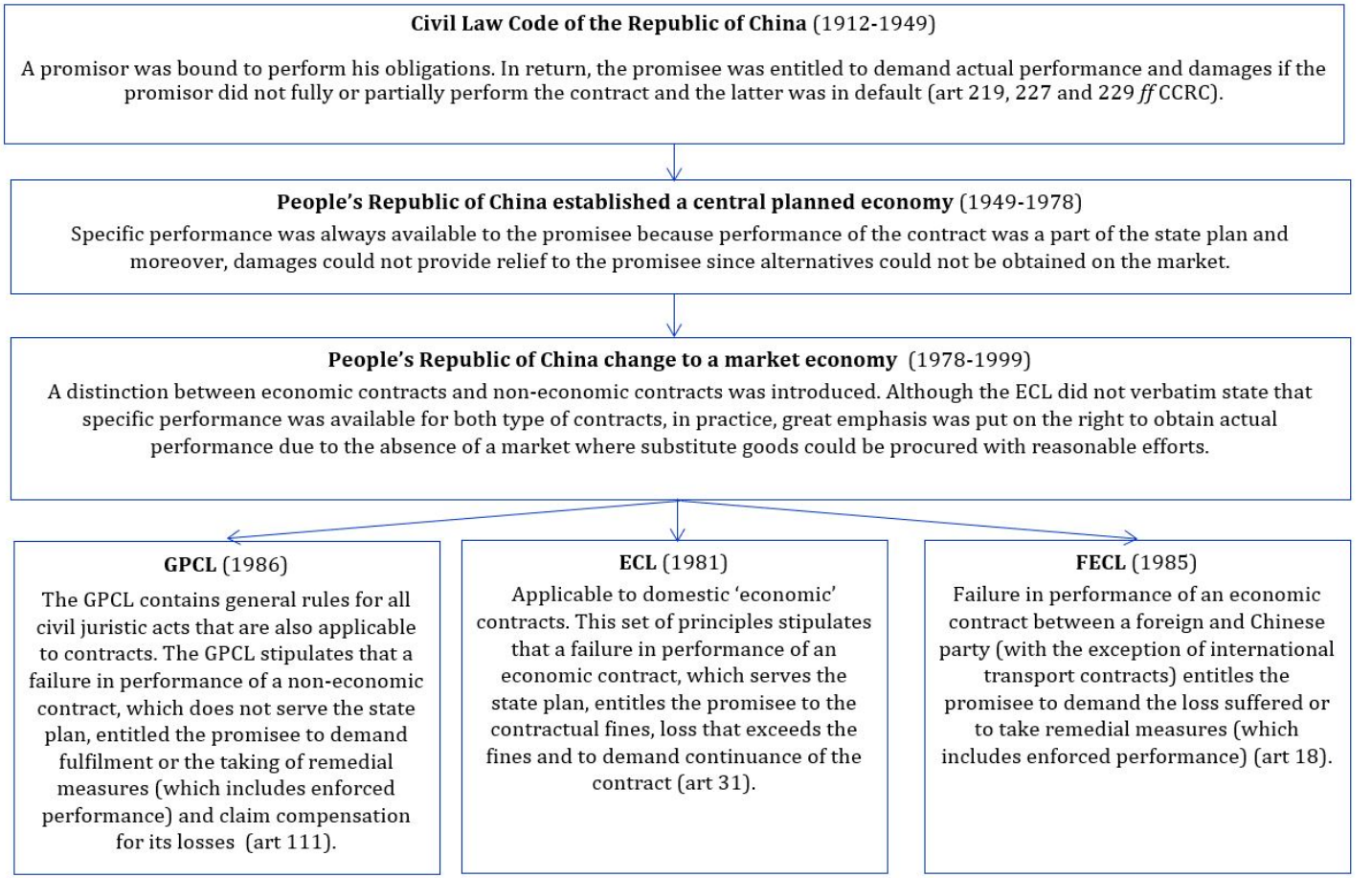
667 Liming 1992 (n 636) 29; Wang ZhuoDang, *Textbook of Chinese Civil Law* (1982) 226.

668 Liming 1992 (n 636) 29; The Educational Central of High Judges, *The Collection of Civil Cases* (1989) [1] 12.

669 Bing Ling 2002 (n 229) para 8.065.

670 Art 107 CCL.

Figure 11 Historical underpinnings of the right to demand continuance of performance in China



107. Under the contract law of China, a failure in performance of a contractual obligation can lead to a claim for termination of the contract,[671] substitute or compensatory damages,[672] or a demand for enforced performance by means of a claim for continuance of the contractual promise, executed by the promisee or a third party.[673] The right to demand continuance of performance of a contractual promise is basically a judicial measure to obtain actual performance of a non-monetary positive or negative obligation or performance of a monetary obligation, which in practice also qualifies as *specific performance*.[674] However, the term specific performance is in common law jurisdictions only used to address non-monetary obligations. In this present thesis, the right to claim continuance of performance is referred to as a claim for the actual performance of a contract for sales in a commercial setting. These contracts are, for the vast majority, subject to the provisions of the contract law of China, but it may be noted that additional specific statutory terms can apply for certain agreements,[675] regardless of the premise that state intervention by imposing punitive measures is not in accordance with the private law character of the contract law of China.[676]

108. Before exploring the different aspects of judicial measures to obtain actual performance of (non-) monetary contractual obligations, it is important to take note of the impact of an act of promise making and of voluntarily concluding a reciprocal agreement under the contract law of China. It is held that a promise and a subsequent contractual agreement are embedded in a social institution, albeit that only legally enforceable contractual agreements are protected by statutory provisions.[677] This section shows that under the current contract law of China, provisions to enforce a contractual promise are no longer an instrument to ensure implementation of the state plan and,[678] moreover, that the system has moved towards a combination of civil and common law concepts on a substantive level.

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671 Art 94 CCL.

672 Art 112 CCL.

673 Art 107, 108 CCL; Bing Ling 2002 (n 229) para 8.009; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 21–22, 24; the right to claim judicial remedies in the case of an anticipatory failure in performance is said to derive from the common law perspective on a failure in performance of a contractual obligation; compare Bu 2013 (n 226) 70; the burden of proof of the non-performance lies with the claimant; A claim for continuance of a contract is also known as enforced performance.

674 Arts 107, 109–110 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 21.

675 Bing Ling 2002 (n 229) para 8.010.

676 Bing Ling 2002 (n 229) para 8.003.

677 Zhang 2006 (n 41) 67.

678 It is held that the Chinese shifted towards a social-market economy; Han Shiyuan, 'The Performance Interest in Chinese Contract Law: Monetary Awards' in Chen-Wishart, Loke and Ong 2016 (n 156) 41.

109. The main principle under the contract law of China is that a promisor is obliged to perform an effective contractual promise in accordance with the agreed terms of the contract.[679] Therefore, the statutory right to claim continuance of a contract for (anticipatory) non-performance serves the (expectation) interest of a promisee by placing the latter in the position as if the contract was properly performed.[680] This premise should be viewed in light of the statutory principle that a legitimate contract has a legal binding force on the parties, which brings about that contracting parties are obliged to fulfil their promise in accordance with their agreement.[681] These statutory provisions are based on the premise that a legally binding and effective contractual promise reflects the primary duty of contracting parties to fully perform their promises in accordance with the terms of the contract and not a duty to compensate the damages of the promisee.[682] This premise is further substantiated with the argument that substitute products and compensatory monetary damages do not always achieve the same result.[683] For example, promisees may not be able to obtain similar substitute products from alternative suppliers.[684] For that reason, it is held that the duty to fully perform a contractual promise is not interchangeable with monetary damages if the contractual promise is not completely performed.[685] This means that an agreement between parties concerning the payment of damages by the promisor does not automatically have the effect of a waiver of the promisee to claim continuance of the contract.[686]

110. The aforementioned considerations demonstrate that the contract law of China adopts the civil law principle of *pacta sunt servanda*,[687] in the sense that a promisee is primarily entitled to claim for enforced performance of a contractual promise without the occurrence of an actual failure.[688] Yet, the contract law provisions appear to act on the notion that a

679 Bing Ling 2002 (n 229) para 8.079.

680 Bing Ling 2002 (n 229) paras 8.002, 8.064; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 21.

681 Arts 8, 60 CCL.

682 Bing Ling 2002 (n 229) paras 8.064, 8.065; Zhang 2006 (n 41) 200.

683 Bing Ling 2002 (n 229) para 8.064; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 27.

684 Bing Ling 2002 (n 229) paras 8.064, 8.065; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 27.

685 Bing Ling 2002 (n 229) para 8.064; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 23.

686 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 23; However, it should be noted that the CCL does not indicate any hierarchal order between the right to claim actual performance of a contract and damages.

687 Bing Ling 2002 (n 229) para 2.030.

688 In this respect reference is made to an official comment to the Uniform Commercial Code of the United States of America, which states: *'(…) the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to*

claim for enforced performance can only be brought to court in the event of a failure in performance.[689] On the basis of this more or less common law approach, it is argued that enforced performance of a non-monetary obligation is only available to contracting parties if damages are assessed by the court as an inadequate measure.[690] Furthermore, the qualification as a remedy is justified by the argument that continuance of a contract compels the non-performing party to perform his or her contractual promises instead of voluntary compliance and, therefore, demand for the continuance of performance is qualified as a remedy.[691] However, one important and insurmountable difference with the discretionary common law remedy of specific performance remains. That is, the right to enforced performance is protected by law,[692] and may not, therefore, be characterised as a remedy which is left at the discretion of the court.[693] This means in effect that a Chinese court must substantiate a denial of a claim for enforced performance with justifiable reasons.[694] Moreover, intentional interference with a contractual promise can be regarded by the court as a tortious act.[695] Thus, contracting parties have a right to claim for enforced performance before any breach of contract has occurred. However, if the obligation is not yet due, the court shall only provide an order which entails a judicial recognition of the right to performance.[696]

111. It is important to highlight that the contract law of China stipulates that a promisor is liable for a failure in performance and, therefore, the promisee is entitled to choose between a claim for enforced performance, other remedial measures, or damages.[697] The option to choose enforced performance and other remedies is, however, barred by law, if performance is legally or practically impossible, the agreed performance is unsuitable for an order for enforced performance, performance is too expensive, or performance is not

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win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain.' UCC § 2–609, Official Comment 1.

689 Arts 107, 108 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 21, 22; Bu 2013 (n 226) 70 (Bu states that art 108 CCL is adopted from common law).

690 Zhang 2006 (n 41) 299; In contrast, it is held by Lei Chen that the right to continuance of the contract (qualified as specific performance) is regarded as a right of the promisee.

691 Zhang 2006 (n 41) 297.

692 Art 8 (2) CCL; Bing Ling 2002 (n 229) para 2.031.

693 Zhang 2006 (n 41) 297.

694 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 22.

695 Art 106 (2) GPCL; Bing Ling 2002 (n 229) para 2.031.

696 Clarisse von Wunschheim, Pierre Tercier and Gianmaria Ajani, *Enforcement of Commercial Arbitral Awards in China: business laws of China* (West 2017) § 4:22 and § 4:3 accessed Westlaw China on 31 January 2017.

697 Art 107 CCL is based on CISG, PICC and PECL; Han Shiyuan, 'The Performance Interest in Chinese Contract Law: Monetary Award' in Chen-Wishart, Loke and Ong 2016 (n 156) 41.

demanded within a reasonable time.[698] Aside from these situations, the premises that a contracting party is free to choose between enforced performance, other remedial measures and damages imply that there is no hierarchy between the judicial instruments mentioned above.[699] This alleged lack of hierarchy indicates that in the current timeframe not all contracts are a part of the political agenda of China and for that reason, it could be held that the right of contracting parties to enforced performance is disconnected from the state plan.[700] However, it is also argued that the right to enforced performance remains the preferred remedy under the Chinese contract law since the termination of a contract and damages are only available to the contracting parties in specific statutorily defined situations and if particular requirements are met.[701] Having said that, where a contracting party remedies its failure by performing the agreed obligation, the initially aggrieved party remains entitled to claim losses incurred due to the failed performance, such as interest during the delay in the event of a failure in performance of a monetary obligation.[702] Aside from occurred losses, other forms of damages cannot be claimed if the aggrieved party decides to claim for enforced performance.[703]

112. To support comparisons, it is noted that Chinese contract law does not include a judicial instrument to request the court to authorise the aggrieved party to procure that which would have resulted from the contract or to undo what has been done in breach of the contract.[704] In the event a claim for enforced performance is awarded by the court, it is at the discretion of the court to appoint a third party to perform the obligations of the non-performing party, at the expense of the latter.[705]

113. In Chinese contract law, the right to enforced performance is a matter of strict liability.[706] This means that an aggrieved party is entitled to enforced performance of a

698 Art 110 CCL; See Ch 6.

699 Bing Ling 2002 (n 229) para 8.080; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 24; Han Shiyuan, 'The Performance Interest in Chinese Contract Law: Monetary Award' in Chen-Wishart, Loke and Ong 2016 (n 156) 40, 41, 53; Zhang 2006 (n 41) 296; before the enactment of the CCL, it was argued that a promisor was obliged to perform its promises unless an exception applied based on statutory provisions or the doctrine of economic contract.

700 Zhang 2006 (n 41) 297; Han Shiyuan, 'The Performance Interest in Chinese Contract Law: Monetary Award' in Chen-Wishart, Loke and Ong 2016 (n 156) 41.

701 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 24; Art 94 CCL.

702 Art 112 CCL; Bing Ling 2002 (n 229) para 8.080.

703 Bing Ling 2002 (n 229) para 8.080.

704 In contrast, the right to request for authorisation is a substantative right in the Dutch law of obligations and a direct judicial measure to obtain actual performance of a contractual promise (art 3:299(1)(2) DCC).

705 Civil Procedure Law of the People's Republic of China (2017 Revision); Bing Ling 2002 (n 229) para 8.801.

706 Art 107 CCL; Bing Ling 2002 (n 229) paras 8.009, 8.032; Bu 2013 (n 226) 70.

contract in the event of a (non-) attributable failure in performance,[707] even if the non-performance is caused by a third party.[708] Thus, the fault of the non-performing party is not required.[709] Nonetheless, a claim for enforced performance of a contractual obligation shall not be awarded in the event of a lawfully excused non-performance.[710] For example, parties have excluded the right to claim for enforced performance (or other judicial measures) in the terms of their contract,[711] the non-performance is caused by the conduct of a third party which amounts to – or results from – a situation of *force majeure*,[712] the promisor can bring a defence to court, which it also has against the third party (in the case of assignment of contractual rights),[713] if the non-performance of an indirect agent towards its principal is caused by a third party and the principal chooses to bring a claim to court against the third party.[714] Non-performance is also regarded as excused in the event of a valid defence of, for example, a situation of *force majeure*,[715] if the conduct of the promisor is by law not qualified as unlawful and if the non-performance is caused by an act of the promisee.[716]

114. The above-described approach of the right to obtain actual performance of a contractual promise under the contract law of China shows similarities with the common law perspective on the primary source of judicial measures to obtain actual performance.[717] The Chinese perspective on the right to demand continuance of a contract under the contract law of China is also reflected in the statutory provisions for failure in pe rformance of monetary obligations, which in short stipulate that the promisee may demand payment

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707 Bing Ling 2002 (n 229) para 8.032.

708 Art 121 CCL; Bing Ling 2002 (n 229) paras 8.009, 8.033, 8.039; Bu 2013 (n 226) 71, para 9; liability issues between the promisor and the third party are regulated by other statutory provision, such as art 254 of the PRC Contract Law for Work contracts, arts 123(1), 125(4)(2), 126, 132 Civil Aviation Law; arts 51(1)(12), 60(1), 70(1), 114 Maritime Law.

709 Art 121 CCL; Bing Ling 2002 (n 229) para 8.033; Bu 2013 (n 226) 70.

710 *E.g.,* art 110 CCL stipulates that the right to continuance of performance is not available to the promise in the event performance is legally or practically impossible, if performance is unsuitable or too expesive or continuance of performance is not required within a reasonable time.

711 Art 121 CCL can be subject to exemption; Bing Ling 2002 (n 229) para 8.034.

712 Bing Ling 2002 (n 229) para 8.035; in the event the act of the third party is caused by a situation of *force majeure,* the promisor may escape a claim for continuance of performace (or other judicial measures) in certain circumstances.

713 Bing Ling 2002 (n 229) para 8.036.

714 It follows from art 403 CCL that if a contract is concluded by an agent (mandatary) in the agent's name with a third party, who is not aware that the agent works as a proxy (representative/mandator) for another party (a principal), and the non-performance of the agent towards the principal is caused by this third party, the agent is obliged to disclose the third party name to the principal, and the principal may then exercise its rights of the agent against the third party, unless the third party would not have entered the contract if it was aware of the existence of the principal; Bing Ling 2002 (n 229) para 8.037.

715 Art 117(1) CCL; Bu 2013 (n 226) 70.

716 Bing Ling 2002 (n 229) para 8.010.

717 Bu 2013 (n 226) 70.

(performance) if the promisor fails to fulfil his or her monetary obligation.[718] However, from a doctrinal perspective, it is argued that a promisee is primarily entitled to demand continuance of a contractual promise[719] before any issue of non-performance arises because the right to performance of a contractual promise is said to derive from the bindingness of a contractual promise.[720] As to whether a Chinese court is actually prepared to follow this academic reasoning is doubtful because of the closed system of statutory provisions for the right to demand continuance of a contract in the contract law of China and due to unanswered questions in practice, on the matter of enforceability.[721]

115. The interim conclusion that a (non-)attributable failure in performance is required for the award of a claim for the actual performance of a contractual obligation can be derived from the considerations above, although article 8 of the contract law of China states that a contract is binding on parties. In this respect, it is argued that the civil law principle *pacta sunt servanda* still applies in China as one of its fundamental principles,[722] and therefore, that enforcement of actual performance can be demanded before any (expected) failure in performance.[723] Awarding such a claim, however, is solely regarded as a confirmation of liability of the promisor for continuance of performance of his or her contractual obligations.[724] From this perspective, it is understandable that Chen Lei labelled the option to demand the actual performance of a contractual obligation as a remedial right.[725] The reference to remedies is probably based on the idea that the wording of article 107 of the contract law of China suggests that enforcement of actual performance is only available after a failure in performance of the contractual promise. The word 'right' presumably reflects the civil law principle that performance is available as of right. However, in contrast to the historical view in Chinese law,[726] the statutory obligation to act in good faith entails a number of grounds on which a claim for continuance of performance can

718 Art 109 CCL.

719 Bing Ling 2002 (n 229) para 8.004.

720 Bing Ling 2002 (n 229) para 8.001; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 22, 23, 27; Han Shiyuan, 'The Performance Interest in Chinese Contract Law: Monetary Award' in Chen-Wishart, Loke and Ong 2016 (n 156) 40, 41.

721 Zhang 2006 (n 41) 67 *ff.*

722 Bing Ling 2002 (n 229) para 8.001.

723 In the case the promisor explicitly expresses or indicates by act its intention not to perform its obligations under the contract, the promisee is entitled, before the expiration of the due date of the contract, to demand that the promisor bear the liability for breach of contract; see for this statutory provision about anticipatory breach art 108 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 27.

724 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 22, 23, 27.

725 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 23, 26.

726 Bing Ling 2002 (n 229) para 8.064.

be rejected by the court.[727] It is argued that these statutory restrictions on the right to continuance of a contractual non-monetary promise have resulted in a significant change of the view on the bindingness of a contractual promise, by stipulating that the right to continuance of a contract is not available to the promisee if performance is impossible, if awarding a claim for continuance of performance is unsuitable, the costs of enforcement are disproportional, or if the promisee fails to bring a claim to court for continuance of performance within a reasonable time.[728]

116. The contract law of China does not provide clear guidance for the question of whether parties are free to choose between statutory performance remedies. It is, therefore, first discussed whether the aggrieved party is free to choose between actual performance, remedial measures and damages. The second point is whether the aggrieved party is free to choose between the remedial measures of repair and replacement. Following this, an analysis of the debate concerning the right to change the initial choice for a certain performance remedy is provided.

A promisee may require actual performance, remedial measures and damages if the promisor does not perform its obligations,[729] unless the statutory requirements are not met, or certain statutory barriers apply.[730] It is held that the aforementioned order of remedies suggest that the contract law of China prioritises an action for actual performance over remedial measures and compensation of damages,[731] and that future legislation should follow the same sequence.[732] In this vein, it is also said that adoption of the idea that parties are free to choose between available remedies is not in accordance with the principle that contracting parties should adhere to their promises (which is said to promote the development of trade and the economy).[733] Nonetheless, in recent literature it is held that a promisee is free to choose between a claim for actual performance, damages and judicial

727 Arts 6, 110 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 28.

728 Arts 6, 110 CCL; Bing Ling 2002 (n 229) para 8.003; a more elaborate discussion about these restrictions on the right to claim continuance of a contractual promise is presented in Ch 6.

729 Art 107 CCL; Bing Ling 2002 (n 229) para 8.080; *Changchun Foreign Economic and Trade Co. v Changchun Chaouang Real Estate Development Co* Changchun Intermediate People's Court and Jilin High People's Court (1993) SCPC (1992–1996 Collection) 202; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 24; Han Shiyuan, 'The Performance Interest in Chinese Contract Law: Monetary Award' in Chen-Wishart, Loke and Ong 2016 (n 156) 53; Zhang 2006 (n 41) 296.

730 Arts 107, 110 CCL.

731 Hao Liyan (郝丽燕), 'On Delivery of Substitute Goods in the Case of Defective Performance of Sales of Specific Goods' (论特定物买卖瑕疵履行时的交付替代物), Jinan University School of Political Science and Law (济南大学政法学院) (2017) iss 9 Politics and Law 86.

732 *Ibid.*

733 *Ibid.*

measures for defective performance, or a combination of these remedies if appropriate.[734] For example, in the case *Sofa Frames*, a supplier of wooden products signed a contract for the sale and delivery of 500 sofa frames to be delivered in multiple batches, with the last delivery by 20 June.[735] The seller also concluded a contract with a third party for the sale and delivery of 800 wooden sofa frames, although its manufacturing capacity was not sufficient to perform both contracts in accordance with the agreed time for delivery.[736] In order to comply with the second contract, the seller failed to deliver the outstanding wooden sofa frames under the first contract.[737] As a result, the court ordered continuance of performance of the contract, payment of a judicial penalty and damages.[738] In another case,[739] a contract was signed for the sale and purchase of a ginseng farm (the roots of the ginseng plant are used in traditional Chinese medicine for a wide variety of health issues).[740] The buyer of the farm sold the first harvest but failed to pay the first instalment of the purchase price of the farm.[741] As a result, the aggrieved sellers seized the harvest and sold it to another party.[742] The court considered that the terms of the contract did not provide a legitimate ground for this action and, therefore, it ordered the sellers to complete the delivery of the ownership of the farm and to pay the damages incurred by the buyer.[743] Aside from the fact that the examples above demonstrates that a claim for actual performance, damages and judicial penalties can coexist, it is also suggested that the payment of damages does not remove the right of the promisee to claim actual performance.[744]

That said, the right of a promisee to terminate a contract, in the event of a fundamental breach or after a reasonable period to cure the failure has elapsed, is subject to higher barriers than a claim for actual performance of the contract,[745] which suggests that the contract law of China favours a claim for actual performance of a contract over

734 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 36; He Xu Xu (贺栩栩), 'Improvement of Rules on Continuous Performance in Sales Contracts' (论买卖合同法中继续履行规则的完善) (2016) iss 12 Political Science and Law 94 (政治与法律).

735 Shen 1996 (n 140).

736 *Ibid.*

737 *Ibid.*

738 *Ibid.*

739 *Ibid.*

740 US Department of Health and Human Services, National Center for Complementary and Integrative Health <https://nccih.nih.gov/health/asianginseng/ataglance.htm> accessed on 22 August 2017.

741 *Ibid.*

742 *Ibid.*

743 *Ibid.*

744 Shen 1996 (n 140).

745 Art 94 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 24.

termination.[746] Nevertheless, the freedom of the promisee to choose between the available remedies is unaffected even if the promisor offers to repair or to replace the defective performance,[747] unless the promisee is a consumer and the promisor offers to cure the defects within a reasonable time.[748] In this respect, it may be noted that the freedom to choose between an action for actual performance, repair, replacement or damages, may be limited by a contractual exemption clause, albeit that Chinese scholars differ about the effect of such a clause.[749]

At this point, it is relevant to make a link with the earlier example of an advertisement on litter bins and the subsequent question whether *wasteful performance* could interfere with the choice to claim the actual performance of a contractual obligation.[750] In the event wasteful performance is not avoided, the Chinese court could appraise that the claimant breached its obligation to act in good faith and, subsequently, could deny the claim for continuance of performance. Thus, if the non-performing party 'has acted in such a way as to lead a reasonable person to conclude that he does not intend to perform the contract',[751] the claim for continuance of performance shall probably be rejected, unless the claimant shows that it had justified reasons to perform the contract, such as a well-founded expectation that damages would not cover its losses or any inextricably linked contractual obligations with third parties, which exposes the defendant to additional lawsuits.[752] Having said that, the bindingness of a contractual promise is a statutory principle in the contract law of China,[753] which is reinforced by the statutory principle to act in good faith.[754] It is, therefore, not to be expected that the Chinese courts are willing to abandon these fundamental principles of Chinese contract law. This proposition is also supported by the view that the promisee is provided with the right for enforced performance to be enforced by the court, and that Chinese courts are entitled to order enforcement of performance 'as a matter of principle'.[755]

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746 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 24.

747 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 36.

748 A rejection of the consumer of the offer of the promisor to remedy the defect, can exempt the promisor from liability for the defective goods; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 36; Bing Ling 2002 (n 229) para 8.088.

749 Ch 8.

750 S 4.2.3.

751 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 28.

752 *Ibid*.

753 Art 8 CCL.

754 Art 6 CCL; Bing Ling 2002 (n 229) para 2.041.

755 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 28.

Concerning the relation between an action for repair and replacement, the contract law of China stipulates that if the quality of the goods are not in accordance with the terms of the contract, and the contract does not encompass a remedial scheme to cure a non-performance, the promisee is entitled, in light of the nature of the goods and the degree of loss, to reasonably choose between the performance remedies of repair, replacement, returning the goods, or reducing the price.[756] First, it is argued that the courts prioritise a promisee's right to repair over replacement, even if the consequences have a severely detrimental impact on the promisor (*e.g.* the costs of repair are higher than the costs of delivery of substitute goods).[757] In this vein, it is argued that in case of a defective performance, the right of the promisee to choose between repair and replacement could result in a very unfavourable outcome for the promisor because the latter has to bear the financial consequences.[758] By contrast, it is argued that the promisor already benefits from the actual performance of its obligations (payment of the purchase price) and, therefore, should not also be allowed to choose between the elimination of its flaws (repair) or payment of an alternative (replacement).[759] In this respect, it is also said that awarding a claim of a promisee for repair or replacement fulfils two roles.[760] The first is fulfilment of the subjective right of the promisee to protect its interest in performance of the contract, and the second is to give the promisor another chance, by providing an opportunity to perform its obligations in return for payment of the purchase price.[761] In this approach, protection of the interest of the promisor in performance and payment is guaranteed by the obligation of the promisee to provide the former with the opportunity to repair or replace its non-performance and, thus, to continue to perform the contract.[762] Another reason for giving the option to the promisee to choose between repair and replacement is that the latter is not exposed to the risk of (temporarily) losing the ability to use the purchased goods, if the promisor chooses to repair its non-performance instead of replacement.[763] Theoretically, the promisee could sue for damages for the loss of use, but it is held that the courts are typically not inclined to provide a plaintiff with a court order for alleged monetary damages due to a loss of use because the objective of the contract law of China is said to pursue the fulfilment of the purpose of a contract.[764]

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756 Arts 107, 111, 155 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 35.
757 Hao 2017 (n 731) 86.
758 *Ibid.*
759 *Ibid.*
760 Hao (n 731) 86; Mario Schollmeyer and Alper Utlu, 'Die Nacherfüllung im Kauf' (2009) 31(10) JURA 721.
761 Hao (n 731) 86; Schollmeyer (n 760) 721.
762 Hao (n 731) 86; Schollmeyer (n 760) 721.
763 Hao (n 731) 86.
764 *Ibid.*

The interest of the promisee is said to be protected by its alleged right to choose between repair and replacement. Conversely, the interest of the promisor is protected by the proportionality principle, which means that the latter may refuse to provide a replacement if the financial costs for providing an alternative performance are too high (disproportionality between the purpose of the contract and the means to achieve this purpose).[765] This is reflected in the principle that the choice of the promisee for repair or replacement should be reasonable.[766] In addition, it is argued that the interest of the promisor is protected by the principle that the promisee is not entitled to change its choice for repair and replacement during the period it has provided the promisor with the opportunity to perform one of these remedies.[767] This principle is based on the view that the choice of the promisee generates trust in the promisor and, therefore, the former may not be allowed to change its choice for repair or replacement.[768]

Turning briefly to the discussion about the right to revoke a choice for a certain performance remedy, the contract law of China only stipulates that the promisee is entitled to reasonably choose between the available remedies if the promisor fails to deliver the goods in accordance with the terms of the contract.[769] It does not provide any guidance for answering the question of whether the promisee is entitled to revoke its choice.[770] Nonetheless, it is held that the promisee is obliged to take into account the interests of the promisor and, therefore, may not arbitrarily change its choice (see the considerations above).[771] There is one exception. In unforeseen circumstances arising after the initial failure in performance, the promisee is allowed to change its choice, unless the promisor has already started with the necessary activities to repair or replace the goods.[772] All told, however, these viewpoints are currently not supported by statutory principles.

Another interesting point to take into consideration is that a promisee is not required to select one of the available performance remedies within a reasonable time.[773] This, ultimately, may result in a long period of legal uncertainty of the promisor, therefore, it is held that the contract law of China provides insufficient protection of the interest of a promisor to a sales contract.[774] The absence of an obligation to choose between the available remedies within a certain time limit is said to be in line with the contract law of China,

765 *Ibid.*
766 Art 111 CCL.
767 Hao (n 731) 86.
768 Hao (n 731) 86; He 2016 (n 734) 95 footnote 4.
769 Arts 111, 155 CCL.
770 He 2016 (n 734) 94.
771 *Ibid.*
772 *Ibid.*
773 *E.g.,* in No. 1 Intermediate People's Court of Beijing Municipality (2015), No. 03857 and No. 1 Intermediate People's Court of Beijing Municipality (2005), No. 51 the court awarded a claim for (continuance) of performance, even though a long period had elapsed after the non-performance.
774 He 2016 (n 734) 94.

which places great emphasis on the right to performance.[775] However, the lack of a deadline could also amount to a lack of incentive to fulfil the purpose of the contract,[776] and it contradicts with the preference of the contract law of China for the fulfilment of a contract (as soon as possible). Therefore, it is suggested to apply the following principles:[777] where there is no time limit set for demanding delivery, the seller may perform, and the promisee may require performance, at any time, provided that the other party shall be given the time required for preparation.[778] In case the remedy cannot be performed by the promisor due to any reasons attributable to the promisee, the latter is liable for damages.[779] Adoption of these principles would mean that the promisee is encouraged not to wait to inform the seller about its choice for a performance remedy.[780] Another suggestion which has been made is to adopt the principle that the aggrieved party is obliged to choose a performance remedy within a reasonable time on pain of expiration of its rights under the contract.[781] This option may positively affect the contractual relationship since it provides the promisee with the necessary time to consider which remedy would be most effective to cure the failed performance.

4.2.5 Conclusions

117. This section aims to determine the historical and contemporary foundation of the availability of a claim for enforced performance in order to enhance the understanding of the fundamental differences in approaches taken by the subject legal systems. As a preliminary note, the usage of the term enforced performance herein refers to a judicial action for obtaining the very thing parties bargained for under a commercial sales contract, that is, delivery of the goods and payment of the purchase price. In looking at the theoretical underpinnings of the availability of enforced performance of these obligations in the subject jurisdictions, there are three dogmatic common denominators, albeit with a completely different effect on the availability of enforced performance. First, the contract law of the Netherlands, Singapore and China each distinguish between legal rights deriving from the law governing the contract and the contractual stipulations, and the judicial instruments to protect these rights.[782] This means in effect that the rules for determining the availability

775 Art 107 CCL.
776 He 2016 (n 734) 94.
777 *Ibid.*
778 Application, by analogy, of art 139, 62(4) CCL.
779 Application, by analogy, of art 143 CCL.
780 He 2016 (n 734) 94.
781 *Ibid.*
782 As shown below, the nature of the legal rights of contracting parties are (in civil and common law traditions) not necessarily reflected in the available judicial actions.

of a claim for enforced performance are generally discussed after the definition of the legal rights of contracting parties.[783] The unification instruments are structured in a similar way.[784] It appears, therefore, that the legal structure adopted by the subject legal systems qualifies as a 'right-action model'.[785] In this model, the availability of enforced performance and its limits depends on the nature of the legal right which needs protection and the circumstances of the case.[786] This brings about the premise that a legal right is not necessarily protected by a judicial action for enforced performance. Nonetheless, when enforced performance is not available, the contract law of the three subject jurisdictions do not deny the existence of a legal right deriving from the contract law principles and contractual stipulations.[787] The influence of the nature of the legal right on the availability of enforced performance returns in the discussion about the third common denominator. In view of the controversy about enforced performance in the common law tradition, it is briefly noted here that Singapore contract law has taken an approach where enforced performance is not available if the nature of the legal right concerns a non-monetary performance obligation (with the exception of specific cases).[788] This approach fits neatly into the 'right-action' model, as discussed above. It can, however, also be said that the Singapore common law system reflects some elements of the (contested) Friedmann's 'primacy of remedy model', entailing the notion that legal rights derive from the available judicial

783 NL: the obligations of the seller are laid down in arts 7:9 and 7:17 DCC and the special consequences of the non-performance in art 7:21 DCC. It should be noted that Dutch contract law has taken a unique position in comparison to the other investigated legal systems, in the sense that it acts on the assumption that the mere existence of an obligation brings about a right to enforced performance. Dutch contract law only confirms this right in the form of a statutory provision which stipulates that the person who is obliged to perform can be ordered to do so. See art 3:296(1) DCC; SGP: the duties of the seller and buyer are laid down in SGA, s 27 and the actions for non-performance in SGA, s 49 *ff.;* CHN: Ch 4 CCL provides for the obligations of contracting parties and Ch 7 CCL for the consequences of a failure.

784 *E.g.,* arts 30, 35 CISG provides for the obligations of the seller and art 45 CISG *ff* for the remedies for a failure in performance; PICC: Ch 6 entails the rules on performance and Ch 7 is concerned with the consequences of non-performance; PECL: Ch 7 deals with the required performance and Chps 8 and 9 with the remedies for non-performance; DCFR: Book III, Ch 2 encompases the principles on performance and Book III, Ch 3 the remedies for non-performance; PACL: the draft articles on performance precedes the draft articles on non-performance.

785 This notion is modelled on the right-remedy model described by Friedmann in Cohen and McKendrick (n 4) 8–10.

786 *E.g.,* a commercial contract which entails the sale of certain goods, and the production of these goods require personal work of the seller.

787 A striking example follows from S 27 of the Singapore SGA, which stipulates that it is the duty of the seller to deliver the goods. This duty is not affected by the principle that enforced performance is not available where it concerns non-delivery of commodities (and substitute goods are available at the marketplace).

788 This concerns situations where damages are inadequate to cure the consequences of a non-delivery of specific and ascertained goods, and where substitute goods are scarce and procurement of substitute goods is practically unobtainable. The availability of enforced performance in these situations is further limited by counter-exceptions, such as the common law clean hands doctrine and where an order for enforced performance requires constant supervision of the court.

instruments.[789] Taking into account the fact that the common law of Singapore does not encompass a general right of contract parties to enforced performance of non-monetary obligations, this would mean that parties to a commercial contract have no legal right to enforced performance. This consequence runs entirely counter to the exceptions to this basic rule,[790] which directly relate to the nature of the legal rights arising from a commercial contract. Moreover, the primacy of remedy model ignores that the availability of a remedial measure is merely a response to a wrongdoing. As mentioned previously, its availability depends on the nature of the legal rights and the assessment of the court as to the appropriateness of enforced performance.

118. The second common denominator is found in the notion within the three subject jurisdictions that a legal right of contracting parties derives from the adage *pacta sunt servanda*. This theoretical principle operates, however, completely different in the three jurisdictions. The underlying reason for this is that the civil law tradition entails the notion that the availability of enforced performance is a direct consequence of the principle of *pacta sunt servanda*.[791] As a result, the law provides measures to ensure that contracts are performed. In the common law tradition, the availability of enforced performance depends primarily on an infringement of a legal right which cannot be remedied by monetary compensation.[792] A detailed discussion about this issue will be returned to later in section 4.4. Here it is reiterated that the present section demonstrates that the contract law of the Netherlands and China approaches are rooted in the civil law tradition. As a result, both jurisdictions consider a claim for enforced performance as a judicial action which is interrelated with the legal right deriving from the act of promise making. This means in effect that a claim for enforced performance of a legal right can be brought to court prior to a failure in performance. This runs counter to the approach taken by the contract law of Singapore which is rooted in the common law tradition. Consequently, the contract law of Singapore acts on the notion that the legal rights of contracting parties follow from the act of contract making, but the fundamental question of whether the discretionary remedy of enforced performance is available arises first and foremost after a failure in

789 Friedmann in Cohen and McKendrick (n 4) 4–8; See also SA Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harvard Law review 1727. In this article two ways of understanding damages awards are explored. The first is the duties view, which supposes that damages awards confirm existing legal duties to pay damages. According to this view, damage awards are structurally similar to awards that require defendants to do things such as deliver contractually promised goods. The second way of understanding damage awards is the liability view, which supposes duties are not confirmed, but created by damage awards. According to this view, damage awards are structurally similar to a monetary fine for a criminal wrongdoing.

790 S 4.4.3.

791 Schwenzer 2016 (n 91) art 28 para 1.

792 Schwenzer 2016 (n 91) art 28 para 2.

performance.[793] The unification instruments have adopted a balanced approach in this regard, in the sense that legal rights are protected by a general availability of enforced performance which only arises in the case of a non-performance.[794] As for non-monetary obligations arising from a commercial sales contract subject to the contract law of Singapore, the picture is, unfortunately, more complicated due to the later discussed adequacy of damages test and the fact that it always remains at the discretion of Singapore courts to assess whether enforced performance is the most appropriate measure. As for the impact of these elements on the availability of enforced performance, it should be noted that the courts are entitled to deviate from the traditional English common law interpretation of the principle *pacta sunt servanda* where this is required in view of local circumstances. Today, this point is of significant importance considering the increasing divergence between the roles of England and Singapore as regional and international trading hubs for commodities.[795]

119. As mentioned earlier, the nature of a legal right may affect the available judicial actions. This point brings about the third common denominator, *i.e.,* enforced performance is not available when the performance of an obligation arising from a commercial sales contract requires a 'personal' undertaking of the promisor. The subject legal systems, however, differ on the question as to what extent enforced performance is not available in these situations. Disagreement between the legal systems brings about the proposition that a legal right arising from a commercial sales contract can be categorised as a strong or weak right, depending on the law governing the contract. The Dutch and Chinese contract law, as well as most unification instruments, have taken the default approach that enforced performance is available, unless the nature of the subject matter of a sales contract is related to highly personal work,[796] although it appears that counter-exceptions are possible in exceptional cases.[797] This escape route in the form of counter-exceptions needs to be interpreted liberally as the civil law roots of both jurisdictions hold the fundamental notion that an aggrieved buyer should not be forced to settle for damages as a substitute for the promised performance.[798] The Singapore common law approach starts with the notion

793 Phang et al 2012 (n 112) para 23.074.

794 Art 45 CISG; Arts 7.2.1, 7.2.2 PICC; Art 8:101 PECL; Art III.-3:101 DCFR, Comment A; Arts 6, 7 Draft Articles on Non-Performance PACL.

795 <https://www.singstat.gov.sg/modules/infographics/economy> accessed on 28 January 2019.

796 The CISG is silent on the matter, but a similar result can be achieved by seeking recourse to the exemptions discussed in s 6.2; Art 7.2.2(d) PICC; Art 9:102(c) PECL; Art III.–3:302(3)(c) DCFR; Art 7(b) Amendment Draft on Non-Performance PACL.

797 The term counter-exceptions is used to refer to limitations on the availability of enforced performance of delivery of specific and ascertained goods to the contract, and where substitute goods are only obtainable on the market with great difficulty, if at all.

798 Schwenzer 2016 (n 91) art 28, par 2.

that enforced performance is not available if it would infringe the freedom of contracting parties by forcing them to carry out a positive act, unless monetary compensation is inadequate to provide the required relief. The distinct interpretation of the non-availability of enforced performance of performance obligations can be traced back to a broad interpretation of the concept of the 'bindingness' of a contractual promise by the Dutch and Chinese contract law, and the narrow interpretation adopted by Singapore contract law.[799] Taking the above into consideration, it may be said that under Dutch and Chinese contract law, a legal right related to an obligation to perform something other than payment of the purchase price is significantly stronger, when compared to similar rights under Singapore contract law. It appears that the approach taken by the unification instruments is more on par with the contract law of the Netherlands and China.

120. It is a basic tenet that commercial parties conclude a sales contract in order to obtain the very thing they bargained for. The performance interest of commercial parties in this regard is reflected in the commonly shared view of Dutch, Singapore and Chinese contract law, that contractual promises bring about legal rights. Nonetheless, the cultural notions and legal traditions of the subject jurisdictions have resulted in fundamental differences in approaches to the protection of the performance of monetary and non-monetary legal rights. An important disagreement is related to the influence of the nature of a legal right on the availability of obtaining judicial protection in the form of enforced performance, which causes a significant degree of legal uncertainty in the realm of international commercial sales contracts and where parties are not aware of the (impact of the) diametrically opposed approaches. Despite the fact that the CISG brings about a more balanced approach in this regard, it does not provide a solid solution for contracting parties from different legal backgrounds. This follows from the principle that the court adjudicating a claim for enforced performance of a CISG-contract may react in the same way as it would react to similar sales contracts according to its own law.[800] Contracting parties could also opt for the PICC or draw inspiration from the approach taken by the other unification instruments. Although on the mere basis that the unification instruments encompass a solution in the form of a general availability of enforced performance on a failure in performance, it cannot be assumed that the drafters removed the dividing line between the civil and common law view on the question of whether enforced performance of a commercial sales contract should be available. This requires a detailed analysis of the rules on enforced performance of the buyer's obligation to pay the purchase price, the seller's

799 O Remien, 'Enforced Performance in European Contract Law' in K Boele-Woelki, FW Grosheide and EH Hondius (red), *The Future of European Contract Law : Essays in honour of Ewoud Hondius to commemorate his retirement as professor of civil law at the University of Utrecht* (Kluwer Law International 2007) 321 *ff*; Mak (n 527) 54 *ff*.

800 Schwenzer 2016 (n 91) art 28 para 3.

obligation to deliver the goods and the enforceability of additional performance obligations, such as the handing over of essential documents and the availability and delivery of spare parts.

4.3 Payment of the agreed price

4.3.1 Introduction

121. This section analyses the availability of enforced performance regarding the buyer's obligation to fully pay the contracted price of the goods. The importance of this discussion derives from the fact that requirements and limitations for the enforcement of monetary obligations vary considerably between jurisdictions and under the identified unification instruments. The divergence becomes clearly visible when considering the situation where a buyer repudiates the contract, but the seller continues to perform and subsequently claims for payment of the purchase price. From a comparative and practical perspective, another interesting issue that arises is that where the buyer only performs its payment obligation in part. This raises the question as to whether the seller releases the buyer from its remaining obligations by accepting partial payment. The two examples below show that there are a number of other situations where enforcement of the buyer's obligation to pay the purchase price is not quite so certain.

> *Illustration 1* – A fashion brand, located in country X, and a retail chain, located in country Y, conclude a sales contract for the entire winter collection 2018. The sales contract entails a commitment of the fashion brand to deliver the clothing before 1 August 2018. However, the goods were only sent to the buyer by the end of October 2018. Therefore, the retail chain refuses to pay the agreed price due to the late delivery. Subsequently, the fashion brand demands payment from a third party (Company C) who promised to pay the agreed purchase price if the buyer failed to do so. Company C argues that the seller is in breach of its duty to act in good faith because activating the guarantee is not an ultimate measure. This situation raises the question of whether the seller's right to obtain payment from Company C can be removed by avoidance of an unreciprocal promise; that is, the guarantee to pay the purchase price. Although avoidance, guarantees and good faith are not subject to discussion in the present research, this example displays the potentially complex nature of establishing whether a claimant is entitled to enforced performance of a monetary obligation. The aforementioned situation is illustrated below.

Figure 12 Example of the complex nature of determining the enforceability of the obligation to pay the price in a commercial context

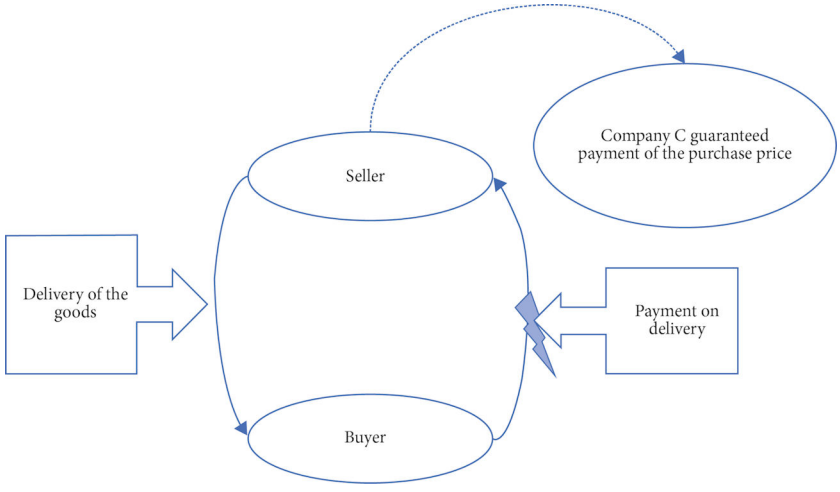

Illustration 2 – Suppose that a sales contract brings about the obligation of Company A (seller) to deliver two batches of a unique essential oil to the warehouse of Company B (buyer). The contract stipulates that the buyer can only be enforced to payment of the agreed purchase price for the second batch if the seller proves that it has sufficiently contributed to the joint effort to expand the business of the buyer. The contract further states that payment of the price for the goods only becomes due on delivery. Several months after delivery and payment of the first batch, the question arises as to whether the seller is entitled to payment of the second batch. In this situation, the buyer refuses to take delivery of the second batch and alleges that the seller did not show any commitment to support the expansion of the business of the buyer.

4.3.2 The right of action to obtain the agreed price in the Netherlands

122. Dutch contract law does not encompass an express right of the seller to recover the purchase price,[801] but it stipulates that the buyer is obliged to pay the full purchase price and that payment must be made at the stipulated time and place of delivery.[802] For situations where the buyer fails to pay the price in full, the seller can claim for payment of the outstanding amount under the overarching principle that the person obliged to give and

801 MBM Loos in C Mak in Schelhaas 2002 (n 19) 348; Sieburg, *Asser 6-II* (n 532).
802 Arts 6:29, 7:26(1)(2) DCC.

to do something may be ordered to do so by the court on the demand of the person to whom the obligation is owed.[803] This means in effect that a claim for enforcement of the buyer's obligation to pay the purchase price and enforcement of the seller's obligation to deliver the goods are subject to the same prerequisites. That is, limitations arising from the law, the nature of the obligation or a juridical act (*e.g.* the seller agrees to renounce its right to claim for the purchase price).[804] However, the aforementioned right to demand enforced performance (*i.e.* theoretically) does not require a failure in performance because it acts on the notion that the right to enforcement directly follows from the act of promise making. In principle, the court is therefore obliged to award a claim for enforced performance,[805] unless one of the previously mentioned limitations apply.

That having been said, the general consensus is that a claim for enforced performance of payment of the price shall only be awarded if the buyer's obligation is due and not (fully) fulfilled, although it is at the discretion of the court to order enforced performance on the condition that enforcement may only be carried out once the buyer's obligation becomes due.[806] Furthermore, a claim for enforced performance of the buyer's obligation may also be barred when the seller lacks sufficient interest,[807] when such a claim is manifestly unacceptable in view of the requirements of reasonableness and fairness,[808] and when a claim for enforcement constitutes an abuse of right.[809] This limitation may apply in the case where the buyer, for justifiable reasons, repudiates the contract before the seller's delivery obligation becomes due, but the latter decides to ignore the interest of the buyer by delivering the goods at the agreed place and time, and subsequently claims for the agreed price.

Enforcement issues may also arise when the buyer's obligation to pay the purchase price does not become due because it refuses to provide the necessary cooperation for delivery of the goods. There are some specific statutory provisions on the matter, but these are not in particularly helpful in this situation because Dutch contract law is simply not familiar with an overarching statutory duty to cooperate. For example, it follows from Dutch contract law that the buyer who demands delivery of the goods shall be in default where delivery is prevented because it does not provide the necessary cooperation.[810] It

803 Art 3:296(1) DCC.
804 Art 3:296(1) DCC.
805 S 4.2.2, 4.4.2.
806 Art 3:296(2) DCC; Sieburg, *Asser 6-II* (n 532) para 343; MBM Loos in C Mak in Schelhaas 2002 (n 19) 349.
807 Art 3:303 DCC.
808 Arts 3:12, 6:2(2), 6:248(2) DCC; This is the effect of the so-called derogatory effect of the standard of reasonableness and fairness, which means in effect that a contractual obligation to bring about a certain state of affairs is not enforceable to the extent that, in the given circumstances, this would be manifestly unacceptable according to the criteria of reasonableness and fairness; Hijma and Olthof 2017 (n 248) paras 300, 493.
809 Art 3:13 DCC.
810 Art 6:58 DCC

also follows from Dutch contract law that the buyer who demands delivery is in default where, for circumstances attributable to the buyer, the latter does not comply with an obligation owed on his part to the seller, who for that reason rightfully suspends delivery of the goods.[811] The court could discharge the seller from its obligation to deliver the goods if the buyer is in default.[812] All these principles do not have the effect that the buyer's obligation to pay the price becomes due in the example provided above. Nonetheless, where the court establishes that it follows from the requirements of reasonableness and fairness that the buyer is obliged to cooperate but failed to do so, the court could consider that the buyer's obligation to pay the price has become due and thus enforceable.

It should also be noted that there is a specific difference between the method of enforcement, in the sense that a failure in performance to pay a fixed sum may be enforced by direct execution. Put differently; it is possible to obtain payment without the cooperation of the non-performing party by means of a seizure and compulsory sale of goods owned by the latter.[813] For non-monetary obligations (*e.g.* the contractual obligation of the buyer to take delivery and the obligation of the seller to deliver the goods), the aggrieved party may claim for a court order for performance under pain of a judicial penalty (judicial penalties cannot be used to coerce performance of the obligation to pay the purchase price).[814]

4.3.3 An action for the price in Singapore

123. According to the sales law of Singapore, a buyer is obliged to make full payment of the purchase price for the goods, in accordance with the agreed time for payment.[815] An action for payment of the agreed sum is available as of right (in other words, at common law) to the seller,[816] once the contractual promise to pay the agreed price has become due and payable.[817] In contrast, a claim for the enforcement of a non-monetary obligation to bring about a certain state of affairs, and a claim for payment of a certain sum to a third

811 Art 6:59 DCC.
812 Art 6:60 DCC.
813 Arts 439 *ff*, 700 *ff* Dutch Code of Civil Procedure; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 589; Hartkamp 2011 (n 80) para 182.
814 Art 611a(1) Code of Civil Procedure; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 589.
815 SGA, s 27; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 194.
816 Phang et al 2012 (n 112) para 23.040; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 194.
817 *MP-Bilt Pte Ltd Oey Widarto* (n 623); Phang et al 2012 (n 112) paras 23.053, 23.088; Shenoy and Loo 2013 (n 13) para 18.82; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 194.

party is subject to the discretionary power of the courts.[818] Despite this distinction between actions for non-monetary and monetary obligations, it is held that enforcement of an obligation to pay the purchase price has the same effect as an order for enforced performance of a non-monetary promise, which, in essence, allows the promisee to obtain what it actually bargained for.[819] Considering the differences between the various monetary obligations, it is noted that an action for the agreed purchase price cannot be compared with a claim for (un)liquidated damages, because the former is considered a primary obligation arising from the contract, and the latter a secondary obligation enforced by law.[820] A claim for damages becomes relevant where the buyer wrongfully neglects or refuses to accept and pay for the goods.[821]

A seller is entitled to sue for payment of the outstanding purchase price if the property in the goods has passed to the buyer and the latter wrongfully neglects or refuses to pay for the goods according to the terms of the contract.[822] Aside from this obvious principle, it is important to focus on the occurrence of a partial payment in two situations. First, where the seller fails to deliver the goods and the buyer has already paid a part of the purchase price, the doctrine of a total failure of consideration prevents the seller to claim for the outstanding sum.[823] That is to say, the doctrine of consideration allows the buyer to ask for return of the sums paid. Secondly, in instances where the seller delivers the goods and accepts partial payment of the purchase price, the buyer could argue for application of the doctrine of promissory estoppel. This common law doctrine could (potentially) release the buyer from its obligation to pay the outstanding balance when the seller has led the buyer to believe that it will not enforce its legal right to full payment, the buyer relied on the seller's promise and the court establishes that it is inequitable for the seller to go back on its promise.[824] For the present comparative discussion, it is important to mention that these elements encompass moral considerations. For example, for the purpose of the doctrine of esptoppel the promisee should have acted in reliance on the promise in such a way as to make it inequitable to allow the promisor to act inconsistently with it.[825]

In instances where the property in the goods has not passed and the goods have not been appropriated to the contract, the seller also maintains an action for the purchase price

818 See the English case *Beswick v Beswick* [1968] AC 58, (1967) 2 All ER 1197; confirmed for Singapore contract law in Phang et al 2012 (n 112) para 23.038.

819 Shenoy and Loo 2013 (n 13) para 18.74; Hunter 2017 (n 7) para 8.5.

820 Phang et al 2012 (n 112) para 23.042.

821 SGA, s 50 (1); Phang et al 2012 (n 112) para 23.120 *ff*; Hunter 2017 (n 7) para 8.7.

822 SGA, s 49; Phang et al 2012 (n 112) para 23.120 *ff*; Hunter 2017 (n 7) para 8.6; Chong et al 2016 (n 125) para 10.7.14.

823 S 3.4.5.

824 Phang and Goh 2012 (n 318) para 275.

825 See *i.a., Abdul Jalil bin Ahmad bin Talib and others v A Formation Construction Pte Ltd* [2006] 4 SLR(R) 778 (SGHC); Phang and Goh 2012 (n 318) para 282.

if the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to fulfil its monetary obligation.[826] Appropriation of goods means separation of the agreed quantity from the other goods. For example, Company A agrees to sell 1000 bags of jasmine brown rice to Company B out of 5000 bags available (the total harvest). Appropriation of the sold rice may be done by identifying the particular bags or by ((un)conditional) delivery of the bags. Appropriation of the goods is also present if the rice was filled by the seller into the bags supplied by the buyer. That being said, the seller is entitled to sue for the agreed price regardless of whether the property in the goods has passed; it is only required that the buyer factually or constructively has accepted the goods.[827] In the case the buyer argues that the accepted goods are not in accordance with the contract, the seller remains entitled to claim payment of the agreed price, albeit that the buyer may counterclaim for damages.[828]

The seller's right to enforced performance of the buyer's obligation to pay the purchase price is subject to two important prerequisites. That is, the seller has a legitimate interest in performance of the contract and delivery of the goods is possible without the cooperation of the buyer. The legitimate interest requirement is, however, of low significance as the seller is under no duty to mitigate its losses, and it does not apply if the seller is bound to the performance of other contracts based on the initial (repudiated) contract.[829] Furthermore, the requirement of the seller's legitimate interest in performance does not apply retrospectively for accrued obligations concerning payment of the purchase price, which can even be sued for after the seller accepted the buyer's repudiation of the contract.[830] In addition to the requirement of legitimate interest, Singapore contract law also requires a certain degree of reciprocity [100]. This effectively means that the buyer should be ready and willing to pay the purchase price and to be ready and willing to do everything to make delivery possible. In turn, the seller has to show it is willing to do all things on its part thereafter to be done.[831] The requirement of reciprocity, however, does not apply if the seller is not able to deliver the goods because the buyer refuses to cooperate (*e.g.* the buyer refuses to submit the required documents for shipment of the goods), and where the failure in performance does not affect the essence of the agreed performance.[832]

826 SGA, s 49; Phang et al 2012 (n 112) para 23.120 *ff*; Hunter 2017 (n 7) para 8.6; Chong et al 2016 (n 125) para 10.7.15.

827 Chong et al 2016 (n 125) para 10.7.16.

828 Chong et al 2016 (n 125) para 10.7.17.

829 See the English case *White and Carter* (n 621), applied and clarified for Singapore law in *MP Bilt Pte Ltd v Oey Widarto* (n 623); Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 195.

830 *Ibid.*

831 *Indulge Food* (n 628) SGHC [53]; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 197.

832 *Indulge Food* (n 628) SGHC [61]; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 197.

4.3.4 Right to demand payment in China

124. The contract law of China acts on the notion that a right to enforced performance of the buyer's statutory obligation to pay the full purchase price arises from the act of promise making,[833] although the applicable statutory provisions reveal that actual enforcement is only available if the sales contract is effective, and the buyer did not pay the agreed price (regardless of its fault).[834] The same statutory prerequisites apply for enforced performance of non-monetary obligations, notwithstanding the fact that the limitations for obtaining an order for payment of the purchase price are less extensive.[835] This is because an action for payment of the price is not subject to specific statutory restrictions,[836] such as unsuitability or hardship of the buyer with the exception of unforeseen circumstances (see the considerations below).[837] In addition, enforced performance of payment of the outstanding amount does not have to be claimed within a reasonable time,[838] and it may not be excluded by contracting parties because of the highly replaceable character of money.[839] Only those general restrictions discussed hereafter are said to affect the seller's right to claim payment of the agreed price for the goods.

The overall principle is that contracting parties are obliged to act in good faith, and by not doing so, they are exposed to pay the risk that the court shall deny the claim for enforced performance of the obligation to the outstanding purchase price for the goods.[840] Furthermore, a claim for enforced performance of a monetary obligation is barred if the seller has not performed his or her own contractual obligations under the contract.[841] The seller may also be obliged to mitigate its losses (section 6.5), meaning that the seller has to cease all activities encompassing the preparation for delivery of the goods.[842] This applies in particular when the buyer has repudiated the contract, or where delivery of the goods

833 Arts 60, 159 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 23.

834 Arts 109, 130, 159–162 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 27; Peter Murray and Jiang Lin, *International Trade and Maritime Law in China* (Thomson Reuters 2017) § 4:68, accessed Westlaw China on 7 February 2017.

835 Art 109 CCL.

836 Bu 2013 (n 226) 72.

837 Bing Ling 2002 (n 229) para 8.066; In Zhang 2006 (n 41) 298 it is argued that a situation of *force majeure* is not a hurdle for awarding a claim of non-monetary obligation, which contradicts the suggestions in Bing Ling 2002 (n 229) para 8.069.

838 Art 109 CCL; Bing Ling 2002 (n 229) para 8.066.

839 Bing Ling 2002 (n 229) para 8.066; Zhang 2006 (n 41) 298.

840 Art 6 CCL; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 28.

841 Art 68 CCL; Bing Ling 2002 (n 229) para 8.067; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 27.

842 Arts 119(1), 6 CCL entails the obligation of contracting parties to act in good faith when exercising their rights and obligations under the contract; Bing Ling 2002 (n 229) para 8.067.

is contingent on the cooperation of the buyer.[843] If in such cases the goods are not delivered, the seller is not entitled to sue for payment of the agreed price, and is left with a claim for damages.[844]

In addition to the above-mentioned situations, the seller may not be entitled to claim for payment of the outstanding amount if the buyer prevents the seller from performing its obligation, making the performance of the contract by the promisor objectively and subjectively impossible (section 6.2).[845] Further, a seller may also be deprived of its right to enforced performance of the buyer's obligation to pay the purchase price if government regulations or restrictions make it legally impossible to perform the contractual promise,[846] or in the event of a vital change in circumstances of the particular case, such as a significant decrease in the demand for offshore oil and gas services due to unexpected volatility of oil and gas prices.[847] In this respect, it may be noted that the court is entitled to take into account new circumstances (*i.e.* potential hardship of the buyer due to a change of circumstances) by altering the contractually agreed prices or to terminate the contract on a request of the promisor.[848] As a result, the initial contractual monetary obligations are amended or cease to exist.

4.3.5 Conclusions

125. The notion that the seller is entitled to enforced performance of the buyer's duty to pay the price for the goods when this obligation is due, is the common denominator between the investigated national and international legal systems. This rule is the result of the universally adopted principle of *pacta sunt servanda*,[849] which serves as the backbone for the protection of the seller's performance interest in receiving full payment of the purchase price. Nevertheless, an important difference between the three subject jurisdictions

843 Art 119 (1) CCL; Bing Ling 2002 (n 229) para 8.067; A more elaborate discussion about the requirement to mitigate losses in relation to a claim for continuance is presented in s 6.5.

844 Bing Ling 2002 (n 229) para 8.067.

845 Bing Ling 2002 (n 229) para 8.068.

846 This principle is in line with art 62 of the CISG; Bing Ling 2002 (n 229) para 8.069.

847 Art 110(2) CCL should be applied by analogy in these cases; this particular article of the CCL is in accord with Art 245 of the German Civil Code and Art 402 paragraph 2 of the Japanese Civil Code. The latter is based on the German Civil Code; Bing Ling 2002 (n 229) paras 8.069, 8.070; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 31; A change of circumstances is not easily accepted as an excuse for non-performance. Any Chinese court that would like to apply the doctrine of a change of circumstances must have sought approval from a provincial high court or the Supreme Court. A more elaborate discussion about the barrier of change of circumstances is presented in s 6.2.

848 Bing Ling 2002 (n 229) para 8.079.

849 Arts 53, 62 CISG; Art 7.2.1 PICC; Art III.-3:301 DCFR; Art 9:101 PECL; Art 6 Amendment Draft on Non-performance PACL.

becomes apparent when considering a situation where the buyer's obligation to pay the outstanding amount has not arisen because the seller has not yet delivered the goods, or where the agreed time for payment is not yet due. This brings about the important question how the subject legal systems react to a situation where the buyer refuses to provide the necessary cooperation to enable the seller to make delivery and subsequently refuses to pay the purchase price. The second example mentioned under paragraph 121 demonstrates that this situation is entirely conceivable in the realm of commercial sales. The enforceability of payment of the purchase price may also amount to difficulties where the buyer fails to act in accordance with its obligation to deliver (non-substantial) parts for the production of the goods, or to specify the goods to be delivered by the seller. The considerations in this section reveal that the three subject jurisdictions and the majority of unification instruments have not adopted a uniform legal solution for such cases. The same can be concluded when considering the situation where the buyer only pays a part of the purchase price. In view of this, the following aims to provide new insights in order to tackle potential enforcement issues in the situations mentioned above by those involved in international commercial sales contracts across the borders of the three subject jurisdictions. The following also aspires to enhance the understanding of the dogmatic divergence between the three subject legal systems and how the national interpretation of civil and common law concepts works out at the national level.

126. The starting point is that the differences between the approaches taken by the three investigated jurisdictions trace back to the dogmatic qualification of the judicial action to obtain payment of the price of the goods (*i.e.* basic right *vs* remedy).[850] To put this premise into context, the Dutch and Chinese contract law act on the notion that the seller's right to enforced performance of the buyer's obligation to pay the purchase price directly arises from the act of promise making (*i.e.* conclusion of the sales contract).[851] By contrast, the Singapore contract law has taken the approach that the right to enforced performance of a monetary obligation arises from a failure in performance. Hence, a claim for enforced performance of a monetary (and non-monetary) obligation is characterised as a remedial measure. It should, however, be noted that Chinese contract law also categorises a judicial action for enforced performance of (non-) monetary obligations as a remedial measure, although the statutory right to enforced performance emerges from the act of promise making.[852] The unification instruments identified adopt a similar theoretical qualification

850 S 4.2.

851 Sieburgh, *Asser 6-I* (n 363) para 412; Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 23.

852 Arts 107, 109 CCL.

and structural approach by qualifying enforced performance as a right arising from the contract (*i.e.* the juridical act), which obtains operative effect on a failure in performance.[853]

127. The impact of the qualification of an action to obtain payment of the purchase price as a basic right or remedy becomes relevant when considering the situation where the monetary obligation is not yet due. With regard to situations where a commercial sales contract is subject to Dutch or Chinese contract law and the buyer is not yet obliged to pay the purchase price, the court could provide a judicial order for enforced performance (or a confirmation of the right to payment) on the condition that enforcement can be effectuated once the buyer's obligation is due. By contrast, the Singapore contract law, as well as the unification instruments, do not envisage the availability of an order to enforced performance before the monetary obligation is due. The PECL and DCFR, however, made a very important exception for situations where the buyer's obligation to pay the purchase price does not become due because it refuses to provide the necessary cooperation for delivery. In this situation, the PECL and DCFR adopt the principle that the seller may claim for enforced performance of the payment of the purchase price which is not yet due, provided that the buyer is unwilling to receive the reciprocal performance.[854] The CISG is not familiar with a similar principle, but it follows from the considerations in section 5.3 that the same result can be achieved by enforcement of the buyer's express duty to take delivery of the goods. This also applies for the PICC and the draft PACL which encompass an actionable obligation to provide the necessary cooperation for the fulfilment of the seller's obligation to deliver the goods.[855] If in these instances the enforcement order is carried out, the buyer's obligation to pay the purchase price becomes due and thus enforceable. Although this study contends that the three subject jurisdictions do not recognise an enforceable duty of the buyer to take delivery of the goods,[856] and are also not familiar with the solution offered by the PECL and DCFR, a similar result can be achieved under Dutch and Chinese contract law, where (theoretically) the availability of obtaining a judicial order for enforced performance of a monetary obligation is not related to the performance of the reciprocal obligation. However, Dutch contract law stipulates that payment of the price must be made at the time and place of delivery. The contract law of China brings about the rule that if the buyer fails to pay the price, the seller may claim

853 Art 46 CISG; Art 7.2.1 PICC; Art 9:10 PECL; Art III.-3:301 DCFR; Art 6 Amendment Draft on Non-Performance PACL.

854 Art 9:101(2) PECL; Art III.-3:303(2) DCFR.

855 The DCFR also adopted an enforceable obligation of the buyer to take delivery, but enforcement of this obligation is unnecessary in this situation considering the principle (art IV.A.–3:301 DCFR) that the seller is entitled to claim for enforced performance of a monetary obligation which is not yet due if the buyer is unwilling to take delivery.

856 S 5.3.

for payment. These provisions could be interpreted as a rule that payment of the price cannot be required if the duty to pay has not yet arisen, notwithstanding the dogmatic notion previously mentioned, that the right to payment arises from the act of promise making. Another option offered by both jurisdictions follows from the principle of good faith, which could potentially serve as a legal basis for demanding enforced performance of the buyer's obligation to pay the price for the goods because the latter is unwilling to cooperate to enable the seller to make delivery. Considering that the legal options described above bring about legal uncertainty, and the fact that Singapore contract law does not envisage payment of the purchase price before the due date, it is submitted here that the legislators of the three investigated jurisdictions, as well as the drafters of the CISG, PICC and the draft PACL, might draw inspiration from the approach taken by the PECL and DCFR.

128. Apart from the theoretical discussion above, consideration should also be given to the practical consequences of a situation where the seller accepts a partial payment. The starting point is that the contract law of the Netherlands, Singapore and China agree on the matter that the buyer is obliged to pay the outstanding amount where the seller rejects a partial payment. The same approach is adopted by the unification instruments.[857] Nonetheless, an important difference emerges when considering the situation where the buyer pays a lesser sum than agreed and this part performance is accepted by the seller.[858] Under Dutch and Chinese contract law, as well as the unification instruments, the obligation to pay the purchase price ceases to exist for the part which has been paid. The seller may claim for the remainder because the buyer is not released from its obligation to pay the outstanding amount. Only in extraordinary circumstances could the seller lose its right to claim for the remainder where the contract is governed by Dutch or Chinese contract law on the basis of the principle of reasonableness and fairness and the principle of good faith respectively (*e.g.* the buyer could reasonably rely on conduct or a declaration of the seller that partial payment releases the former from its obligation to pay the balance).[859] This approach stands in stark contrast to the solution provided for under the common law system of Singapore. As discussed earlier, the contract law of Singapore acts on the doctrine of a valuable consideration.[860] This, in effect, means that the buyer's obligation to make payment of the outstanding sum for the delivered goods is not affected by the seller's

857 Art 53 CISG; Schwenzer 2016 (n 91) para 23; Art 7.2.1 PICC; Art 9:101 PECL (full or partial non-performance of the buyer's payment obligation is not relevant, see art 1:301(4) PECL and MBM Loos in Schelhaas 2002 (n 19) 347); Arts III.-3:301, III.-3:101 DCFR; Art 1(c) Amendment Draft on Non-performance PACL; Lee 2016 (n 16) 193.

858 See for a general discussion about this matter Schwenzer, Hachem and Kee 2012 (n 13) paras 36.03–36.05.

859 NL: arts 6:248(2), 3:296 DCC; CHN: arts 6, 60, 109 CCL.

860 S 3.4.5.

acceptance of a part payment. The underlying rationale is that the seller's willingness to accept a lesser sum only amounts to a modification of the contract price when consideration for this adjustment is provided. That said, a claim for payment of the remainder can be refused by the court upon the doctrine of promissory estoppel. So, the main issue at hand is the requirement of a valuable consideration for the acceptance of the part payment and the doctrine of promissory estoppel, which is troubling for many businesses not familiar with the common law system. Interestingly, the principle of reasonableness and fairness, the principle of good faith and the doctrine of promissory estoppel all act on a moral level. Furthermore, the term 'waiver' of rights emerges in situations where these legal standards act as a barrier for the seller to obtain the outstanding amount on the basis of its own behaviour, which is a familiar concept under Dutch, Singapore and Chinese contract law, although the thresholds differ significantly. The difference between, on the one hand, the approach taken by Dutch and Chinese contract law, and on the other hand, the contract law of Singapore is that the common law doctrine of promissory estoppel can only be applied if certain elements are satisfied. Considering this divergence and that the different approaches are not consolidated in the unification instruments identified, explicit contractual stipulations for a situation of partial payment might prevent significant difficulties in the case of a commercial sales contract across the borders of the subject legal systems, and more generally when a sales contract concerns commercial parties from separate civil and common law jurisdictions. From a practical perspective, this means that parties to a commercial sales contract across civil and common law borders should be mindful of the Singapore common law rule that consideration is required if the buyer's obligation to pay the purchase price is varied in any way. So, for example, if the buyer agrees to pay 50% of the purchase price before the initially agreed time for payment and the seller in return promises to give the buyer more time to pay the balance of to reduce the total amount owed, there is consideration on both sides and the variation is contractually binding.[861] However, where the seller agrees to accept part payment of the purchase price (part payment is a unilateral variation) does not discharge the buyer to pay the remainder because the part payment is not good consideration.

861 Janet O'Sullivan and Jonathan Hilliard, *The Law of Contract* (6th edn, Oxford University Press 2014) para 6.56 *ff*.

4.4 Non-monetary obligations

4.4.1 Introduction

129. The purpose of the present section is to determine the basic degree of assurance that a contracting party is able to obtain the very thing it bargained for under a commercial sales contract. This is done by analysing the approaches taken by the contract law of the Netherlands, Singapore and China to the availability of enforced performance of non-monetary obligations in general and how these basic principles relate in substance with the approaches taken by the unification instruments. This comparative inquiry gives particular regard to the notion of non-monetary obligations in the realm of commercial sales transactions and the appropriateness of the domestic approaches in view of transactions involving generic and specific goods. In this section, enforced performance is understood as a judicial order to bring about the actual result of a commercial sales contract and does not encompass the ability of the aggrieved party to obtain the performance at the expense of the other party.[862] In other words, the discussion focusses on the obligation of the seller to deliver the goods in accordance with the terms of the contract and the availability of judicial enforcement in the case of, for example, non-delivery and delayed delivery.[863] It must also be noted that the considerations provided hereinafter should not be read in isolation when determining the flexibility of the judicial measures for enforced performance. By contrast, the findings presented in the subsequent chapters have a significant impact on the final conclusions.

> *Illustration* – A distributor, located in country A, entered into a contract with a trader, located in country B, for the purchase of reusable coffee cups from a manufacturer in country C. The parties agreed on the quantity, purchase price and method of payment, time for delivery and environmental standards for production. The seller threatens not to perform its contractual obligation and to sell the goods elsewhere if the buyer refuses to pay an additional surcharge to cover the costs of the seller. The buyer brings an action for an anticipatory failure in performance of the contract and enforced performance of the seller's delivery obligation.

862 Ch 7.

863 The availability of enforced performance in the form of replacement and repair is discussed in s 5.4.

4.4.2 Right to enforced performance in the Netherlands

130. Dutch contract law acts on the notion that the right to claim for enforced performance derives from the contractual rights of the parties.[864] In view of this, it is recalled that a failure in performance is not required for a judicial action to obtain an order for enforced performance of obligations to bring about a certain state of affairs.[865] Hence, the act of promise making is sufficient.[866] The privileged situation of the promisee is lessened by the obligation of the claimant to prove that it has sufficient interest in a court order for enforced performance before the due date.[867] The courts are given discretionary powers to undertake the assessment of sufficient interest, and to restrict an award for enforced performance by requiring that enforcement is only available at the moment the obligation is due and claimable.[868] In this respect, the promisee is obliged to furnish the facts that the contractual promise becomes at one point due, and if the underpinnings of the request for enforcement are disputed by the promisor, to further substantiate its claim.[869]

131. The considerations above have to be seen in light of the key principle that an alleged impossibility of performance is not necessarily a barrier for granting a court order which confirms the right to performance of the promisee.[870] There is justified merit in keeping open the possibility of providing a judicial order for enforced performance. That is, the court could order that enforcement can only be carried out once the cause of the barrier to performance is lifted; the court could authorise the aggrieved party to obtain the very

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864 S 4.2.2.

865 Art 3:296(1) DCC.

866 *Van der Gun v Farmex* Dutch Supreme Court 22 May 1981, ECLI:NL:PHR:1981:AG4192, NJ 1982, 59; Sieburg, *Asser 6-II* (n 532) para 343.

867 The Dutch word is *opeisbaar* which is best to be translated as claimable or enforceable; Mak (n 527) 91; CJJC van Nispen, *Sancties in het vermogensrecht* (serie Mon. NBW deel A11, Kluwer 2003) para 12; see for the requirement of sufficient interest art 3:303 DCC; Haas 2009 (n 206) 56; Sieburg, *Asser 6-II* (n 532) para 344; Sieburgh, *Asser 6-I* (n 363) para 166; AW Jongbloed, 'commentaar op artikel 296 Boek 3 BW' para 7 in J Hijma (ed), *Groene Serie Vermogensrecht* (Wolters Kluwer 2018) (n 530); AW Jongbloed and H Struik, 'Vooruilopen op tekortkoming bij niet-opeisbare verbintenissen volgens het NBW' (1983) *AA* 704; Compare art 150 of the Dutch Code of Civil Procedure, which stipulates that a plaintiff is burdened with the proof to the facts and rights such as the existence of a contractual obligation of the defendant to perform an obligation in favour of the plaintiff. The burden of proof of the plaintiff can be lessened, removed or shifted to the defendant if this follows from a special provision or the standards of reasonableness and fairness. A shift of the burden of proof is possible if the defendant has made it unreasonably burdensome for the plaintiff to prove the existence of the contractual obligation.

868 Art 3:296(2) 2 DCC brings about the principle that where the contractual promise is subject to a condition or term, the court is entitled to award a claim for enforced performance subject to that condition or term; Haas 2009 (n 206) 56; Hofmann 1976 (n 84) 136; De Vries 1984 (n 207); Dutch Supreme Court 21 October 1983, *NJ* 1984, 804; Sieburgh, *Asser 6-I* (n 363) paras, 14, 166, 246.

869 Haas 2009 (n 206) 56; Hofmann 1976 (n 84) 136; Jongbloed in *Groene Serie Vermogensrecht* (n 530) para 3.

870 Sieburgh, *Asser 6-I* (n 363) para 373; Dutch Parliamentary History Book 6 (n 207) 486–488.

thing it bargained for (section 7.3). It also prevents the non-performing party from suing for restitution if it finds a way to overcome the initial (practical) barrier to performance or just ignores a legal impediment and delivers the goods anyway.[871] In other words, impossibility of performance does not tacitly affect the right to performance. It should, however, be noted that even though the prerequisite of sufficient interest is satisfied, the right to enforced performance does not axiomatically result in a court order for enforced performance. For instance, the court shall not grant a claim for enforced performance of natural obligations,[872] nor is enforced performance available for obligations arising from moral promises (to be objectively determined).[873] In these cases, the parties are only subject to non-actionable duties (*i.e.* obliegenheiten).[874] An order for enforced performance is also not available if this is not appropriate considering the nature of the obligation, such as strictly personal obligations. In this vein, enforced performance is believed to be inappropriate for an obligation to give a speech, to write a manuscript and the moral obligation of the Dutch government to support homeless residents in finding a home by mediating between parties.[875]

132. In 2015, the aforementioned view on the availability of enforced performance of strictly personal obligations was shaken by a judgement of the District Court of Rotterdam.[876] This case came to the attention of the international press after the court ordered the artist Dahn Vo to perform his contractual obligation, which meant that he was obliged to produce a large and impressive artwork for the Dutch art collector Bert Kreuk for a price of US$350,000 on pain of a financial penalty.[877] In this case, the District Court established that a contract was concluded between Dahn Vo and Bert Kreuk and that the former failed to perform his contractual obligation.[878] The most logical subsequent reasoning would be that the nature of a contractual promise to produce an artwork entails a strict personal obligation and, therefore, the promisor cannot be forced to perform the contract. This line of thinking is based on the statutory principle that the person who is

871 Sieburgh, *Asser 6-I* (n 363) para 373; Hofmann 1976 (n 84) 126; Jan Smits, Daniel Haas and Geerte Hesen (eds), *Specific Performance in Contract Law: national and other perspectives* (Intersentia 2008) 19; Jongbloed *Groene Serie Vermogensrecht* (n 530) para 5.

872 Art 6:3 DCC; Sieburgh, *Asser 6-I* (n 363) para 14, 60 *ff*; Jongbloed in *Groene Serie Vermogensrecht* (n 530) para 6.

873 Consult Jongbloed in *Groene Serie Vermogensrecht* (n 530) para 6 for examples of various types of obligation which cannot be subject to a claim for enforced performance.

874 S 1.5.

875 *Lauppe v Lelystad* District Court Zwolle 27 maart 1985, KG 1985, 124; *Stichting Waterpakt v Staat* Dutch Supreme Court 21 March 2003, ECLI:NL:PHR:2003:AE8462, NJ 2003, 691.

876 District Court Rotterdam 24 June 2015, ECLI:NL:RBROT:2015:4417.

877 <https://artsbeat.blogs.nytimes.com/2015/12/02/danh-vo-and-bert-kreuk-settle-legal-dispute-over-artwork> accessed on 21 June 2017.

878 (n 876) para 2.17.

obliged to provide a certain work may be ordered to do so by the court on the demand of the person to whom the obligation is owed unless otherwise follows from the nature of the obligation.[879] This exception might be applicable in the case of an author who concluded a contract with a publisher to write a certain work. In case a claim for actual performance is not available to the promisor due to the nature of the obligation, the promisor is still entitled to claim damages.

133. The District Court of Rotterdam considered that the artistic nature of the contractual promise of Dahn Vo would only bar a court order to produce an artwork according to the initially agreed details.[880] Therefore, the judge stipulated that Dahn Vo was free to choose to adhere to the original assignment, but he was also free to deliver an artwork in accordance with the progress Dahn Vo had made as an artist.[881] In this respect, the court considered that contracting parties are professionals and, therefore, it could be expected that they would be able to reach a written agreement about the exact details of the work, which was to be large and impressive.[882] However, this well-argued practical solution of the court did not work out. In the following negotiations, Dahn Vo proposed to fulfil his contractual obligation by making a specific wall work for the amount of US$350,000 which would entail a line from the film *The Exorcist* that was said to represent Dahn Vo's inspiration of his latest body of work. It reads as follows: 'Shove it up your ass, you faggot'. Bert Kreuk did not accept the proposal of Dahn Vo but instead proposed the line 'From anger, hatred and all ill will', which was in turn rejected by Dahn Vo. Finally, the parties concluded that there was no solution to their dispute so the negotiations stopped and Dahn Vo has withdrawn his appeal.

134. Although it is not clear why the court did not apply the principle that a claim for actual performance is not available if this follows from the nature of the obligation, it could be that Dahn Vo did not, or did not sufficiently, argue that the performance of the initial agreement was impossible due to the nature of the obligation. Having said that, if the court ascertained that it was impossible for Dahn Vo to perform the contract, the alternative claim for damages could be allowed by the court. This may be the reason why Dahn Vo never argued that he was not able to perform his contractual obligation and that he agreed to negotiations about the fulfilment of the contract, albeit that it could be said that the earlier mentioned proposal of Dahn Vo shows that there was only an intention to frustrate and no desire to reach an agreement.

879 Art 3:296(1) DCC.
880 (n 876) para 2.21.
881 *Ibid.*
882 *Ibid.*

135. Although the considerations above suggest that the concept of enforced performance of an obligation to do or to give something has a very wide scope, a restriction follows from the principle that where a term for performance has been set, it is presumed to bar an earlier demand of performance.[883] Nonetheless, the impact of this principle is limited as the court is provided with the discretion to grant a claim for enforced performance on the condition that actual performance becomes available after lapse of the stipulated time for performance.[884] In other words, the focus lies on the right to enforced performance deriving from the act of promise making, rather than a decree for enforced performance deriving from a legal action.[885] Furthermore, the statutory principle embodying the right to claim for enforced performance is merely a general legal basis for specific actions to remedy a non-performance,[886] such as a demand for the removal of a charge or encumbrance,[887] a claim for delivery of what is missing,[888] and a claim for repair and replacement.[889] The Dutch contract law expressly requires a failure in performance for bringing about these specific forms of enforced performance of a sales contract. This is a fundamental departure from the general right to enforced performance, which (theoretically) does not require the occurrence of a non-performance.

4.4.3 The discretionary remedy in Singapore

136. In Singapore, the judicial remedy to obtain the actual performance of a positive non-monetary contractual promise on a failure in performance, is given at the discretion (the equitable jurisdiction) of the court.[890] Hence, the mere conclusion of a contract does not constitute a directly enforceable right to enforced performance of the non-monetary obligations arising therefrom.[891] In the case of a sale of goods, this means that it is at the discretion of the court, on the application of the aggrieved party, to order that the non-monetary contractual promise shall be performed specifically by the non-performing party.[892] It is, therefore, not the act of promise making but the failure in performance which entitles a contracting party to claim for enforced performance of the delivery of specific

883 Art 6:39(1) DCC.
884 Art 3:296(2) DDC.
885 De Jong, Krans and Wissink 2018 (n 194) 9.
886 Hijma and Olthof 2017 (n 248) paras 542–543.
887 Art 7:20 DCC.
888 Art 7:21(2) DCC.
889 Art 7:21(1)(b-c) DCC.
890 *Chung Khiaw Bank Ltd v Bajaj Textiles Ltd* [1968–1970] SLR(R) 78 [9] (SGHC); Halsbury's Laws of Singapore (Contract 2016) vol 7 paras 80.585, 80.588; Hunter 2017 (n 7) para 8.19; Phang and Goh 2012 (n 318) para 1552.
891 Halsbury's Laws of Singapore (Contract 2016) vol 7 para 80.585.
892 SGA, s 52(1).

and ascertained goods,[893] as well as the delivery of generic goods which are scarce, rendering the procurement of substitute goods practically unobtainable [138–149]. Starting from this principle, a claim for enforced performance can be brought to court if the dispute encompasses non-performance of designated contractual obligations,[894] unless the Singapore government is a contracting party.[895] Aside from this observation, the principle of priority of damages plays a central role in determining the enforceability of a non-monetary obligation.[896] This means in effect that a court order for enforced performance is only available 'when it will do more perfect and complete justice than an award of damages'.[897] This is said to be the case if the subject matter is not easy to quantify, or when the subject of the contract has an intrinsic value to the aggrieved party and, therefore, awarding a claim for damages cannot give the latter satisfactory relief.[898] It may be recalled that the adequacy of damages test derives from the competitiveness between the (abolished) courts of common law and equity (s 4.2.3), and the reluctance of the courts to enforce performance because disobedience could result in imprisonment following a contempt of court proceeding (s 6.6 and 7.4). It is also important to note at this point that a claim for the costs incurred in obtaining substitute goods is regarded as a form of damages instead of a consequence of enforced performance (s 7.3). Put differently, where an aggrieved buyer can obtain replacement goods from the market which provide the required satisfaction, a court order for enforced performance is not available. It, therefore, follows that an obligation to deliver generic goods is generally not enforced by a Singapore court.

137. The common law principle of priority of damages encompasses a two-step test. First, a claim for actual performance is only available where damages are not adequate to protect the performance interest of the aggrieved party (to be determined on the factual matrix of the case).[899] In the realm of commercial sales, this principle follows a subject approach,

893 *Ibid.*

894 Shenoy and Loo 2013 (n 13) para 18.3; *Excelsior Hotel Pte Ltd v Hiap Bee (Singapore) Pte Ltd (OCBC Finance (Singapore) Ltd, intervener)* [1989] SGHC 84 [12], (1989) 2 SLR(R) 322.

895 Government Proceedings Act (Cap 121, 1985 Rev Ed), s 27(1)(a); Shenoy and Loo 2013 (n 13) para 18.88; Halsbury's Laws of Singapore (Contract 2016) vol 7, para 80.587; *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] SGCA 51 [7], [8], [25] – [38], (1995) 2 SLR(R) 282.

896 Halsbury's Laws of Singapore (Contract 2016) vol 7 para 80.586; Phang and Goh 2012 (n 318) para 1552.

897 Halsbury's Laws of Singapore (Contract 2016) vol 7 para 80.586.

898 Shenoy and Loo 2013 (n 13) para 18.87; Chow Kok Fong, *Law and Practice of Construction Contracts* (v 1, 4th edn, Sweet & Maxwell Asia 2004) para 4.35; *Coastland Properties Pte Ltd v Lin Geok Choo* [1999] SGHC 293 [2].

899 Shenoy and Loo 2013 (n 13) paras 18.3 and 18.89; Phang et al 2012 (n 112) para 23.071; Phang and Goh 2012 (n 318) paras 1552, 1553. In this respect it is noteworthy that awarding specific performance is a discretionary remedy of Singapore courts and therefore, an appellate court will only overrule a first instance judge on the basis that (i) the ruling was based on a misunderstanding of the law and evidence before him or her and if (ii) the appellate court ascertains that no reasonable judge would have reached such an order. See *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] SGCA

to the extent that the availability to claim for the actual performance of a non-monetary obligation is limited to situations where the seller fails to deliver specific or ascertained goods, and where the seller fails to deliver generic goods which are scarce, rendering the procurement of substitute goods practically unobtainable. Secondly, in instances of a failure to deliver specific or ascertained goods, the Sale of goods Act stipulates that enforcement can be awarded whether awarding a claim for actual performance is a just and appropriate remedy.[900] The two-step test discussed above is based on the premises that damages comply with the economic interest of contracting parties and the moral perspective that contracting parties should not be exposed to the risk of infringement of their liberty to act or not to act.[901] In this light, the following discusses whether a claim for damages and an order for enforced performance of a non-monetary obligation should be equally available to the aggrieved party because awarding a claim for damages is not in every situation in accordance with the justified performance interest of the latter.[902] The following arguments substantiate this view: (i) actual performance compels the promisor to do what it promised to do rather than leaving the promisee behind with only the financial equivalent, which was not that which parties initially contracted for;[903] (ii) the core obligation is performance, and therefore, first and foremost, the promisee should be entitled to enforce the promisor to perform his or her undertaking;[904] (iii) actual performance, in general, leads to a better result than substitutive damages, in certain situations, because the latter imposes the obligation on the parties to mitigate their losses.[905]

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50 [76], (2012) 1 SLR 32; Confirming *Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR(R) 157, *The Vishva Apurva* [1992] 1 SLR(R) 912 and *Federal Computer Services Sdn Bhd v Ang Jee Hai Eric* [1991] 2 SLR(R) 427.

900 SGA, s 52; Singapore law adopted this principle as stated in the English case *Johnson v Agnew* (n 611); See the Singapore cases: *Indian Overseas Bank* [1991] (n 611); *Indian Overseas Bank* [1993] (n 611); *Lee Chee Wei* 2007 (n 591) 3 SLR (R) 537 [55], [66]; See also Phang et al 2012 (n 112) para 23.079 and the considerations in *E C Investment Holding Pte Ltd* (2012) (n 899) SGCA 50 [103]; Phang and Goh 2012 (n 318) para 1552.

901 *Lee Chee Wei* 2007 (n 591) SLR(R) 537, [52]; Phang and Goh 2012 (n 318) para 1552; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 201; This would mean, in a commercial context, that an order for actual performance is not available where this would force a party to run a business, see the English House of Lords decision in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 2 WLR 898; ABL Phang, 'Specific Performance – Exploring the Roots of "Settled Practice"' (1998) 61 Modern Law Review421, 423; Phang and Goh 2012 (n 318) para 1556.

902 O'Sullivan (n 861) para 18.3.

903 *Ibid.*

904 Kimel 2003 (n 542); Fried (n 541) 142; *Restatement (Second) of Contracts* §347 (1981).

905 Donald Harris, David Campbell and Roger Halson, *Remedies for Breach of Contract* (2nd edn, Cambridge University Press 2002); see the English case *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673; see s 6.5 for the impact of a duty to mitigate.

138. Based on these arguments, it is said that a promisee should be equally entitled to claim for damages and enforced performance of an obligation to do or convey something.[906] In view of this, the courts in England and the United States have shown a tendency to move away from the 'adequacy of damages test' to an assessment of the appropriateness of enforced performance.[907] Put differently, enforced performance is available where goods are unique or ascertained, 'or in other proper circumstances'.[908] In this respect reference is made by the Singapore court to the English case *Argyll v Waddell* (1997), where the English House of Lords did not show any willingness to veer from the underlying principles of the adequacy test, and[909] the English case *Rainbow Estates v Tokenhold* (1999) where a more relaxed approach was shown.[910] From the perspective of a broader availability, enforced performance of a delivery obligation of generic goods could be ordered where the buyer cannot obtain substitute goods from another source (*e.g.* in instances where 'the petroleum market is in an unusual state in which a would-be buyer cannot go out into the market and contract with another seller, possibly at some sacrifice to the price').[911] In view of the foregoing, it may even be said that enforced performance is becoming the default remedy in certain situations.[912] As a consequence, the gap between the Anglo-American approach and the civil law tradition is starting to narrow.[913] It appears, however, that Singapore courts do not necessarily follow the trend in English and American case law of extending the availability of enforced performance because such a judicial order is still firmly believed to be an extensive interference with the liberty of the promisor.[914] The Singapore Court of Appeal reinforces this notion in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd*.[915] However, in this case, it was also considered by the court that the principle as mentioned above did not apply to an operating licence which entailed the obligations to conform to the rules and regulations of Shell because this was, in essence, a commercial contract between two independent contractors.[916] That being said, the key

906 O'Sullivan (n 861).

907 See the English cases *Bewick v Beswick* (818); *Tito v Waddell* (No 2) [1977] Ch 106 [1977] 3 All ER 129; Uniform Commercial Code (US) s 2–716(1); Treitel 1998 (n 55) para 63.

908 Treitel 1998 (n 55) para 63.

909 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, (1997) 3 All ER 297.

910 [1999] Ch 64, (1998) 2 All ER 860; See also *Beswick v Beswick* (nr 818) AC 58 at 88, 102; Treitel 1998 (n 55) para 63.

911 See the English case *Sky Petroleum Ltd v V.I.P. Petroleum Ltd* [1974] 1 WLR 576; Treitel 1998 (n 55) para 63.

912 Cohen and McKendrick (n 4) 232.

913 Cohen and McKendrick (n 4) 232.

914 Phang et al 2012 (n 112) para 23.080; *Lee Chee Wei* 2007 (n 591) SLR(R) 537 [52], [53]; O'Sullivan (n 861) paras 18.49, 18.50; See the English cases *Cud v Rutter* [1720] 1 P Wms 570, 24 E.R. 521; *Wilson v Northampton and Banbury Junction Rly Co* [1874] 9 Ch App 279 at 284; *Bankers Trust Co v PT Jakarta International Hotels & Development* [1999] 1 Lloyds's Rep 910 at 915; See also Dori Kimel 'Remedial Rights and Substantive Rights in Contract Law' (2002) 8 Legal Theory 313; Kimel 2003 (n 542).

915 *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] SGCA 35 [72], [75], (1992) 2 SLR(R) 1.

916 *Ibid.*

point is that, regardless the nature of the agreed performance and terms of the contract, it is at the discretion of a Singapore court to allow or deny a claim for enforced performance.

139. The notion of the concept of enforced performance described above, is also visible in the Singapore Court of Appeal case *Ng Lay Choo Marion v Lok Lai Oi* where it was held that the general threshold regarding whether damages are adequate is a fundamental element of the assessment of the court whether it is just and equitable to award a claim for enforced performance of a contract of sales.[917] The Singapore Court of Appeal case *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* provides a clear example of the interpretation of Singapore courts of the adequacy of damages principle in view of protection of the buyer's performance interest.[918] It was considered by the court that an order for damages would have taken away the rights of the buyer's superior proprietary (*i.e.* ownership) rights in favour of the third parties involved and, therefore, the equities were assessed to be in the purchaser's favour, which meant that an order for enforced performance of the agreement was the most appropriate remedy.[919] The Singapore High Court case *Yeoh Wee Liat v Wong Lock Chee and another suit* offers another view on the assessment as to whether damages are an adequate remedy and the weight attached to the interest of the buyer in the actual performance of the contract.[920] In this case, the defendant did not fulfil its obligation to effect the necessary transfer of shares to the plaintiffs. The latter brought an action to court for enforced performance. The court considered that parties concluded an agreement for the two plaintiffs to hold 33% of the shares and the defendant the remaining 34%, which meant that parties had contracted to have nearly equal stakes, such that no one party would be the dominant shareholder, and not to be minority shareholders powerless to oppose a majority shareholder. Therefore, the court concluded that damages would not be an adequate remedy.[921]

140. Despite the considerations above, damages remain the preferred remedy in the realm of commercial sales. The favourable look on the appropriateness of a monetary remedy coincide with the argument that the purpose of contracting is to allocate future risks.[922] This consideration also operate alongside the 'harm principle',[923] which entails the idea that a *breach of promise* and a *breach of contract* should be distinguished.[924] The former

917 [1995] SGCA 67 [16], (1995) 3 SLR(R) 77; Phang et al 2012 (n 112) para 23.119.
918 *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* (n 617).
919 *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* (n 617) SGCA 24 [17].
920 *Yeoh Wee Liat v Wong Lock Chee and another suit* [2013] SGHC 153, (2013) 4 SLR 508.
921 *Yeoh Wee Liat v Wong Lock Chee and another suit* (n 920) SGHC 153 [54].
922 Fried (n 541) 142; Kimel 2002 (n 914); Kimel 2003 (n 542).
923 See the explanation of John Stuart's harm principle in Kimel 2003 (n 542).
924 C MacMillian, 'From Promise to Contract: towards a liberal theory of contract' (2004) 15(1) King's Law Journal 202; Kimel 2003 (n 542).

leads to abused trust and personal insult and the latter merely to a loss of benefits, which can be restored by (expectation) damages and only when the monetary hurt is not restored, enforced performance can be awarded.[925] From this perspective and simply put, it is understandable that in common law a contract can be breached on the basis that there is a better bargain available because the harm can be restored through substitute damages.[926] It seems, however, that the main reasons for Singapore courts to stick to the view that damages are the preferred remedy, is that the courts are reluctant to actually interfere with the liberty of a person to act or not to act if substitute damages could also cure the failed performance and because ignoring an order for enforced performance of a non-monetary obligation could lead to harsh measures, such as penal sanctions and imprisonment.[927]

141. A Singapore court may grant an order for enforced performance if the subject matter of a contract has a unique and intrinsic value. These elements must be assessed from the viewpoint of the purchaser claiming for enforced performance. In this vein, it was adjudicated by the Singapore High Court in *Lee Chee Wei v Tan Hor Peow Victor and Others* that in the case of shares of a private limited company the vendor's interest are strictly monetary (that is, payment of the purchase price) and, therefore, it would not be appropriate to provide an order for enforced performance of the sales contract in favour of the vendor of such shares.[928] Concerning the sale of real estate, the principle applied that no two pieces of land are the same and, therefore, it was axiomatic that the subject matter was unique and of intrinsic value to the buyer.[929] In *Tay Ah Poon and another v Chionh Hai Guan and another*, the Court of Appeal confirmed this principle by stipulating that a claim for enforced performance is almost invariably granted when seeking to enforce contracts for the purchase and sale of land, since the purchaser is entitled to get the very parcel bargained for and not to be forced to take an inexact substitute.[930]

142. In recent years, Singapore courts have considered that all circumstances are relevant in determining whether a claim for enforced performance should be awarded. This new

925 Macmillian (n 924) 205; Kimel 2003 (n 542); E Allan Farnsworth, 'Legal Remedies for Breach of Contract' (1970) 70 Columbia Law Review 1145; Charles Goetz and Robert Scott, 'Enforcing Promises: An Examination of the Basis of Contract' (1980) 80 Yale Law Journal 1261; See also for the preference for expectations damages Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard Law Review 708.

926 This is a reflection of the doctrine of 'economic breach'. According to economics, this doctrine shows that the common law entails more a hybrid of practical principles than morality; Macmillian (n 924) 206; Kimel 2003 (n 542); Fried (n 541) 143.

927 Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 201; Shenoy and Loo 2013 (n 13) para 18.87.

928 *Lee Chee Wei v Tan Hor Peow Victor* [2006] SGHC 116 [9].

929 Halsbury's Laws of Singapore (Contract) vol 7 para 80.595.

930 *Tay Ah Poon and another v Chionh Hai Guan and another* (n 589).

approach has been adopted in a case where two parties claimed enforced performance of a contract of sale of a property which was based on an option to purchase the property.[931] The court considered that all the relevant facts and circumstances of the case should be taken into account to assess whether the party claiming for enforced performance had intended to buy the land for investment or for other reasons. In this case, the Singapore High Court refused a claim for enforced performance of a contract of sale of a property as the seller only had a financial interest in the subsequent execution of the sale of the premises.[932] In a similar vein, in *Lim Beng Cheng v Lim Ngee Sing* the Singapore High Court considered that damages were an adequate remedy as the plaintiff's interest in the property was primarily monetary in the form of an investment, the latter was, at some point, prepared to accept monetary compensation if it was right, and the property was also not a particularly unique piece of property.[933] In this case, the English common law default consideration that two pieces of land are not alike and damages do not provide the aggrieved party with an adequate remedy, did not apply.[934] However, a strict monetary interest in the initial performance of the contract does not necessarily rule out an order for enforced performance.[935] For example, in *Lee Chee Wei v Tan Hor Peow Victor* the court dealt with a failure in performance of a sale of shares of an unlisted company.[936] The court considered that a contractual promise to sell shares in an unlisted company could be specifically enforced because these shares are limited in number and not always available in the open market. Nonetheless, the court made use of its discretionary power to assess whether it would be just and appropriate to enforce performance of the contract.[937] In addition, the court considered that a claim for enforced performance would be impractical and required supervision of the court.[938] Based on these circumstances, the court denied the claim for enforced performance and ordered payment of nominal damages instead. The limitations of impracticality and constant supervision are further discussed in chapter 6. Other limiting aspects can also be taken into account. For example, the courts may consider the traditional common law concept of mutuality, which entails the principle that the court will not compel a defendant to perform its obligations specifically if it cannot at the same time ensure that any unperformed obligations of the plaintiff will be specifically performed, unless damages would be an adequate remedy to the defendant for any default on the

931 *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd & Anor (Orion Oil Limited & Anor, Interveners)* [2010] SGHC 270.

932 *New Dennis Arthur & Anor v Greesh Ghai Monty & Anor* [2012] SGHC 122; Singapore Academy of Law Annual Review of Singapore Cases (n 120) 12.136 *ff.*

933 *Lim Beng Cheng* (n 615) SGHC 282 [105], [107]-[110].

934 *New Dennis Arthur & Anor v Greesh Ghai Monty & Anor* (n 932).

935 *Lee Chee Wei* 2007 (n 591) SGCA 22 [54].

936 *Ibid.*

937 *Lee Chee Wei* 2007 (n 591) SGCA 22 [55].

938 *Lee Chee Wei* 2007 (n 591) SGCA 22 [56].

plaintiff's part.[939] The requirement of mutuality should be assessed in light of the requirement of reciprocity as set out in the Singapore case *Indulge Food Pte Ltd Torabi Marashi Bahram* [123]. In this case, the Singapore High Court reiterated the principle that enforcement of non-monetary obligations cannot be enforced when the claimant did not, cannot, or will not, render its own performance owed under the contract.[940]

143. An essential factor of the adequacy test is whether the subject matter is unique in the sense that there is no substitute performance available.[941] Thus, when answering the question as to whether enforced performance is available for sales contracts, it has to be assessed whether procurement of substitute goods is practically obtainable.[942] For example, a subsidiary of a Japanese construction company brought a claim to court against a sub-contractor with its principal business in Australia for enforced performance of the obligation to deliver building materials on site for the construction of several apartment blocks in Singapore. A part of the agreed price for these materials was paid in advance of delivery. Nonetheless, the sub-contractor refused to deliver the containers with the material which had already been paid for. It was held by the court that the non-delivery was unjustified and that the materials probably had no market value because the goods manufactured by the sub-contractor were specifically made for the project. Taking this into consideration, the court provided an order for enforced delivery of the containers with the materials at the worksite.[943]

144. The qualification of specific and ascertained goods requires some extra attention since this is one of the main thresholds for awarding a claim for enforced performance of a non-monetary promise under the Singapore Sale of Goods Act. Difficulties may arise, for example, in the earlier described situation of bulk goods.[944] In short, a sales contract with bulk goods may be subject to a claim for enforced performance if the agreement is clear about the quantity and other specifics of the goods.[945] For example, the sale of 500 metric tonnes of organically produced jasmine rice which is a part of a bulk of 2000 metric tonnes. It is, however, unclear as to whether the jasmine rice should be existing at the time of

939 *Co-operative Insurance Society* (n 909); *Price v Strange* [1978] Ch 337 [367-368]; Phang et al 2012 (n 112) para 23.136; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 206.

940 N 909; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 206.

941 Halsbury's Laws of Singapore (Contract 2016) vol 7, para 80.586; Hunter 2017 (n 7) para 8.18, 8.19.

942 SGA, s 52; Phang et al 2012 (n 112) para 23.109; Halsbury's Laws of Singapore (Contract 2016) vol 7, para 80.596; Hunter 2017 (n 7) para 4.3.

943 *Kajima Overseas Asia Pte Ltd v Glenn Industries Pty Ltd* [1997] SGHC 11.

944 S 3.3.

945 Hunter 2017 (n 7) para 4.4.

conclusion of the contract in order to be defined as specific goods.[946] This touches on the question of whether future goods could be subject to a claim for enforced performance. In *Simgood v MLC Shipbuilding* (2015) the Singapore High Court awarded a claim for enforced performance of a contractual promise to construct and deliver a vessel pursuant to section 52(1) of the Sale of Goods Act, which stipulates that in any action for breach of contract to deliver specific or ascertained goods, the court has the power, on the plaintiff's application, to provide an order for enforced performance of the contract, without giving the defendant the option of retaining the goods on payment of damages.[947] In order to provide an order for enforced performance, the court had to assess whether the thing sold was specific or ascertained. In accordance with section 6(1) of the Singapore Sales of Goods Act, the court considered that goods might only be qualified as specific if they exist at the moment parties concluded the contract. As the vessel was not in existence at the moment parties entered into the contract, the thing sold could not be qualified as a specific good. Nonetheless, the court assessed that the contracting parties had identified the vessel, without any doubt, as the thing sold under the contract and, therefore, the vessel was ascertained, which in turn, provided the court with the statutory power to award the claim for enforced performance of the contract. Thus, even if the things sold cannot be qualified as specific, the court remains entitled to award a claim for enforced performance of a non-monetary promise if contracting parties can identify the goods as the things to be delivered at a later stage. This could occur, for example, if the goods sold are still under construction.

145. In assessing whether the claim for enforced performance of the obligation to construct and deliver the ship should be allowed, it was also considered whether it would be just and fair in all circumstances for the court to exercise its equitable power to award enforced performance instead of damages. In this regard, it was also taken into account as to whether the thing sold was unique to the aggrieved party,[948] if the thing sold was needed for immediate use and if contingency plans were made for the use of other ships, whether it would be difficult for the aggrieved party to establish the purchase price and if the seller would be able to pay any damages awarded by the court. In this respect, the court held that a claim for damages is unlikely to be awarded if this would result in the insolvency of the seller because this would benefit the buyer over the other promisees.

146. The discretion of the court also entails the right to provide an order for enforced performance of the contract under a variation of the conditions as agreed by parties. In *Lee Cheng Kang and another v Lee Tian Kai,* the Singapore Court of Appeal dealt with a

946 Chong et al 2016 (n 125) para 10.2.10.
947 [2015] SGHC 303.
948 Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.221.

case where an allegedly naïve seller sold his share in a property for less than the market price under the influence of his nephew, who was a real estate agent.[949] This situation entitled the court to provide an order for enforced performance under a different consideration than stipulated by parties (the agreed price).[950] That is, the buyers were ordered to pay the market value of the shares in the property based on an average of three values.[951] In the Singapore Court of Appeal case *Ng Lay Choo Marion v Lok Lai Oi* the court first established that it could not see any ground for denying the aggrieved party an order for enforced performance of the contract. Preceding this assessment, the court stated that it was relevant to consider what terms should be imposed in order to do justice to the parties.[952] This meant that the respondent was ordered to transfer the apartment in question on the terms that the appellant had to make payments on the loan and interests.[953]

147. Although the above considerations may imply that enforcement of the seller's delivery obligation is only available when the goods are deemed specific or ascertained and damages do not provide the aggrieved buyer with an adequate remedy, the Supreme Court of Judicature Act of Singapore states that the High Court has the power to grant all reliefs and remedies at law and in equity, including specific performance.[954] This suggests that Singapore courts retain the discretionay power to issue an order for enforced performance outside the Sale of Goods Act when justified by the particularities of the contract rendering damages an inadequate remedy.[955] For example, when the goods are ordinary articles of commerce with no special value or interest, but due to global trade war substitute goods are obtainable on the market only with great difficulty, if at all.[956] In this situation, damages are not an adequate remedy when the court establishes that non-delivery of the supplies impels the buyer towards insolvency, because the latter is not able to fulfil the outstanding purchase orders. This consideration should be viewed in light of the usage of the instrument of mandatory injunctions to specifically order the promisor to do what it had promised under the contract, even though the obligation cannot be enforced under the Sale of Goods Act because the goods are not specific or ascertained to the contract.[957] This way of protecting the parties' performance interest is described in more detail below.

949 [1996] SGCA 4, (1996) 1 SLR(R) 87.
950 *Lee Cheng Kang and another v Lee Tian Kai* (n 949) SGCA 4 [24, 25].
951 *Lee Cheng Kang and another v Lee Tian Kai* (n 949) SGCA 4 [23].
952 *Ng Lay Choo Marion* (n 917) SGCA 67 [21].
953 *Ibid.*
954 Supreme Court Judicature Act (Cap 322, 2007 Ed) s 18(2), Sch 1 para 14 (as amended by the Supreme Court of Judicature (Amendment) Act (No 16/1993)).
955 Phang et al 2012 (n 112), para 23.119.
956 *Howard E Perry v British Rly Board* [1980] 1 WLR 1375 [1382-1383]; Phang et al 2012 (n 112), para 23.119.
957 Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 193; Phang et al 2012 (n 112), para 23.119.

148. In *Sky Petroleum Ltd v VIP Petroleum Ltd*, the buyer agreed to purchase at a fixed price its entire order (with a minimum annual quantity) of petrol and diesel fuel for its filling stations for the next ten years.[958] During the 1973 oil crisis, the seller terminated the contract and the buyer brought an action to court to restrain the seller from withholding its supplies. The court held that an injunction, under the circumstances would essentially be an order of specific performance of the contract to sell, which would normally be refused on the basis that damages would be sufficient. However, in the rare situation where the defendant was the only supplier and the only method which would enable the plaintiff to carry on their business, an interim mandatory injunction would be granted as damages would no longer be a sufficient remedy. Interestingly, the subject matter could not be qualified as specific or ascertained goods, but an indirect award for enforced performance in the form of an interim mandatory injunction was justified on the basis that it was uncertain as to whether the claimant could obtain an alternative supply.[959] This shows the far-reaching power of the courts to grand enforced performance by indirect means in cases where such an order normally is not available (unascertained goods). However, the availability of enforced performance outside the ambit of the Sale of Goods Act should not be overestimated due to various common law counter-exceptions, such as difficulty of supervision and want of mutuality.[960] It must also be mentioned that the contract in *Sky Petroleum Ltd v VIP Petroleum Ltd* did not qualify as a contract for the sale of goods, but it involved a long-term supply contract under which successive sales would arise if orders were placed and accepted.[961] Nonetheless, contracting parties should be aware of the discretionary power of the courts to issue a mandatory injunction in relation to contracts for the sale of goods which are neither specific nor ascertained.[962]

149. The aforementioned availability of a mandatory injunction order as an indirect form of the common law remedy of 'specific performance' (*i.e.* enforcement of non-monetary obligations to bring about a certain state of affairs) should be distinguished from a prohibitory injunction order.[963] This instrument may be used to order the promisor not to do something.[964] For example, an injunction to restrain the supplier to sell its products

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958 *Sky Petroleum Ltd* (n 911).

959 *Sky Petroleum Ltd* (n 911); Halsbury's Laws of Singapore (Contract 2016) vol 7 para 80.596; Anson's Law of Contract (n 360) 616. See also the English case *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799.

960 Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 206; Phang et al 2012 (n 112), para 23.136.

961 Phang et al 2012 (n 112), para 23.119, footnote 246.

962 *Gatekeeper Inc v Wang Wensheng (t/a Hawkeye Technologies)* [2011] SGHC 239.

963 Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 207, 208; Anson's Law of Contract (n 360) 615-619.

964 Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 207; Anson's Law of Contract (n 360) 615.

to other distributors in a certain territory. However, in situations where enforcement of a prohibitory injunction would come close to the common remedy of 'specific performance' Singapore courts, generally, will refuse such an order.[965]

Another interesting point in this context is that Singapore courts may consider an interim mandatory injunction as in indirect enforcement measure when there is a serious question to be tried with a real prospect of success, damages are inadequate and the risk of injustice to the promisee if the injunction were not granted is greater than the risk of injustice to the other party if the injunction were granted.[966] On whether there is a distinction between interim mandatory injunctions and prohibitory injunctions, the Singapore Court of Appeal held that the courts generally require a higher degree of assurance before they are willing to grant interim mandatory injunctions as opposed to interim prohibitory injunctions.[967] However, the Court held that this was "no more than a generalisation, albeit a useful one, of what courts normally do".[968]

4.4.4 Mixed approaches in China

150. The contract law of China stipulates that if a party fails to perform its non-monetary contractual obligations, it may be ordered, amongst other things, to continue to perform the contract.[969] It appears that the term 'enforced performance' is similar to the meaning of the term 'continues to perform'.[970] The aggrieved party to a commercial sale is generally entitled to enforced performance, unless one of the statutory exemptions apply.[971] There are three main observations that need to be addressed in that regard. First, the contract law of China adopted the general structure of the PICC for actions to obtain performance of non-monetary obligations. This approach resulted in merging civil and common law principles. This means in effect that the contract law of China establishes the right to

965 Phang et al 2012 (n 112), para 23.174; Phang and Goh 2012 (n 318) para 1566; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 207, 208, 214; *Pub 1997 Pte Ltd v Scorpion [1994] 1 SLR(R) 437* [20]-[21], [25]; *Tomongo Shipping Co Ltd v Heng Holdings SEA (Pte) Ltd [*1997] 1 SLR(R) 263 (SGHC); *Chua Kwok Fun Kevin and another v Etons Management Consultants Pte Ltd and others* [1999] SGHC 84, (1999) 1 SLR(R) 1088 [956]; *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* (n 915) SGCA 35 [69].

966 *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd and others* [1994] 3 SLR(R) 114; *American Cynamid Co. v Ethicon Ltd* [1975] AC 396.

967 *Chuan Hong Petrol Station v Shell Singapore Pte Ltd* (n 915).

968 *Ibid.*

969 Art 107 CCL.

970 Chen Lihu and Zhu Ping, 'On the Actual Performance System in International Contract Law' (2008) iss 1 Present-day Law Science 94 (陈立虎，朱萍．国际合同法上的实际履行制度研究．时代法学); Tan Ling, 'Actual Performance Responsibility and its Legal Application' (2000) 5 Modern Law 85 (谭玲．实际履行责任及其法律适用[J]. 现代法学); Zheng and Lei (n 646).

971 Art 110 CCL.

enforced performance in line with the civil law structure but then directly limits this right by means of various statutory limitations, which more resembles the common law approach. Second, the contract law of China embraces the common law approach in the sense that enforced performance is available if a party fails to perform its contractual obligations.[972] However, the systems are not identical as Chinese contract law does not confine the right to enforced performance of non-monetary obligations under commercial sales contracts to specific situations. By contrast, Chinese contract law has adopted the civil law distinction between a failure in performance of any obligation, and a failure to deliver in accordance with the agreed quality. In the case of the latter, the aggrieved party is entitled to claim repair and replacement, provided that the statutory requirements are fulfilled.[973] Lastly, the contract law of China comprises a statutory right to enforced performance of a non-monetary obligation where one party expresses explicitly or indicates by its conduct that it will not perform its obligations under a contract (*yugi huiye*).[974] The right to require performance in instances of a prospective failure in performance is based on the common law concept of anticipatory breach. The latter allows the aggrieved party to terminate the contract if, prior to the agreed date for performance, the other party repudiates the contract.[975]

151. A sales contract which is subject to the contract law of China entails by law transfer of the ownership of the goods on their delivery,[976] to deliver the goods within the time limit and place agreed,[977] and delivery in accordance with the agreed quality.[978] If a party fails to perform one of these obligations, it could be ordered by the court to perform its obligations or to take remedial measures.[979] The right to claim continuance of performance is also qualified as enforced performance and, in light of common law terms, as a remedial right or the broadly known term 'specific performance'.[980] The approach as mentioned above is similar to the view taken by the General Principles of Civil Law, which also provides an aggrieved party with a right to demand enforced performance.[981] Compared to the earlier mentioned ECL it is said that the principles of the contract law of China are a great step forward because the latter have introduced a number of restrictions on the right to claim enforced performance, albeit it is held that the scope of application is still too broad

972 Art 107 CCL.
973 Art 111 CCL.
974 Art 108 CCL; Bing Ling 2002 (n 229) para 8.022; Zhang 2006 (n 41) 294.
975 Art 94(2) CCL; Bing Ling 2002 (n 229) paras 8.017–8.022; Zhang 2006 (n 41) 294.
976 Art 133 CCL.
977 Arts 136, 138, 141 CCL.
978 Art 155 CCL.
979 Art 107 CCL.
980 Chen-Wishart, Loke and Ong 2016 (n 156) 19.
981 Art 111 GPCL.

and[982] that the remaining emphasis on enforced performance of the contract hinders the economic development of China.[983] In this respect, it is argued that in the current market economy contracting parties should be encouraged by the law to focus on efficiency and to require compensation of the monetary benefits of a contract in the case of a failed performance, especially when there are alternatives readily available on the market.[984] However, the statutory maximum limit on damages suggests that enforced performance of a contractual obligation remains the preferred option.[985] Moreover, it is frequently repeated in case law that contracts should be performed.[986]

152. A court order for enforced performance of the contract means in effect that the aggrieved party is entitled to request the court to enforce the defaulting party to fulfil its contractual obligations. It is held that this right enables the aggrieved party to achieve the purpose of the contract,[987] and to do justice to the integrity of social life.[988] It is held that, on the face of it, an order for enforced performance would result in the fulfilment of the initial contractual obligations, because the scope of the obligations of the promisor remains unchanged.[989] In other words, the burden placed on the non-performing party by the contract does not increase and, therefore, it could be said to make promisees indifferent.[990] In view of the above, it is held that a claim for enforced performance does not arise from (the liability for) the non-performance, but from the act of promise making and, therefore, performance of a court order for enforced performance does not differ in nature from the results if, from the outset, the contract was correctly performed.[991] From this perspective a claim for the continuance of performance is not regarded as a remedy for non-performance, but merely a right which arises from the act of concluding a contract.[992]

982 Zheng and Lei (n 646).

983 Art 110 CCL; Zheng and Lei (n 646).

984 Zheng and Lei (n 646).

985 Art 113 CCL stipulates that the amount of damages shall be equivalent to the losses caused by the non-performance, but shall not exceed the amount that may be foreseen as a result of a failure in performance.

986 *E.g., Daqing Kaiming Wind Power Tower Manufacturing Co Ltd v Huarui Wind Power Technology (Group) Co Ltd* [2015] SPC Gazette 2015, issue 11.

987 Zheng and Lei (n 646).

988 Lu Chen, 'Specific Performance and Its Limits' (2007) iss 4 Journal of Comparative Law 98 (芦谌, . 履行请求权及其界限.比较法研究. 2007年. 期号 4. 页码 98).

989 Chen (Lihu) and Zhu (n 970).

990 Ye Changfu, 'On Judgment and Choice of the Value of Specific Performance of Contract' (2005) iss 2 Modern Law Science Xiandai Faxue 152 (叶昌富. 论强制实际履行合同中的价值判断与选择. 现代法学. 2005 年. 期号 2. 页码 152).

991 *Ibid.*

992 Chen (Lihu) and Zhu (n 970); Wang Liming, *Breach of Contract Theory* (China University of Political Science and Law Press 2003) 430; Ye (n 990).

153. However, it is also argued that the fulfilment of a court order for enforced performance is different in nature compared to voluntary performance because the former takes place after the expiry of the agreed time for performance and thus amounting to a non-performance (negative behaviour), and interference of the coercive power of the state is required.[993] Based on this reasoning it is held that the right to claim enforced performance is a remedy deriving from the *civil liability* for the incorrect performance of a contractual promise.[994] The mandatory character of the statutory right to require performance of a contractual obligation is said to be reflected in the principle that payment of the incurred damages does not deprive the aggrieved party of its right to claim enforced performance.[995] These considerations are in line with the wordings of the provisions of the contract law of China, which clearly indicate that an aggrieved party to a contract is entitled to claim continuance of performance in the event the contract is not properly performed.[996] The strong emphasis on the right to performance of a contract is also reflected in the statutory principle that if the buyer is burdened with the risk of damages or loss of the goods, the right to claim enforced performance is not affected.[997] All told, however, an act of termination of the contract or an action to obtain other remedies is regarded as an implied waiver of the promisee of its right to claim enforced performance.[998] Based on the obligation of the promisee to act in good faith (section 4.5) it is also held that a change in circumstances and a failure in performance by the promisee to mitigate its losses, could limit the availability to claim enforced performance of the contract.[999] The relation between the obligation to mitigate losses and the right to claim enforced performance of a contract is discussed in section 6.5. Apart from the effect of the obligation to mitigate losses, contractual promises based on personal trust and confidence (a distinct form of the earlier mentioned barrier of unsuitability), such as partnerships, are also said to restrict the ability to obtain the actual performance unless the obligations of contracting parties can be explicitly defined.[1000]

154. In addition to the arguments mentioned above, which show a strong preference for enforced performance as the primary remedy, it is argued that adoption of the common

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993 Chen (Lihu) and Zhu (n 970).

994 *Ibid.*

995 *Ibid.*

996 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 34.

997 Art 149 CCL.

998 Bing Ling 2002 (n 229) para 8.077; Han Shiyuan, 'The Performance Interest in Chinese Contract Law: Monetary Damages' in Chen-Wishart, Loke and Ong 2016 (n 156) 41.

999 Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 31; a more elaborate discussion about the relation between the right to actual performance and the duty to mitigate losses is presented in s 6.5.

1000 Bing Ling 2002 (n 229) para 8.074 ; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 29.

law preference for damages and, thus, abandonment of the primary right to enforced performance, would diminish the social benefits of the market economy in China (which are designed to, *i.a.*, increase employment opportunities).[1001] Furthermore, it is held that acceptance of the common law view that a contract merely represents a monetary bargain would be tantamount to a denial of the bindingness of a contractual promise and the protective nature of the contract law of China, in the sense that it is said to protect society against parties who engage in business activities, without any consideration of the interests of the other party.[1002]

4.4.5 Conclusions

155. The current divergence of views between the three jurisdictions can be traced back to their fundamental notions of the bindingness of a contractual promise and their perspective on the appropriate means to protect the interests in performance of contracting parties. The present section reveals in this regard that Dutch and Chinese contract law qualify enforced performance of non-monetary obligations as a right of contracting parties. By contrast, the contract law of Singapore adheres to the common law approach which deals with enforced performance of non-monetary obligations as a remedy. Consequently, Dutch and Chinese contract law act on the overarching principle that commercial parties are, by default, entitled to enforced performance of a non-monetary obligation, whereas the contract law of Singapore takes the view that the availability of enforced performance depends on the extent an infringement of the interest of the aggrieved party can be remedied by damages. In the realm of commercial sales, the assessment to be made also entails the question whether the goods are specific or ascertained. However, the considerations above reveal that Singapore courts may issue an order for enforced performance of goods which do not qualify as specific or ascertained to the contract and fall outside the ambit of the Sale of Goods Act. The discussed case law demonstrates that the courts may grant an order to enforced performance of the delivery of generic goods when substitute goods are only obtainable on the market with great difficulty. The remedy of a (interim) mandatory injunction can be used to achieve this result (*i.e.* to compel the positive performance of a contractual obligation), but this option is only available in very specific circumstances. Thus, it may be said that the buyer's contractual right to delivery of the stipulated goods is only protected in exceptional situations. Another approach is that the default remedy available for enforcement of the seller's delivery obligation (*i.e.* damages) does not reflect the nature of this obligation (*i.e.* non-monetary positive performance obligation to bring

1001 Ye Changfu 2005 (n 990).
1002 *Ibid.*

about a certain state of affairs). Nonetheless, on an overall assessment of the discussed viewpoints, it appears that the disagreement between the investigated jurisdictions is rooted in the central issue of whether a judicial award for enforced performance provides the most desirable relief in view of the subjective interests of the contracting parties and the factual situation. It is, however, not possible to provide a general statement as to the availability of enforced performance in the realm of commercial sales contracts other than the overarching notion that the desirability and adequacy of the measure is related to the nature of the subject matter. This is because the discussed legal developments demonstrate a significant degree of willingness of the national courts to re-examine their views on the extent to which enforced performance should be available. Special mention must be made here of the Dutch case Dahn Vo, the fact that enforced performance of a non-monetary obligation under a commercial sales contract is not confined to the narrow approach found in the sales law of Singapore and the flexibility of the rules on enforced performance under the contract law of China.

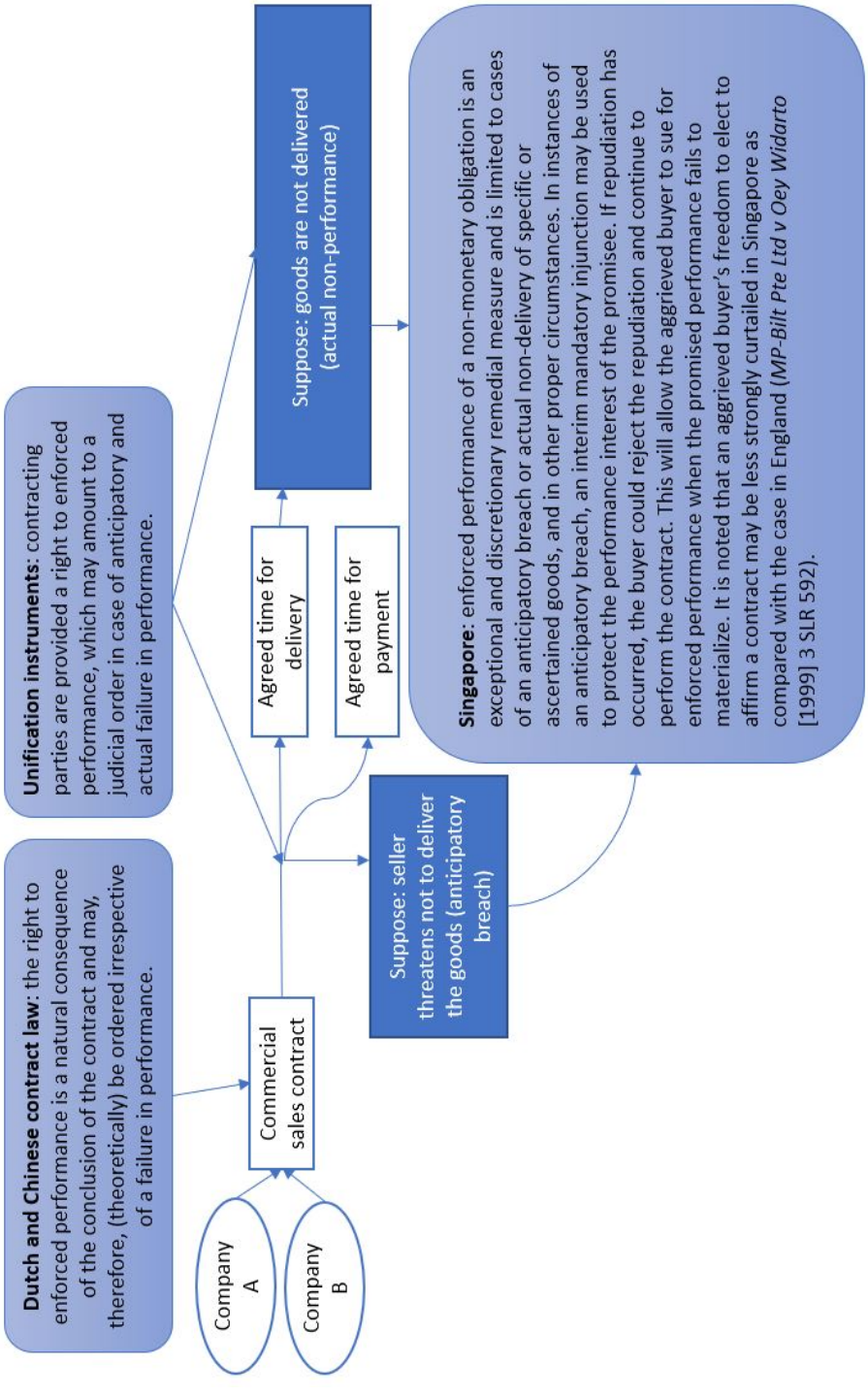
156. That having been said, the default availability of enforced performance of non-monetary obligations under the contract law of the Netherlands and China runs counter to the frequently advanced argument that commercial parties merely contract for economic reasons. On the other hand, the preference for damages in the contract law of Singapore given the dynamics of international trade, also do not appear to necessarily provide a satisfactory solution for commercial sales transactions. This is because, generally speaking, it is difficult to determine the exact monetary damages suffered by the aggrieved party. This holds especially true for the monetary investment in finding suitable substitutes, the additional costs arising from the negotiations of the terms of the transaction of substitute goods and the calculation of the potential costs of returning defective goods (*e.g.* in the case the port of destination lies in a developing country). Due to the complexities of international trade, the costs mentioned above are generally higher in comparison to standard domestic sales transactions. It is, therefore, submitted here that a court order for enforced performance of a non-monetary obligation is most appropriate for cross-border sales transactions as it will most likely provide full relief to the aggrieved party and, thus, make the promisee indifferent as to performance or legal relief. That said, when a significant monetary investment is required for the fulfilment of a court order for enforced performance, the interest of the non-performing party should not be ignored. This situation typically occurs where a non-performing seller is required to deliver replacement goods. On top of the cost of providing a replacement, the seller is also exposed to the financial burden of reselling the goods if the latter is not able to find another buyer due to, for example, regulations of the port of destination or the perishable nature of the goods. Nevertheless, the financial burden could also be seen as a part of the responsibility of the seller for its non-performance.

157. It appears that the unification instruments attempt to balance the above-discussed right *versus* remedy approach by theoretically labelling enforced performance of non-monetary obligations as a right of contracting parties, although the legal instruments to obtain a judicial order for enforcement are dealt with as a remedy for a failure in performance.[1003] In practice, Dutch and Chinese contract law act on the same notion, as a claim for enforced performance only brings about a judicial confirmation of the right to performance where the obligation is not yet due. Furthermore, the understanding of enforced performance as a default right of contracting parties in a commercial context is in both jurisdictions counterbalanced by considerations of sufficient interest and good faith.[1004] See the illustration below for a simplified overview of the practical impact of the discussed principles.

1003 Art 46 CISG; Art 7.2.2 PICC; Art 9:102 PECL; Art III.–3:302 DCFR; Art 7 Draft Articles on Non-Performance PACL.

1004 S 4.2.

Figure 13 Operative effect of the rules on enforced performance of non-monetary obligations



158. In light of the above, it is of little surprise that enforced performance of the seller's obligation to deliver the goods (generic and specific) is available as of right under Dutch and Chinese contract law. In other words, the buyer to a commercial sales contract is provided with the assurance that it can enforce what is expected under the contract, which can take the form of enforced delivery or a cure, either by repair or by replacement. A major drawback of the general availability of enforced performance in the contract law of the Netherlands and China is that it ignores the interests of commercial sellers involved in sales transactions of generic goods, as damages are usually believed to be the most sufficient form of relief for both parties to the contract. Nonetheless, the aggrieved buyer may insist on enforced performance in these instances, unless there are reasons to limit its right to performance. It appears that the approach taken by the contract law of Singapore (*i.e.* enforced performance is only available in exceptional circumstances) is more adequate in cases of generic goods, although it brings about a situation of legal uncertainty because it imposes the entire risk of non-performance on the aggrieved buyer. These considerations brings about the fundamental question of whether a legal system is capable of answering the question of which party is in need of protection by a judicial order for enforced performance. It is submitted here that this is virtually impossible because the buyer's interest in actual delivery of the goods in accordance with the contract is always subjective and dependent on the circumstances of the case.

159. As mentioned above, it seems that the drafters of the CISG bridged the gap between the 'right *versus* remedy' approach by providing for the availability of enforced performance, although this was achieved by categorising the judicial action for obtaining an order for enforced performance as a cure for a failed performance and by adopting specific restrictions. An important limitation of common law descent is the requirement of a fundamental breach to demand replacement of non-conforming goods.[1005] However, this attempt to balance both approaches in a legal framework which reflects the civil and common law traditions has barely any significance for commercial sales contracts, as the CISG adopted the principle that a court is not bound to enter a judgement for enforced performance unless it would do so under its own law.[1006] The PICC, PECL, DCFR and the draft PACL achieved a more successful solution by starting with the default availability of enforced performance of a non-monetary obligation, which cannot be circumvented by the application of the law of the court adjudicating the dispute (provided that the applicable domestic law accepts this). The solution offered entails the notion that enforced performance is available as of right, which is subject to various restrictions as present in the civil and common law tradition, such as impossibility of performance, hardship and

1005 S 5.4.3.
1006 Art 28 CISG.

notification duties.[1007] An important point to note is that the unification instruments mentioned above (expressly and implicitly) adopted the common law principle that enforced performance is not available if the buyer could have reasonably obtained the goods from another source (this requirement is generally not adopted by civil law jurisdictions).[1008] The common law system of Singapore is also familiar with this requirement, but it is absent in the contract law of the Netherlands and China. The complexity of the divergence between the subject legal systems can best be clarified by analysing the response of the court to the simplified example mentioned under paragraph 129. In this case the adjudicating court shall have to deal with the substantive issue of the alleged anticipatory breach of the contract by the seller. This follows from the threat of the seller not to deliver the coffee cups if the buyer does not pay a surcharge to cover an increase in production costs. According to the principles adopted by Dutch and Chinese contract law, as well as the CISG, a judicial order for enforced performance shall be available, even if the buyer could obtain the goods elsewhere. This stands in stark contrast with the approach taken by the sales law of Singapore, as well as by the PICC, PECL, DCFR and the draft PACL, which have taken (indirectly) the approach that enforced performance is not available if the buyer could reasonably obtain the goods from another source.

160. This does not mean that the approach taken by the unification instruments suits the dynamics of commercial sales transactions best because this requires a significant level of adaptability of the applicable rules to changing needs and circumstances. It is therefore suggested that parties to a commercial sales contract across the borders of the three investigated jurisdictions carefully consider the most appropriate approach for their situation in view of the differences discussed in the following chapters. This time-consuming undertaking is required because contracting parties cannot overcome the divergence between the civil and common law tradition by simply relying on the CISG. Contracting parties could opt-out and agree to contractual stipulations which are in full accordance with their commercial needs. This option, however, ignores the restrictions on contractual modification of the available remedies for the situation where the seller fails to deliver the goods in accordance with the agreed terms.[1009] It is therefore of paramount importance to assess the considerations above in view of the analyses provided in the subsequent chapters

1007 Chs 5, 6.

1008 Art 7.2.2(c) PICC adopted the restriction that enforced performance cannot be granted when the aggrieved party may reasonably obtain performance from another source; Art 9:102(2)(b) PECL and art III–3:302(3)(b) DCFR act on the notion that in deciding whether enforced performance would be unreasonably burdensome or expensive, it may be relevant to take into account whether the aggrieved part could easily obtain the goods from another source and claim the costs of doing so from the non-performing party (see Comment F); Art 7(d) Amendment Draft on Non-Performance PACL.

1009 Ch 8.

in order to determine the actual flexibility with which the courts can act as regards to granting enforced performance of a commercial sales contract under the subject legal systems, the degree of protection against abuse and the extent the law can assure the promisee's interest in obtaining the actual thing it bargained for.[1010]

4.5 Ancillary performance obligations arising from the principle of good faith

161. *Preliminary* – The central question of the present section is the question of whether an actionable ancillary performance obligation can arise under a commercial sales contract by application of the behavioural standard of good faith.[1011] The aim of this section is to determine the extent to which this highly contested legal concept provides guidance in determining the degree of performance owed by parties to a commercial sales contract and if it may be used to assume ancillary enforceable obligations beyond the seller's obligation to deliver the goods and the buyer's obligation to pay the purchase price. This discussion is treacherous ground because the divergence between the legal systems on whether the principle of good faith could bring about actionable ancillary obligations under a commercial sales contract derives from strong cultural notions and legal traditions.

> *Illustration 1* – A manufacturer, located in country X, concludes a sales contract with a buyer, located in country Y. Under the sales contract, the manufacturer is obliged to hand over documents of title at the stipulated place of delivery in order to allow the buyer to take possession of the goods. Two weeks before delivery, country Y announces that it prohibits the import of goods from a number of designated countries with immediate effect. As a result, the buyer is obliged to submit a certificate of origin and a number of other administrative documents in order to obtain the goods once they have arrived. The contract and default provision of the applicable law is, however, silent on the question of whether the manufacturer is obliged to provide these documents.

> *Illustration 2* – A seller, located in country X, and a buyer, located in country Y, conclude a sales contract for delivery of industrial equipment, which requires labour-intensive maintenance and frequent replacement of certain parts. For the delivery of the spare parts, the parties concluded separate sales contracts on an ad hoc basis. After two years, the seller stops the delivery of the spare parts needed for the operation of the equipment.

1010 Ch 9.

1011 This section does not discuss ancillary protection duties because a failure in performance is generally governed by the rules on damages.

> The contract and default provisions of the applicable sales law are, however, silent on the question of whether the seller is subject to an ongoing obligation to ensure the availability of spare parts for a particular period.[1012]

162. *Domestic approaches* – The starting principle under Dutch contract law is that where enforced performance is demanded of an obligation which is not laid down in the express language of the contract and does not follow from the default provision of the law, the court shall first determine the meaning, and the juridical effects of the contract concluded by the parties.[1013] The above-described undertaking runs via the so-called *Haviltex*-formula, which means that the court assesses 'the sense the contracting parties could reasonably attach to the stipulations in the present circumstances and that which they could reasonably expect from each other in this regard'.[1014] As a second step, the court takes into consideration that contracting parties are obliged by law to act, between themselves, in accordance with the requirements of reasonableness and fairness.[1015] This principle is further set out in the statutory provision for reciprocal obligations that a contract not only has the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, apply by virtue of law, usage or the requirement of reasonableness and fairness.[1016]

The mandatory legal standard of reasonableness and fairness derives from the *bona fides* principle as developed in Roman law.[1017] The principle that a contract include not only the things agreed on by contracting parties,[1018] but also the effects deriving from the principle of reasonableness and fairness, means in the realm of commercial trade relations that parties are obliged to observe the legitimate interest of the other party and,[1019] more specifically, to adhere to the reasonable commercial standards of fair dealing.[1020] The behaviour of contracting parties is *objectively* assessed by the court, meaning that the state

1012 ICC Arbitration Case n 8611 of 23 January 1997 (Industrial equipment case) <http://cisgw3.law.pace.edu/cases/978611i1.html> accessed on 19 December 2018; David Ramos Muñoz, 'The Rules on Communication of Defects in the CISG: Static Rules and Dynamic Environments. Different Scenarios for a Single Player' (2005) Pace essay <http://www.cisg.law.pace.edu/cisg/biblio/munoz.html#389> accessed on 19 December 2018.

1013 Hartkamp 2011 (n 80) para 116; Anne Hendrikx, 'Het aanvullen van een leemte in de overeenkomst naar Nederlands en Engels recht', *Een Kwart Eeuw : Privaatrechtelijke Opstellen, Aangeboden Aan Prof. Mr. H.J. Snijders Ter Gelegenheid Van Zijn Emeritaat* (Wolters Kluwer 2016) 155.

1014 *Haviltex* (nr 310).

1015 Art 6:2(1) DCC; *Haviltex* (nr 310).

1016 Arts 6:216, 6:248(1) DCC; Hartkamp 2011 (n 80) paras 32, 105; Hendrikx (n 1013) 155.

1017 Sieburgh, *Asser 6-III* (n 203) 380, 392.

1018 Sieburgh, *Asser 6-III* (n 203) 379.

1019 Sieburgh, *Asser 6-III* (n 203) 392; *Baris v Riezenkamp* (545); *Vodafone v ETC Dutch Supreme Court* 19 October 2007, ECLI:NL:HR:2007:BA7024, NJ 2007, 565.

1020 *Baris v Riezenkamp* (n 545); *Vodafone* (n 1019); Sieburgh, *Asser 6-I* (n 363) para 55; Sieburgh, *Asser 6-III* (n 203) 392; Hartkamp 2011 (n 80) para 32.

of mind of the involved parties is not taken into account.[1021] In this regard, a court shall assess, in light of the nature of the agreement, whether, in the given circumstances, any commercial party could have reasonably expected that the contract included the alleged obligation. Thus, the standards of reasonableness and fairness may come into play as a basis for ancillary obligations if the contract, default provisions of the law and usage do not provide a solution for the shortcoming in the agreement of contracting parties. For example, the standard of reasonableness and fairness could impose an obligation on a company to a joint venture to provide its cooperation to maintain the daily operation of the joint venture by the continuation of the lease of the factory.[1022] In instances where the court assesses that an additional provision is necessary for effective performance, it is required to take into account the nature, purpose and intentions of the agreement, the legitimate interest of the parties and the law.[1023] For example, the standards of reasonableness and fairness would require a buyer, who already took delivery of 600 metric tonnes of goods, to also be obliged to take the remaining three metric tonnes in order to empty the ship.[1024]

163. Singapore contract law, generally, does not acknowledge the usage of the substantive legal principle of good faith in a commercial context.[1025] The main objections for not adopting the legal concept of good faith as a matter of law are the sanctity of contract, uncertainty, setting an unwanted precedent, the indeterminable scope of a duty of good faith and the current conception of academics that good faith is inherent in contract law.[1026] The latter is substantiated with the argument that protection of the reasonable expectations of contracting parties is already an accepted principle in contract law.[1027] In addition, it is said that the soft law application of *lex mercatoria* imposes a duty to act in good faith on

1021 *Artist de Laboureur* Dutch Supreme Court 9 February 1923, ECLI:NL:HR:1923:175, NJ 1923, 676; Dutch Supreme Court 21 June 1957, NJ 1959, 91; Sieburgh, *Asser 6-III* (n 203) 394; Hartkamp 2011 (n 80) para 32.

1022 Dutch Supreme Court 19 December 1958, NJ 1959, 129; *Meegdes v Meegdes* (n 571); Dutch Parliamentary History Book 6 (n 207) art 6.5.3.1, 921.

1023 PJM von Schmidt auf Altenstadt, FE Vermeulen and BTM van der Wiel (eds), *Middelen voor Meijer. Liber amicorum mr. R.S. Meijer* (Boom Juridische Uitgevers 2013) 389 *ff*.; Sieburgh, *Asser 6-III* (n 203) 386, 403.

1024 Dutch Court of Appeal Amsterdam 14 April 1919, NJ 1919, 1101; Sieburgh, *Asser 6-III* (n 203) 403.

1025 *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] SGCA 19, (2016) 2 SLR 1083; *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] SGCA 21, (2015) 3 SLR 695; Ter Kah Leng, 'Good Faith in the Performance of Commercial Contracts Revisited' (2014) n 26 Singapore Academy of Law Journal 111; Hunter 2017 (n 7) paras 10.21, 10.30, 10.31, 10.39; Kim Shi Yin, 'All in Good Faith: Recognising the Doctrine of Good Faith in Singapore's International Sales Law' (2016) <http://www.singaporelawblog.sg/blog/article/168> accessed on 10 November 2016; By contrast, the legal doctrine of good faith applies in fudiciary relationships, such as agreements arising in equity, insurance and employment contracts.

1026 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR (R) 518.

1027 Jay M Feinman, 'Good Faith and Reasonable Expectations' (2013) Arkansas Law Review <http://media.law.uark.edu/arklawreview/files/2015/02/525-570-Feinman.pdf> accessed 28 April 2016.

contracting parties involved in international sales transactions.[1028] To date, it appears, however, that the concept of good faith cannot be implied as a matter of law, and can therefore not be used as a source to assume ancillary obligations of parties under a commercial sales contract.

That being said, it is discussed whether the principle of good faith can be implied in fact on the basis of the intentions of the parties (hence, the term implied 'in fact').[1029] In the view of the Singapore Court of Appeal this means that a good faith principle can be anchored in the express contractual language, the internal and external contexts of the contract and, more broadly speaking, the contractual purpose.[1030] In another case, it was observed that it is possible to incorporate the doctrine of good faith into a contract under the narrow category of terms implied in fact, albeit that this is not likely given (as mentioned above) the uncertain status of the doctrine of good faith.[1031] Nonetheless, it is pointed out that the court could examine the particular facts of the case in order to ascertain whether or not an obligation to act in good faith could be implied in fact.[1032] The actual test to imply a duty to act in good faith, as a matter of fact, comprises the so-called 'officious bystander test' and the below discussed 'business efficacy test'.[1033] The former entails the test as to whether any person would have expected that the alleged obligation was a part of the agreement. The latter reflects the assessment as to whether the alleged obligation is necessary to make the contract effective. In view of the considerations above, it is suggested that with two commercial parties, who have done multiple deals together, certain expectations of the performance of the contract may have developed.[1034] It is also advocated that Singapore law should follow the broadly accepted doctrine of good faith in commercial contracts due to its position as an international business hub.[1035] The most likely approach by Singapore

1028 In Kim (n 1025) the *lex mercatoria* is defined as 'a set of legal norms, or a body of soft law that is neutral, capable of serving as the lex contractus, and independent of any domestic legal regime. Since they are not supported by any governmental authority, the principles of lex mercatoria have no binding character unless the contracting parties choose to bind themselves to them'. In this respect it is held that the lex mercatoria derive from a variations of sources, such as the CISG, the UNIDROIT Principles, the contractual terms stipulated by the parties, usage, et cetera.

1029 *Ng Giap Hon v Westcomb Securities Pte Ltd* (n 1026); in the case *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* (n 1025) it was affirmed that 'the law in this particular sphere (viz, good faith) continues to be in a state of flux', yet refused to discuss the doctrine as it did not come directly for decision before the courts; Ter Kah Leng 2014 (n 1025) 111, 131; Hunter 2017 (n 7) para 10.31.

1030 *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* (n 1025) SGCA 19 [53]; Hunter 2017 (n 7) para 10.36.

1031 *Ng Giap Hon* (n 1026) SLR (R) 518 [61].

1032 *Ng Giap Hon* (n 1026) SLR (R) 518 [34].

1033 *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] SGCA 55; *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 [29]–[31] affirmed in *Ng Giap Hon* (n 1026) SLR(R) 518 [36]); see in similar vein, the English case *Marks & Spencer plc BNP Paribas* [2015] UKSC 72.

1034 Hunter 2017 (n 7) paras 10.34, 10.35.

1035 Kim (n 1025).

courts to the accepted principle in international trade to act in good faith would be that contracting parties are 'expected to make a reasonable effort to fulfil the purposes of their agreement'.[1036] This suggests that a seller could be forced, for example, to hand over instructions for the usage of the equipment sold or to hand over a certificate of manufacturing compliance if this is required by local authorities. In spite of these considerations, the expressed language of a commercial sales contract retains priority under Singapore law in determining the obligations of the parties. Although this is a reflection of the justified responsibility of commercial parties to guard their own interests, it may also act as a legal barrier for international trade because it could be interpreted as a duty to write down all the necessary steps to fulfil the promises made by each party (which is factually impossible). Should there be a desire to lower this legal barrier, the courts could follow the argument that a commercial sales is, by default, based on the reciprocal expectation that each contracting party shall do everything in its power to provide the intended outcome of the contract. Consequently, non-compliance of the promisor with this self-imposed obligation could entitle the promisee to sue for enforced performance of an ancillary obligation arising from its 'justified' expectations.

164. Under the contract law of China, contracting parties are obliged to observe the principle of good faith in accordance with the nature and aims of the contract and trade practices.[1037] This means, for example, that the parties could also be subject to an obligation to notify, disclose material facts or acceptance of delivery of goods which exceed the agreed quantity if this does not result in unreasonable difficulties.[1038] In other words, the contract law of China acts on the notion that the express language of a contract does not always reflect all the commitments deriving from the contract.[1039] However, it is not clear as to whether there is a hierarchical order between the context for the interpretation of the good faith principle, that is, the nature of the contract and trade practices. That said, most notable is that the general principle mentioned above seems to treat trade practices not as a separate source to impose a duty on the parties, but as a framework for the assessment regarding whether the legal concept of good faith could amount to an enforceable obligation which is not reflected in the express language of the contract. Nevertheless, the true meaning of the doctrine of good faith under the Civil Law Principles of China, as discussed below, reveals a different stance on this point.[1040]

1036 Hunter 2017 (n 7) para 10.37.

1037 Arts 6, 61 CCL; The obligation to act in good faith is also laid down in specific regulations, such as art 4 GPCL, art 4 Consumer Rights and Interests Protection Law and art 2(1) Law against Unfair Competition.

1038 Liming 1992 (n 636) 16; Bu 2013 (n 226) 52 para 3.

1039 Bu 2013 (n 226) 52 para 3.

1040 Arts 61 and 62 (1)-(6) CCL.

The scope of application of the legal concept of good faith under Chinese contract law, as a basis for imposing additional duties on contracting parties, seems to be very restricted. This proposition derives from the fact that the contract law of China meticulously sets out the route for establishing the contractual obligations in case the express language falls short.[1041] The basic starting point is that in case contracting parties have not (sufficiently) stipulated the terms for quality, the purchase price or place of performance, the contractual obligations may be determined in accordance with the related clauses of the contract and trade practices.[1042] In the event these sources do not provide an adequate solution for the alleged shortfall in the agreement, it is stipulated which sources could also be used as a basis for ascertaining the required quality of the goods, price, place of performance, time limit for performance and method of performance. For example, it is prescribed by the contract law of China that in case contracting parties fail to determine the mode of performance, the parties are obliged to perform the contract in a manner conducive to the realisation of the aim of the contract.[1043] In case of unclear quality requirements, the parties are obliged to perform the contract in accordance with state standards or trade standards, or in the absence of such standards, in accordance with common standards or special standards conforming to the aim of the contract.[1044] However, the good faith principle is not specifically mentioned as a basis for the implication of obligations. This raises the question as to whether the application of the principle of good faith, as a basis for ancillary obligations, is self-evidentiary due to its prominent position in the contract law of China, or that it simply does not apply to obligations concerning the quality of the goods, price, place of performance, time limit for performance and method of performance. It is held that the legal concept of good faith may be used 'to fill in legislative and doctrinal gaps' where there are also shortfalls in the express language of the contract.[1045] Nonetheless, given the repeated emphasis in the contract law of China on the principle that the parties are obliged to act in accordance with the principle of good faith from the start of the negotiations until the contract is discharged,[1046] it may be assumed that every commercial agreement may be supplemented by the court with collateral commitments on the basis

1041 *Ibid.*

1042 Art 61 CCL.

1043 Art 62 (5) CCL; *Latex Gloves* [1999] China International Economic and Trade Arbitration Commission [CIETAC] 13 January 1999 <http://cisgw3.law.pace.edu/cases/990113c1.html>.

1044 Art 62 (1) CCL.

1045 Nadia Zayani, 'The Doctrine of Good Faith in China: A Tool to Correct the Contractual Behaviour or a Serious Restriction to the Freedom of the Contract and Individual Interests' (2016) 1(10) Dama International Journal of Researchers 13–19 <http://www.damaacademia.com/issue/volume1/issue10/DIJR-O-003.pdf> accessed 3 August 2017.

1046 Arts 6 (application of the good faith principle for fulfilment of obligations), 42 (3) (application of the good faith principle for the pre-contractual stage), 60 (application of the good faith principle for performance of the contract), 92 (application of the good faith principle after termination of the contract), and 125 (determining the actual meaning of a clause in light of the principle of good faith).

of this open-ended legal concept. This assumption also follows from the statutory principle that, in the event that the parties argue about the understanding of a clause of the contract, the actual meaning of the clause shall be inferred and determined by the court on the basis of the words and sentences used in the contract, related clauses of the contract, aim of the contract, trade practices and the principle of good faith.[1047] Thus, it may be held that the obligations of contracting parties can arise from the language of the contract, the determination of the purpose of the contract, the trade usage and the principle of good faith.[1048] These sources may be addressed as the four corners of a contract which are subject to the contract law of China.

165. *Comparative analysis* – The usage of a general duty of good faith as a source for the imposition of ancillary obligations (*e.g.* packaging and handing over of documents) is a controversial concept in Dutch, Singapore and Chinese contract law. The key issue is that the contract law of the three jurisdictions differ with regard to the question of whether good faith may directly oblige commercial parties to bring about a certain state of affairs. Dutch and Chinese contract law adopt the broadest approach in the sense that commercial parties to a sales contract are subject to a general duty of good faith. The principle of good faith, as a general principle of contract law, could be used to identify ancillary performance duties under a commercial sales contract which may be subject to a judicial order for enforced performance. The approach taken by Singapore contract law is, for doctrinal reasons, significantly restrictive since the principle of good faith cannot be implied in law and thus may not be used as a source to find obligations outside the express language of the contract. That having been said, the discussed viewpoints on the possibility of implying the good faith principle, as a matter of fact, suggest that the Singapore courts are moving towards a more liberal approach for commercial contracts. This development is in line with a global trend towards an increasing role of the principle of good faith in global trade.[1049] Nonetheless, at the present juncture, it goes too far to assume that Singapore courts shall support a claim for enforced performance of an ancillary obligation on the basis of a duty of good faith implied as a matter of fact. This conservative view on the direct imposition of the principle of good faith in commercial contracts (*i.a.* as a source to assume ancillary obligations) matches the approach taken by the CISG which does not allow the courts to apply the good faith principle directly to the relationship between the parties.[1050] The idea that good faith cannot be applied directly to individual contracts runs counter to the (civil law inspired) standard of good faith as adopted by the PICC, PECL and DCFR

1047 Art 125 CCL.
1048 Fu (n 169) 79.
1049 Vogenauer 2015 (n 19) art 1.7 paras 1, 7–8.
1050 Schwenzer 2016 (n 91) art 7 para 17; Vogenauer 2015 (n 19) art 1.7 para 2.

which primarily addresses the good faith principle to the contracting parties.[1051] This means in effect that the duty of good faith could serve as a source to assume ancillary performance obligations of the seller or buyer which go beyond their obligations as provided by law and stipulated in the contract. This concept of good faith as a source for ancillary obligations is most in line with the approach taken by Dutch and Chinese contract law.[1052]

The liberal approach taken by the aforementioned legal systems needs to be offset against the CISG, which is (as previously mentioned) not familiar with the concept of good faith as an independent principle; the concept of good faith can only be used as a source for the duty of the courts to interpret the provisions of the Convention in light of its international character and the need to promote uniformity in its application and the observance of good faith in international trade.[1053] As for individual commercial sales contracts, a duty of good faith (as a source for ancillary obligations) can only be assumed where this follows from usages and practices established between the parties, such as on ongoing ancillary obligation to deliver spare parts.[1054] It is also suggested that that principle of good faith can be used in CISG-contracts via interpretation of the statements made by the parties to determine the degree of performance owed for the fulfilment of the buyer's and seller's obligations under the CISG.[1055] That having been said, it is suggested that where the courts are inclined or reluctant to impose a duty of good faith as a source for ancillary obligations under a CISG-contract, they may seek recourse to the general principles on which the Convention is based and where this fails, to the domestic rules determined by the private international law of the forum.[1056] This viewpoint is, however, contentious because parties to a CISG-contract simply cannot be subject to a general duty of good faith following from domestic law.[1057] Taking into consideration all the above, it is advocated here that the approach taken by Dutch and Chinese contract law, as well as the majority of the unification instruments, is most suitable for the complex reality of international trade which may require going beyond the express language of the contract and default provisions of the law to identify the obligations of the parties. That said, Singapore contract law is gradually diverging from the English common law reluctance to directly apply good faith to the contract, and therefore may follow suit where this is appropriate. This development is in line with the US and Canadian courts which are increasingly inclined

1051 Art 1.7 PICC; Art 1:201 PECL; Art III.-1:103 DCFR; Vogenauer 2015 (n 19) art 1.7 para 8.
1052 Vogenauer 2015 (n 19) art 1.7 para 24.
1053 Art 7(2) CISG; Schwenzer 2016 (n 91) 127 at para 17; Hunter 2017 (n 7) para 10.16.
1054 Art 9 CISG; Schwenzer 2016 (n 91) 127 at para 18.
1055 Schwenzer 2016 (n 91) art 7 para 17.
1056 Farnsworth (n 7) 227 at 231. Professor Farnsworth holds the view that art 7(2) CISG provides the court the option to apply the law that would govern the contract under the choice of law; Hunter 2017 (n 7) para 10.16; Schwenzer 2016 (n 91) art 8 para 27.
1057 Schwenzer 2016 (n 91) 127 at para 18.

to adopt a general duty of good faith.[1058] In the context of ancillary obligations of parties to a commercial sales contract, this development suggests that where the contract is silent, good faith could be used to assume an ancillary obligation. Should there be a desire at the international level to bring the CISG on par with the global trend to acknowledge the concept of good faith as a source for obligations, an important step would be the express recognition of good faith as a standard in commercial sales contracts. This suggestion should not be controversial, as the standard of good faith may already be used to determine the level of performance owed under a commercial sales contract.[1059] At a practical level, this would mean that the domestic courts could come to the same conclusion when adjudicating an enforcement dispute arising from the two examples mentioned under paragraph 161. This, in effect, would mean that the seller is subject to an enforceable obligation to furnish additional documents (where it is not already a part of the delivery obligation) and to continue the delivery of spare parts. The considerations above, however, also reveal that good faith is not a generally accepted source for ancillary obligations at the national and international levels. In order to prevent difficulties after conclusion of a contract, it is suggested here that those involved in commercial sales contracts across the borders of the subject legal systems pay sufficient attention to the tacitly assumed obligations they consider relevant to their agreement.

4.6 Conclusions

166. The comparative analysis provided in this chapter demonstrates a strong disagreement between the views of the subject legal systems on the question of whether a claim for enforced performance of the obligations under a commercial sales contract should be available. The divergence is caused by the influence of cultural notions and legal traditions on the structure of the law and the diametrically opposed interpretation of the universal adage *pacta sunt servanda*. The starting point of this proposition is that Dutch and Chinese law encompass an overarching structure with principles for legal obligations deriving from, for example, contractual rights. This legal approach is broken down into general rules on enforced performance of contractual obligations. Both legal systems also adopt more detailed rules for specific contracts, such as sales contracts. These rules should be viewed in light of the civil law interpretation of the adage of *pacta sunt servanda*, which imposes a duty on the promisor to uphold its promise. This principle is the dogmatic backbone of the notion that enforced performance of monetary and non-monetary obligations arising

1058 See the leading Canadian contract law case *Bhasin v Hrynew* [2014] SCC 71; See for the US: Vogenauer 2015 (n 19) art 1.7 para 7.

1059 Schwenzer 2016 (n 91) art 7 para 17.

from a commercial sales contract is available regardless of a failure in performance. In other words, the theoretical starting point in the contract law of the Netherlands and China is the default availability of enforced performance of the seller's delivery obligation and the buyer's obligation to pay the purchase price, even before the promised performance fails to materialize. This favourable consideration toward enforced performance is further strengthened by the imposition of additional requirements for a valid termination and for claiming damages in the case the promisor fails to perform its obligations. Nonetheless, the statutory provisions of the contract law of China have linked the availability of enforced performance to a failure in performance (attributability is not required). Although it may appear that this approach is of common law descent, it cannot be equated with the common law notion of a breach of contract. This is because the requirement of a failure in performance is the result of the influence of the CISG and PICC. It is also for this reason that the reference to a failure in performance does not preclude the right to claim for enforced performance prior to an (anticipatory) non-performance. In other words, the civil law tradition prevails in the rules on enforced performance in the contract law of China.

The availability of enforced performance without an (anticipatory) breach of the contract, is inconceivable under the contract law of Singapore because this common law legal system is based on the general framework of English contract law. This system developed in a more consecutive way in the sense that first the judicial framework for torts was developed and on this foundation came the principles of contract law.[1060] This provides the historical development of the fundamental requirement of a failure in performance for claiming enforced performance under the contract law of Singapore. Nonetheless, it should be recalled that the contract law of Singapore also adheres to the idea that promises are binding, although this principle only results in a default right to enforced performance of payment of the purchase price. The seller's delivery obligation must be assessed in light of the notion that a non-monetary promise is binding, although a failure in performance to bring about a certain state of afairs merely amounts to a legal obligation to pay damages. The default response of damages appears to derive from the notion that enforced performance may result in an unacceptable judicial interference with the liberty of contracting parties. Consequently, the contract law system of Singapore does not envisage enforced performance of non-monetary obligations as a remedy under a commercial sales contract, unless it concerns non-delivery of specific or ascertained goods and damages are inadequate (restrictive interpretation). It appears that Singapore courts are also entitled to issue an (interlocutory) mandatory injuction to direct performance of contracts for the sale of goods of generic goods which are scarce, rendering the procurement of substitute

1060 Damages and the action for an agreed sum where developed in the courts of common law and later, specific performance in the courts of equity.

goods unobtainable. However, enforced performance of the delivery of specific or ascertained goods, and delivery of generic goods in appropriate circumstances, is still subject to the courts reluctance to specifically enforce performance of a contract. In these cases the buyer may also apply to court to protect its performance interest in the delivery of the goods by means of an (interlocutory) mandatory injuction. However, the courts require a high degree of assurance that the question will be tried with a real prospect of success.

The aforementioned restrictive availability of enforced performance runs obviously counter, as discussed above, to the default availability of enforced performance of monetary and non-monetary obligations arising from a commercial sales contract under Dutch and Chinese law. The disagreement between the legal systems on the question of whether enforced performance is or should be available also brings about legal uncertainty when considering the possibility of ancillary performance obligations of contracting parties (*e.g.* packaging duties). It is important to recognise this option because commercial sales contracts and the default provisions of the law governing the contract nowadays may impose performance obligations besides the standard delivery and payment duties. For example, the obligation of the seller to ensure the availability of spare parts and the obligation of the buyer to provide the necessary information to enable the seller to make delivery and where it is not a part of the buyer's obligation to take delivery and/or to cooperate. Under Dutch and Chinese contract law, as well as the PICC, PECL and DCFR, ancillary obligations can be derived from the principle of good faith depending on the circumstances surrounding the contract. It appears, however, that the general duty of good faith as a source for ancillary duties does not exist in the contract law of Singapore. Consequently, the subject legal systems dramatically differ in their views on the scope of enforceable obligations arising from a commercial sales contract if the contract and the law are silent on matters such as the handing over of relevant documents to the seller or buyer, availability of spare parts, or other obligations other than delivery of the goods and payment of the price. This brings about considerable legal uncertainty for those involved in commercial trade across civil and common law borders. That said, the considerations above are, however, by no means sufficient to determine the actual availability of enforced performance, the degree of flexibility with which such a claim can be awarded, and the level of assurance provided for protection against abuse and protection of performance interest. This assessment completely depends on the limitations adopted by Dutch and Chinese contract law and the counter-exceptions found in the contract law of Singapore.[1061] The legal options to give effect to a judicial order for enforced performance (outside enforcement proceedings) also play a key role in this regard.[1062]

1061 Chs 5 and 6.
1062 Ch 7.

167. It appears, at first glance, that the unification instruments identified provide a balanced enforcement regime for those involved in commercial sales contracts across civil and common law regimes. The solution adopted by the unification instruments provides the aggrieved party (buyer or seller) with the right to claim for enforced performance of monetary and non-monetary obligations, which can be brought to court when the obligation is due and not performed. In other words, the unification instruments bring about a theoretical merger of the civil law strict priority of the claim for enforced performance and the common law qualification of enforced performance as a remedial measure. This starting point applies to both forms of performance, monetary and non-monetary obligations, although a distinction is made between the primary limitations on enforced performance. Parties to a commercial sales contract should, however, not rely on the CISG if they are seeking a uniform law which bridges the gap between the fundamental differences in approaches taken by the civil and common law traditions, and more particularly where contract parties are seeking a solution for the disagreements between the three investigated jurisdictions. The reason is that the CISG entails the principle that enforced performance does not have to be awarded if the court adjudicating the dispute is not bound to enter a judgement for enforced performance of an action for the purchase price and delivery of goods if it would not do so under its own law in respect of similar contracts not governed by the Convention. Importantly, a careful assessment is required, even when those involved in commercial sales across civil and common law borders seek a compromise, drawing inspiration from the approach taken by the CISG or the other unification instruments (*i.e.* the PICC, PECL, DCFR and the draft PACL). This is because the remarkably different ways a claim for enforced performance for monetary and non-monetary obligations can be established. For example, whereas the CISG, PICC and the draft PACL set forth the basic obligation of the buyer to pay the purchase price, which is subject to general limitations, the PECL and DCFR have adopted an important exception to the requirement of a failure in performance. This exception allows a claim for enforced performance where the buyer's obligation to pay the purchase price becomes due on delivery of the goods, but the buyer refuses to provide the necessary cooperation for delivery. The contract law of Singapore is not familiar with such an exception, and the approach taken under Dutch and Chinese contract law, and the other unification instruments, only encompasses indirect solutions. Accordingly, it is suggested here that the national legislators of the three subject jurisdictions and the drafters of the CISG, PICC, and the draft PACL could take into consideration the solution offered by the PECL and DCFR.

It is however unlikely that there will be a universally acceptable solution for the discussed divergence in the foreseeable future. It is therefore suggested in the preceding chapters that those involved in commercial sales transactions across the borders of the subject legal systems (and more in general, where it concerns parties from civil and common law jurisdictions) focus on the possibility of contractual modification of the default availability

of enforced performance under the law governing the contract. However, due consideration should also be given to the different thresholds for establishing or excluding enforced performance at the national and international levels.[1063]

1063 Ch 8.