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

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# 5 Specific failures to bring about a certain state of affairs

## 5.1 Introduction

168. This chapter focusses on three different causes for a disturbance in the performance of a commercial sales contract and the extent to which the subject legal systems allow for enforced performance in these situations. The three scenarios are: non-delivery of the goods (section 5.2), refusal to take delivery of the goods and acceptance of the goods (section 5.3), and instances of defective delivery (section 5.4). These forms of disturbance in performance are selected on the factual basis that they go to the very root of performance obligations arising under a commercial sales contract on a practical level and because they are examples of the impact of the disagreement between traditional civil and common law approaches at the national and international levels.

Having said that, there are specific reasons for distinguishing the above-mentioned different kinds of non-performance. First, the specific focus on the various forms is rooted in a disagreement about the substance of the performance obligations arising under a commercial sales contract. For example, where the seller is required to bring about a physical or constructive delivery to comply with its delivery obligation (rather than making the goods available), the question arises as to whether the seller may claim for enforced performance where the buyer fails to take delivery. The second reason for the differentiation in causes of non-performance follows from the broadly accepted notion that non-conforming goods can be delivered. In such cases, the seller's delivery obligation can be fulfilled, despite the fact that the goods do not possess the features agreed in the contract. This premise indicates that the interest of the buyer is not protected by the rules on enforced performance of non-monetary obligations, but is structured in a different way. The third reason is of a dogmatic nature because it concerns the (traditionally) civil law distinction between the available performance remedies in case of the delivery of goods which are different in nature (*aliud*) and delivery of defective goods (*peius*).[1064]

169. Broadly speaking, in certain (generally civil law) jurisdictions, delivery of different goods qualifies as non-delivery, entitling the aggrieved buyer to sue for enforced performance of the seller's delivery obligation to comply with the contract. The remedies

1064 Ss 5.2, 5.4; See for legal systems which have not abandoned the distinction between the deliver of an *aliud* and *peius* Hachem and Kee 2012 (n 13) paras 29.10, 31.15.

of repair and replacement are available for defective goods provided that the applicable requirements are fulfilled. By way of contrast, the common law tradition is focussed primarily on the non-performance and the qualification of the goods, to wit, a sale for generic or specific goods. The type of non-performance, that is, non-delivery and non-conformity, are not an essential concern when determining the willingness of the courts to order enforcement of performance. The relevance of the contrasting viewpoints between civil and common law becomes particularly visible when a completely different product is delivered than initially agreed. From a civil law perspective, the delivery of a completely different product entitles the buyer to sue for actual performance on the basis that the seller failed to fulfil its delivery obligation. In the case of delivery of non-conforming goods, the obligation to deliver the goods is fulfilled, but the buyer may sue for repair or replacement. In general, this distinction between available performance remedies is not familiar to the common law system. In effect, in instances of non-delivery and non-conforming delivery of goods (be it *aliud* or *peius*) which qualify as specific or ascertained, the court may order actual performance if it thinks fit.[1065] This reasoning also applies in the case of the delivery of generic goods which are scarce, rendering the purchase of substitute goods practically unobtainable, and the court establishes that in this situation damages are not an adequate remedy [138–149].

170. Although the opposing doctrinal principles above are the pillars of the civil and common law remedial systems, this section shows that the courts of the investigated legal systems are, increasingly, developing an approach which is more in line with the commercial reality of a trading nation, by assessing, on a case-by-case basis, whether the aggrieved party is entitled to uphold the promises made under a sales contract. The domestic boundaries of this premise are discussed in this section.

## 5.2 Non-delivery of the goods

171. *Preliminary* – The present section deals with a failure in performance to legally deliver the goods, which is not due to an insurmountable obstacle,[1066] but for other reasons, which do not necessarily make delivery impossible. For example, if the seller does not feel any contractual pressure to comply with its duty to deliver the goods to a foreign buyer, the seller is a major overseas manufacturer and does not give priority to small orders, or if the seller pretends to be a factory but is actually a trading company which does not properly manage its supply chain. In view of this, this section discusses whether the seller is subject

1065 SGA, s 52(1).
1066 Ch 6.

to a statutory duty to deliver the goods, the substance of this obligation and whether the seller's delivery obligation is also fulfilled where the features of the goods deviate from the stipulations of the contract. The latter point is of immense importance in bringing about new insights for the potential consolidation of different viewpoints at the international level, and also from a practical perspective. This is because, where the handing over of non-conforming goods (*i.e.* delivery of an *aliud* or *peius*) does not amount to legal delivery, considerations about the availability of enforced performance in the case of non-delivery may suffice.[1067] When non-conforming goods can be legally delivered, the question arising is whether the aggrieved buyer may seek recourse to enforced performance which would require the seller to put the defect right by repair or by a fresh delivery.[1068]

172. Regarding the legal requirements for the fulfilment of the seller's delivery obligation, the following assesses whether the latter is only obliged to make the goods available to the buyer, or must also provide possession of the goods via physical delivery or by transfer of control over the goods (*i.e.* constructive delivery). Aside from physical and constructive delivery, it is important to note that certain jurisdictions are familiar with the instrument of deemed delivery. This may occur, for example, when the buyer fails to notify the buyer (within a reasonable time) that the goods have not arrived at the designated warehouse or when the buyer does not cooperate in a timely fashion. The different forms which might constitute legal delivery in the subject legal systems are illustrated below.[1069]

1067 Ss 5.2, 5.4

1068 See s 5.4 for the question as to whether the investigated legal systems envisage a claim for enforced performance in the form of cure by repair or replacement.

1069 See for a detailed discussion about various aspects of delivery Schwenzer, Hachem and Kee 2012 (n 13) Ch 29.

**Figure 14 Different forms of legal delivery**

173. Considering the fact that the various forms of legal delivery requires that the buyer cooperates, section 5.3 discusses whether and to what extent a seller is able to force the buyer to take delivery of the goods. The following discusses the intricacies of a situation of non-delivery and whether the buyer is entitled to demand immediate delivery or whether it should give the seller a reasonable time to deliver the goods in cases where the parties have not fixed a time for delivery and where a time for delivery is not determinable from the contract.

> *Illustration* – A producer of fruit juices (buyer) concludes a contract with a corporation of farmers (sellers). The parties agree that the farmers are obliged to deliver their crop of Valencia oranges covering the 2017–2018 crop year once the harvest season has ended. The contract does not specify what the sellers must do in order to perform their delivery obligation. The sellers encounter various issues in delivery of the oranges and a dispute arises about the question as to whether the oranges are legally delivered by making them available to the buyer instead of providing physical possession.

174. *Domestic approaches* – Dutch contract law expressly stipulates that the seller is obliged to transfer ownership with its accessories, to deliver the goods and to deliver goods which conform to the contract.[1070] This distinction between the seller's obligations reveals that the delivery obligation can be fulfilled even if the seller delivers goods which do not possess the features as agreed in the contract. This is because the delivery and conformity questions are separate under Dutch contract law.[1071] The seller's obligation to delivery can be fulfilled by giving the buyer the actual or constructive control over the goods.[1072] This can be achieved by enabling the buyer to exercise such control over the goods as the seller was able to exercise over it.[1073] The seller can provide this degree of control by an actual or symbolic transfer (*tradition symbolica*) of the goods, or by means of a bilateral declaration.[1074] As for the latter, a bilateral declaration suffices where: (1) the seller possesses the goods and henceforth holds the goods for the buyer by virtue of a stipulation made at the time of delivery (delivery *constitutum possessorium*); where the buyer already held the

1070 Arts 6:38, 7:9(1)(2), 7:17 DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 268, 289; HN Schelhaas, AJ Verheij and B Wessels, *Bijzondere overeenkomsten* (Studiereeks Burgerlijk Recht 4th edn, Wolters Kluwer 2016) para 25.

1071 An important point to note is that Dutch contract law does not make a distinction between the delivery of *aliud* or *peius*. Both situations are considered as non-conforming deliveries; See s 5.4.

1072 Arts 7:9 (2), 3:114 DCC.

1073 Art 3:114 DCC.

1074 Arts 3:112, 3:115 DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 291; Dutch Parliamentary History Book 7 (Kluwer 1991) 96; AS Hartkamp, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Vermogensrecht algemeen. Deel I. Europees recht en Nederlands vermogensrecht* (Wolters Kluwer 2018) para 143; Schelhaas et al *Bijzondere overeenkomsten* (n 1070) para 28.

goods for the seller (delivery *brevi manu*); and where a third party held the goods for the seller and holds it for the buyer from the time of delivery (delivery *longa manu*). In this event, possession of the goods does not pass until the third party has acknowledged the transfer of the goods or has been notified of it by the seller or buyer. From the considerations above it follows that it is not enough to make the goods available to the buyer. As for a sale subject to reservation of title, delivery also means giving control over the goods to the buyer, although the seller remains the possessor of the goods.[1075]

In instances where the parties did not implicitly or explicitly agree on a time for delivery, and no time limit can be derived from practices established between the parties or trade usage and/or practice, delivery may be demanded immediately by the buyer.[1076] That said, standards of reasonableness and fairness generally oblige the buyer to provide the seller sufficient time to fulfil its obligations to deliver the goods.[1077] In the case a seller completely fails its obligation to deliver the goods, the aggrieved buyer is entitled to resort to a claim for enforced performance under the *lex generali* for obligations and the *lex specialis* for sales contracts.[1078] Although, where the sales contract stipulates a time for delivery, it is presumed to bar an earlier demand for performance.[1079] Nonetheless, the limiting effect of a stipulated time for performance is not significant as the court is entitled to grant a claim for enforced performance on the condition that actual enforcement of the court order is only available on lapse of the stipulated time for performance and the promisor fails to act in accordance with this stipulation.[1080]

175. Sales law of Singapore entails the duty of the seller to voluntarily tender delivery of the goods in accordance with the terms of the contract.[1081] The act of delivery of goods means that the seller must be ready and willing to give physical or constructive possession of the goods, unless otherwise agreed.[1082] Considering this, the question of whether it is for the seller to send the goods to the buyer depends in each case on the contract, expressed

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1075 Art 7:9 DCC; Schelhaas et al *Bijzondere overeenkomsten* (n 1070) para 28.

1076 Art 6:38 DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 312; De Jong, Krans and Wissink 2018 (n 194) 80.4

1077 Dutch Parliamentary History Book 6 (n 207) 170, 171; Compare Dutch Parliamentary History Book 3 (n 204) 162; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 312; De Jong, Krans and Wissink 2018 (n 194) 80.4; RMChM Koot, 'commentaar op artikel 38 Boek 6 BW' in RJQ Klomp and HN Schelhaas (eds), *Groene Serie Verbintenissenrecht* (Wolters Kluwer 2011); Dutch Court of Appeal's-Gravenhage 30 May 2000, ECLI:NL:GHSGR:2000:AK4304, S&S 2001/54.

1078 Arts 3:296(1) 7:9(1) DCC.

1079 Art 6:39(1) DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 312; De Jong, Krans and Wissink 2018 (n 194) 80.4.

1080 Art 3:296(2) DCC; Dutch Parliamentary History Book 6 (n 207) 172; Sieburgh, *Asser 6-I* (n 363) para 246.

1081 SGA, s 27; *Export Services Singapore Pte Ltd v Idemitsu Chemicals Southeast Asia Pte Ltd* [1998] 1 SLR 93; Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.172.

1082 SGA, s 25, 61(1); Shenoy and Loo 2013 (n 13) paras 22.26, 22.25.

or implied, between the parties.[1083] Where a contract of sales entails the obligation of the seller to send the goods to the buyer, delivery of the goods to a carrier is regarded as a delivery of the goods to the buyer.[1084] For a constructive delivery of goods, the goods may be regarded as delivered if the seller or another party holds the goods on the buyer's behalf after the sale, or in the event that the property was already in possession of the buyer before the sale, and the latter continues its possession.[1085] The delivery of the goods may take place by giving access to the warehouse or via a bill of lading.[1086] This obligation is also regarded as fulfilled if the goods are delivered to a carrier for the purpose of transmission to the buyer.[1087] In other words, Singapore contract law has taken the approach that the seller must make the goods available to the buyer in order to perform its delivery obligation.

Where a delivery obligation is assumed, a seller is obliged to deliver the goods in accordance with the agreed time.[1088] Where the time for delivery of the goods is not fixed in the contract, the seller is bound to deliver the goods within a reasonable time.[1089] The amount of time reasonably required follows from the circumstances of the case (*i.e.* a matter of fact).[1090] A demand of the buyer for delivery may be treated as ineffectual unless made at a reasonable hour, and what a reasonable hour is should be determined on the facts of the case.[1091] In *Ng Lay Choo Marion v Lok Lai Oi*, the Singapore Court of Appeal considered that when exercising its discretion to award a claim for enforced performance, it is relevant to consider what terms should be imposed in order to do justice to the parties.[1092] Considering the moment at which a buyer may claim for actual and constructive delivery, the sales law of Singapore has taken the approach that handing over the possession of the goods may only be required if the buyer is capable and willing to pay the agreed purchase price for the goods.[1093] The parties are entitled to agree on a different exchange moment, which (obviously) may affect the moment at which the buyer is entitled to claim for delivery. From the general rule that performance must be precise and exact (*e.g.* the seller's obligation to deliver the goods in accordance with the contractual stipulations), it follows that where the seller fails to perform its delivery obligation, the buyer may claim for a remedial measure.

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1083 SGA, s 29(1).
1084 SGA, s 32(1).
1085 SGA, s 29(4); Chong et al 2016 (n 125) para 10.5.8.
1086 See the English case *Hilton v Tucker* (1888) 39 Ch.D. 669 for fulfilment of the obligation to deliver the goods by handing over the keys of the warehouse; Shenoy and Loo 2013 (n 13) para 22.26.
1087 SGA, s 32 (1) SGA Singapore; Chong et al 2016 (n 125) para 10.5.15.
1088 SGA, s 27.
1089 SGA, ss 29(3), 61(1); Hunter 2017 (n 7) para 7.3.
1090 Shenoy and Loo 2013 (n 13) para 22.28; Chong et al 2016 (n 125) para 10.5.16.
1091 SGA, 29(5); Chong et al 2016 (n 125) para 10.5.16.
1092 *Ng Lay Choo Marion* (n 917) SGCA 67 [21], [23-25].
1093 SGA, s 28; Hunter 2017 (n 7) para 7.1; Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.169.

176. The contract law of China stipulates that a sale amounts to an obligation of the seller to deliver the goods and to transfer the ownership of the goods.[1094] The obligation to transfer the ownership of the goods is said to be the foundation of the statutory obligation to deliver the goods by the agreed time limit.[1095] From the delivery obligation it derives that the seller is required to provide the buyer with actual or constructive possession of the goods. Constructive delivery (*i.e.* transfer of ownership) could involve the transfer of the actual title to the buyer which enables the latter to take possession of the goods.[1096] Thus, where tangible goods are in possession of a third party, the seller can fulfil its obligation to deliver the goods by transferring the right of restitution of the goods to the buyer.[1097] In the event the parties' only intent is to transfer ownership, they can agree that the seller remains holding physical possession of the goods.[1098] Where the sales contract entails a software product which does not require physical delivery, and the parties have not explicitly agreed on the delivery mode and the delivery mode also cannot be determined via the existing contract or business practices, delivery shall be deemed to occur when the buyer receives the agreed-on electronic product or a certification of rights.[1099]

Where a contracting party is subject to a delivery obligation, it is obliged to deliver the goods to the buyer by the agreed time.[1100] In the absence of an agreed time for delivery, the seller may deliver the goods, and the buyer may require delivery, at any time, provided that the other party shall be given the time required for preparation.[1101] It must also be noted that where a commercial sales contract is not clear on this matter and the parties are not able to reach an agreement, it is at the discretion of the court to determine an appropriate time of delivery in accordance with the existing contract or business practices.[1102] Considering the availability of enforced performance, the time for delivery should be due to constitute a delay in performance.[1103] Where the time for delivery has lapsed, the aggrieved buyer may claim for enforced performance.

177. *Comparative analysis* – This section deals with the question of whether the seller is subject to a statutory delivery obligation, and if so, what is required to fulfil the delivery obligation and whether non-delivery can be subject to a claim for enforced performance.

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1094 Art 130 CCL; Liming 2016 (n 224) 276–278.
1095 Art 138 CCL; Liming 2016 (n 224) 276–278.
1096 Liming 2016 (n 224) 277.
1097 *Ibid.*
1098 Bu 2013 (n 226) 90 para 12; Liming 2016 (n 224) 277.
1099 Art 5 Judicial Interpretation of Sales Contracts (n 174).
1100 Arts 135, 138 CCL.
1101 Arts 139, 62 (4) CCL.
1102 Arts 61(4), 139 CCL; Bing Ling 2002 (n 229) paras 8.082, 5.038; Bu 2013 (n 226) 91 para 15.
1103 Art 107 CCL; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 24; Bing Ling 2002 (n 229) para 8.015.

The starting point for this discussion is an important common denominator. That is, the three investigated jurisdictions, together with the CISG and DCFR,[1104] encompass the obligation of the seller to deliver the goods.[1105] The legal systems, however, disagree on the question of what the seller must do in order to fulfil its delivery obligation. Whereas Dutch and Chinese contract law has taken the approach that legal delivery can take place by providing physical or constructive possession, the CISG and DCFR merely require that the seller dispatches the goods or put the goods at the buyer's disposal.[1106] The contract law of Singapore has taken a different approach by adopting the principle that the seller must be ready and willing to give possession of the goods, although the question whether it is for the buyer to take possession of the goods or the seller to send them to the buyer depends in each case on the contract, expressed or implied, between the parties. The difference between the investigated legal systems can be best observed by considering the situation where a contract requires a change in physical possession and the buyer refuses to take delivery. In such a case, Singapore may deem delivery to have occurred where the seller has made the goods available to the buyer. The CISG and DCFR have taken the approach that the obligation of the seller to deliver the goods, entails the mere requirement that the seller dispatches the goods or places them at the buyers disposal. By contrast, Dutch and Chinese contract law require a physical or constructive change of possession for the fulfilment of the seller's delivery obligation.[1107] This, in effect, means that under Dutch and Chinese contract law, the buyer could claim for enforced performance of the seller's delivery obligation in the example provided under paragraph 173 because the oranges have not actually reached the buyer. In the case the contract is governed by the sales law of Singapore or the CISG (or inspiration is drawn from the approach taken by the DCFR), and the court establishes that the oranges are made available (*e.g.* by handing over the oranges to the carrier) dispatched or placed at the buyers disposal, it appears that the farmers may have fulfilled their delivery obligation and the buyer therefore may no longer request for delivery.

Importantly, the aforementioned differences between the requirements for the fulfilment of the seller's delivery obligation reveals that the applicable rules under Dutch and Chinese contract law can be characterised as buyer friendly (*i.e.* the seller is responsible for actual delivery, dispatching the goods or placing the goods at the sellers disposal) and the rules under a Singapore jurisdiction contract, the CISG and DCFR as seller-friendly (*i.e.* the seller is only responsible for making the goods available). An important interrelated effect

1104 The PICC, PECL and draft PACL are not familiar with specific sales law provisions.

1105 Art 30 CISG; Art IV.A.-2:101 DCFR.

1106 Arts 30, 31 CISG; Art IV.A.-2:201(1) DCFR.

1107 The latter approach is one of the reasons why s 5.3 discusses whether the buyer is subject to an obligation to take delivery of the goods, and if so, whether the subject legal systems envisage enforced performance of this obligation.

of favouring one party over the other is that it creates a divergence in thresholds for claiming enforced performance of delivery of the goods. In other words, under Dutch and Chinese contracts, non-delivery occurs where the seller fails to deliver the goods by a physical or constructive change in possession. This is easier to prove for the buyer than the unwillingness of the seller to make the goods available.

178. Regarding the time for performance of the seller's delivery obligation, the three subject jurisdictions and the unification instruments identified adhere to the principle that a seller is obliged to perform its obligations at the time fixed by the parties.[1108] At first glance, it appears that this rule is not of significant importance for determining the availability of enforced performance under Dutch and Chinese contract law because the default regime of both jurisdictions (from a dogmatic perspective) allows such a claim to be brought, regardless of a failure in performance. A significant deviation from this dogmatic principle (rooted in the universal adage *pacta sunt servanda*) can be found in the Dutch contract law principle that a stipulated time for delivery is basically intended to protect the interest of the seller. It is the case, therefore, that the buyer is not entitled to enforced performance of the seller's delivery obligation before the stipulated time for delivery when the contract is governed by Dutch contract law. That said, the buyer is entitled to claim for enforced performance of the seller's delivery obligation, which can be granted by the court on the condition that execution can only take place after, for example, the time of delivery has lapsed and the goods are not delivered.

It can be said that the contract law of the Netherlands displays a position which most resembles the middle-ground solution offered by the unification instruments. This solution encompasses a right to enforced performance, which is only available on a non-delivery. A similar principle is reflected in the contract law of China, although it is also held that the dogmatic view is that a claim for enforced performance is available independent of a failure in performance. In view of the above, it is submitted here that the approach taken by the Dutch and Chinese contract law may cause confusion among those not familiar with the interaction between the provisions for sales contracts and the above-discussed doctrinal viewpoints. The legitimate question for national legislators is, therefore, whether the applicable statutory principles for the enforcement of the seller's delivery obligation should expressly stipulate that a claim for enforced performance is an exclusive remedial instrument. The mere assumption that this is already the case in practice (*i.e.* enforced performance shall not be awarded without a failure in delivery)[1109] is not sufficient to

1108 Art 33(a) CISG; Art 6.1.1(a) PICC; Art 7:102(1) PECL; Art III.-2:102(1) DCFR; Art 5(1) Amendment Draft on Performance PACL, Lee 2016 (n 16) 111.

1109 In other words, enforced performance shall not be awarded without a failure in performance.

remove the uncertainty arising from the dormant effect of the strict civil law interpretation of the principle of *pacta sunt servanda* in Dutch and Chinese contract law.

The viewpoints of the subject legal systems also differ considerably in the case where contracting parties have not agreed on a time for delivery. The Dutch and Chinese contract law, as well as the draft PACL, appear to have taken the strictest approach by entitling the aggrieved buyer to require immediate performance of the obligation to deliver the goods, although the seller should be given a time which is reasonably necessary for the delivery of the goods.[1110] It seems that Singapore sales law is less strict by 'merely' requiring delivery of the goods 'within a reasonable time'. The approach taken by Singapore is in line with the more flexible structure of the CISG, PICC, PECL and DCFR.[1111] In determining the start of a reasonable period for delivery, the aforementioned unification instruments follow the rule that a reasonable period starts to run following the conclusion of the contract.[1112] For Singapore, it may be assumed that the court shall establish – in light of the circumstances of the case – the moment at which the reasonable time for delivery of the goods starts.

179. For those involved in commercial sales transactions across the borders of the investigated legal systems, it is of immense legal and practical importance to fully grasp the scope of the above-described principles for the time at which delivery of the goods is to be performed (*e.g.* when the goods are placed at the disposal of the buyer, when the goods are loaded on the means of transport arranged by the buyer, when the goods are placed alongside ship). This is because the time of legal delivery may play a decisive role in determining when the risk of loss passes from the seller to the buyer.[1113] It should be noted that the transfer of risk and title may not necessary coincide.[1114] Where an international sales contract involves transport by sea or inland waterway, commercial

1110 Art 5(2) Amendment Draft on Performance PACL, Lee 2016 (n 16) 111.

1111 Art 33(c) CISG; Art 6.1.1(c) PICC; Art 7:102(3); Art III.-2:202(1) DCFR.

1112 Art 6.1.1(c) CISG; Art 33(c) PICC; Art 7:102(3) PECL; Art III.-2:102(1) DCFR.

1113 NL: the seller is subject to a statutory duty to transfer the title (*i.e.,* ownership) and to deliver the goods, see art 7:9(1) DCC. Art 7:10(1) DCC stipulates that the goods are at risk of the buyer from the time of legal delivery. The latter, however, does not necessarily bring about the transfer of title. This depends on the particularities of the case. If no term has been set for the obligation to transfer the title and to deliver the goods, these obligations may be performed as well as demanded immediately, art 6:83 DCC; SGP: unless otherwise agreed, the risk of loss is related to the time of passage of property (transfer of ownership) to the buyer. The property in the goods normally passes when the goods are ascertained to the contract, and (in the case of specific and ascertained goods) at such time the parties to the contract intend it to be transferred. See for a detailed discussion Hunter 2017 (n 7) Chs 4, 5; CHN: arts 130, 133, 142 CCL. The seller is obliged to transfer the title (*i.e.,* ownership). The risk of loss passes and the ownership transfers at the time of delivery of the goods; An in-depth discussion about the transfer of risk and title is beyond the scope of this work because of the huge differences amongst national contract law systems at the national and international levels.

1114 Ss 3.4, 4.3.

parties could circumvent potential difficulties in this regard by relying on the Incoterms® such as FAS (*i.e.* free alongside ship-(named port of shipment)) It must, however, be stressed that the moment of transfer of possession and property should be specifically arranged in the contractual stipulations. The same applies when parties opt for another Incoterms® rule. The practical relevance of enhancing the understanding of the rules on the time for legal delivery also follows from a potential relationship with the time for determining the market or a reasonable price owed for the goods and with the time for establishing whether the features of the goods are in accordance with the contractual stipulations (this is generally the case where legal delivery coincides with the time at which the risk passes).[1115] Furthermore, the time at which the risk passes is generally decisive for the impact of subsequently discussed subjective impediments for performance, altering the purpose or equilibrium of a commercial sales contract.[1116] Another important and practical point to bear in mind when considering the rules on the time for delivery of goods in international commercial sale transactions, is that the three investigated legal systems do not include specific rules for the interpretation of sales contracts with respect to time zones, 'business day' definitions, hour format and daylight saving rules. Only the PICC provides a clear-cut rule for time zones but is not concerned with hour format and daylight saving time rules. Considering the importance of cross-border sales in the Netherlands, Singapore and China, it may be worth the consideration of these jurisdictions to adopt a system which governs and defines time zones, hour format and daylight saving rules for international sales transactions. At a practical level, contracting parties may consider to specify which time zone applies to their respective obligations. For example, parties could stipulate that a reference to a time of day is a reference to China Standard Time (Beijing Time domestically).

## 5.3 Failure in taking delivery of the goods

180. *Preliminary* – This section deals with the situation where the buyer fails to take delivery of the goods. The concept of taking delivery must in this context be understood in a broad sense because legal delivery of the goods may occur in various forms (s 5.2).[1117] Where legal delivery brings about a transfer of risk and title, the act of taking delivery also requires that the buyer takes control and bears the responsibility for the risk of loss. The importance of discussing the enforceability of the act of taking delivery of the goods becomes apparent when considering the complexity of international commercial sales transactions, in

1115 *Ibid.*
1116 Ch 6.
1117 S 5.2.

particular when it involves the carriage of goods and when the law or the contract requires that the seller (or its representative) is obliged to deliver the goods to the buyer's (or its representatives) premises. In these cases, numerous challenges may arise due to the potential involvement of third parties, long-range transboundary transport and the fact that the goods cannot be immediately exchanged against the price. The consequences of a failure to take delivery are also significant when the contract concerns the sale of perishable and/or hazardous goods, and the seller remains responsible for the goods until the time, for example, a third party has taken delivery of the goods at the port of destination. With this in mind, it is first discussed whether the investigated legal systems encompass a legal obligation of the buyer to take delivery which can be subject to a claim and subsequently a judicial order for enforced performance.

The second point of discussion concerns the situation where a legal system is not familiar with an express legal obligation of the buyer to take delivery of the goods, but, instead, acknowledges an obligation of the buyer to cooperate. The analysis of the two points above should be considered in view of the disagreement between the civil and common law traditions on the relationship between the factual act of taking delivery and the legal acceptance of the performance. It could be said that civil law jurisdictions make a distinction between the obligation to take delivery and the legal concept of acceptance while common law jurisdictions are more familiar with an overall obligation to accept the goods which encompasses a duty to take delivery.[1118] It should further be noted that the following discussion about consequences of failure in taking delivery draws attention to the distinction between enforceable obligations and an 'obliegenheit' (*i.e.* a non-actionable obligation which only serves as a limitation of the rights of the non-performing party).[1119]

> *Illustration* – A supplier of building materials, located in country A, is the owner of 200,000 metric tons of iron ore. The supplier sells the iron ore to a company located in country B. The parties agree that the iron shall be delivered at a designated warehouse company. However, upon arrival of the iron ore, it becomes apparent that the buyer has failed to secure sufficient storage and to make arrangements for taking delivery of the iron ore in other ways.

181. *Domestic approaches* – Dutch contract law is not familiar with a general obligation of the buyer to take delivery of the goods;[1120] the buyer is only subject to a non-actionable duty (*i.e.* obliegenheit) to provide the necessary cooperation to enable the seller to fulfil

1118 Schwenzer, Hachem and Kee 2012 (n 13) paras 35.03, 35.17, 37.01–37.06, 37.13, 37.12.

1119 S 1.5.

1120 This notion follows from the principle that a promisee is not obliged to accept performance; Dutch Parliamentary History Book 6 (n 207), 219, 230; See for sales contracts: Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 575.

its obligation to deliver the goods.[1121] An important principle in this regard is that a promisee is considered to be in default where the performance of the obligation of the promisor is prevented because it does not cooperate where necessary, or another impediment arises on the part of the promisee, unless the cause cannot be attributed to the latter.[1122] Hence, if a company fails to provide the necessary cooperation, the company, as a promisee of the delivery obligation, can be considered to be in default on the basis of the aforementioned principle. Apart from an explicit duty to cooperate, a commercial party can be subject to a non-actionable obligation if the contract or the law requires that the latter specifies the goods. If the buyer fails to act in accordance with this obligation, the seller is entitled to proceed to do so on its own motion, taking into account the needs of the buyer of which the seller is aware.[1123] It is reiterated that a refusal of the buyer to cooperate does not allow the seller to claim for enforced performance. This situation only results in a *mora creditoris*[1124] which negatively affects the rights of the non-performing buyer and may give rise to the question of whether the seller is entitled to damages.[1125]

There are, however, important exceptions to the general rule that a buyer is not subject to an actionable duty to take delivery of the goods (*i.e.* to cooperate with delivery). For example, when the buyer intends to reject the delivered goods but is not obliged to pay for the goods, the buyer is required to physically take delivery (property in the goods is not transferred; aflevering maar geen ontvangstneming),[1126] unless taking delivery results in serious inconvenience or unreasonable costs or unless the seller or an authorised person is present to take delivery.[1127] Where the buyer is in default in taking delivery in the aforementioned situation, the seller is – in accordance with its obligation to mitigate losses – required to sell the goods in an appropriate manner (for the best possible price) if the goods are subject to rapid loss or deterioration or if its safekeeping would cause serious inconvenience or unreasonable costs.[1128]

The buyer may also be obliged to take delivery of the goods on the basis of an express term or implied term by business usage or under the requirements of reasonableness and

1121 Art 6:58 DCC; see for a detailed discussion about the concept of obliegenheit in Dutch law: De Jong, Krans and Wissink 2018 (n 194) 11, 157, 159. 170.

1122 Art 6:58 DCC.

1123 Art 7:31 DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 575, 576.

1124 Art 6:58 DCC.

1125 Art 6:58 DCC.

1126 *E.g.,* a duty to take delivery of the goods does not arise in case of CIF contracts because the obligation of the buyer to pay the price arises at the moment the seller tenders the shipping documents and does not depend on an inspection of the goods or the arrival of the goods in the port destination; Filippo Lorenzon, Yvonne Baatz, C Nicoll and David Myer Sassoon, *C.I.F. and F.O.B. Contracts* (5th edn, Sweet & Maxwell 2012) paras 8–001.

1127 Art 7:29 (2) DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 581, 584.

1128 Arts 7:30, 7:32 DCC.

fairness in view of the interests of the seller.[1129] A crucial factor for recognising the existence of a duty to take delivery of the goods is the requirement that the seller has a justified interest in acceptance of the goods and that the rights of the latter are affected when the buyer defaults.[1130] For example, in the case where a supplier of gas concluded a contract for the sale of ammonia, which is a by-product from the production process, the buyer was not entitled to refuse the delivery of the ammonia.[1131] In this situation, the seller had a special interest in the buyer's act of taking delivery.

182. The contract law of Singapore expressly and implicitly imposes the duty to take delivery on the buyer.[1132] This fundamental derives from the buyer's statutory obligation to accept the goods, which entails two elements, to wit: taking delivery of the goods and the legal acceptance of the goods.[1133] The aforementioned act of taking delivery of the goods does not automatically constitute an act of *legal* acceptance of the goods.[1134] The delivered goods are only deemed to be *legally* accepted if the buyer declares that it has accepted the goods, when the conduct of the buyer is inconsistent with the ownership of the seller (*e.g.* the buyer uses or resales the goods),[1135] and when after delivery of the goods, the buyer fails to notify the seller within a reasonable time that it has rejected them.[1136] Considering the principle that a buyer is subject to an express or implied duty to take delivery of the goods, the subsequent question arises whether an unjustified delay or refusal in performance of this obligation entitles the seller to claim for enforced performance. This question is answered in the negative as the equitable action of enforced performance of non-monetary obligations is only available for non-delivery of specific or ascertained goods,[1137] and in other proper circumstances [138, 149]. This means in effect that the aggrieved seller is

1129 Art 6:248 (1) DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 578; see for the interest of the promisor Dutch Parliamentary History Book 6 (n 207) 230; *E.g.,* District Court Breda 16 August 2006, ECLI:NL:RBBRE:2006:AY6407, NJF 2006, 444; District Court Rotterdam 10 January 1921, ECLI:NL:RBROT:1921:46, NJ 1921, 384; It is argued that a duty to accept performance follows from the obligation of the parties to take into account each other's justified interest. See MAMC van den Berg, 'Crediteursverzuim: relict van een verouderd rechtsdenken', in Gijs van Dijck, Rob van Gestel, Ivo Giesen and Fred Hammerstein (eds), *Cirkels. Een terugblik op een vooruitziende blik* (Kluwer 2013) 89–96; Van den Berg, Van Gulijk, *Asser 7-VI* 2017 (n 203) 77.

1130 Hijma, *Asser* 7-I* 2013 (n 48) 578; Sieburgh, *Asser* 6-I (n 363) para 291.

1131 Dutch Court of Appeal 's-Gravenhage 8 April 1921, NJ 1921, 1151; Hijma, *Asser* 7-I* 2013 (n 48) 578.

1132 SGA, ss 27, 29, 37(1); Hunter 2017 (n 7) para 7.1; Schwenzer, Hachem and Kee 2012 (n 13) para 35.17.

1133 Shenoy and Loo 2013 (n 13) para 22.57; Chong et al 2016 (n 125) para 10.6.15; Hunter 2017 (n 7) para 7.1.

1134 Shenoy and Loo 2013 (n 13) para 22.57.

1135 In *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] SGCA 1 [2], (2007) 1 SLR(R) 1133 it was considered that the buyer had legally accepted the goods by selling them to its customers; SGA, s 35(1)(b).

1136 SGA, ss 6, 35(1)(2)(4); Chong et al 2016 (n 125) paras 10.6.10, 10.8.3; If the buyer has factually taken delivery, but rightfully rejected acceptance and has informed the seller about its refusal, the buyer is not obliged to return the goods; *Chuan Hiap Seng (1979) Pte Ltd v Progress Manufacturing Pte Ltd* [1995] SGHC 17 [11]-[15]), (2015) 1 SLR(R) 122.

1137 SGA, s 52(1).

only entitled to claim damages when the buyer wrongfully neglects or refuses to take the goods or when the latter causes unreasonable delays in taking delivery.[1138] It should also be noted that an express and implicit duty of the buyer to take delivery of the goods does not entail an enforceable ancillary duty of the buyer to provide the seller with the necessary cooperation to deliver the goods.[1139] Considering the comparative nature of this work, it should also be noted that the contract law of Singapore is not familiar with an overarching duty of commercial parties with equal bargaining power, to act in good faith. Consequently, it appears that there is no legal foundation to adopt a substantive duty of the buyer to cooperate where this is required for delivery. This might be different if the good faith principle is assessed in light of the purpose of the contract (*i.e.* transaction of goods) and the facts of the case (section 4.5), although this shall not result in an actionable duty due to the limited availability of enforced performance of non-monetary obligations under a commercial sales contract.

183. The contract law of China does not explicitly adopt an express obligation of the buyer to take delivery of the goods,[1140] but it appears that the statutory provisions for the sale of goods impose implicitly a non-actionable duty to take delivery of the goods on the buyer.[1141] In addition, note should be taken of the predecessor of the Chinese contract law, that is, the Economic Contract Law. This set of principles included an obligation of the buyer to accept delivery within the time fixed by the parties, which entails the element of taking delivery.[1142] The obligation to pay damages was the statutory remedy for failure in performance of this obligation.[1143] Despite the absence of an enforceable duty of the buyer to take delivery of the goods, the statutory obligation to act in good faith may impose such obligation on the buyer, unless there are justifiable reasons for refusal.[1144] In this context, the obligation to act in good faith may also bring about a duty of the buyer to cooperate, which could serve as a legal basis to establish the buyer's obligation to provide reasonably expected assistance by taking delivery of the goods.[1145] A failure in performance of the obligation to take delivery and/or to provide the necessary cooperation (on the basis of the obligation to act in good faith) is formally regarded as non-performance,[1146] although

1138 SGA, ss 37(1), 50; Chong et al 2016 (n 125) para 10.6.7; Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.191; *Sunny Daisy Ltd WBG Network (Singapore) Pte Ltd* [2006] SGHC 130 affirmed in *WBG Network (S) Pte Ltd* (n 1135).

1139 Compare Hunter 2017 (n 7) para 7.30.

1140 Bing Ling 2002 (n 229) para 8.027; A different view is taken by S Han mentioned in Schwenzer, Hachem and Kee 2012 (n 13) para 37.01 footnote 1 and para 35.17 footnote 28.

1141 Art 143 CCL.

1142 Art 17(4) ECL.

1143 Art 33(2)(a) ECL.

1144 Bing Ling 2002 (n 229) para 8.027; Bu 2013 (n 226) para 7.

1145 Bing Ling 2002 (n 229) paras 5.016, 8.027.

1146 Bing Ling 2002 (n 229) para 8.027.

the buyer's duty to take delivery in this regard is also not actionable because it requires a personal act. Taking into account the consideration above, it is submitted here that a buyer could be subject to a duty to take delivery of the goods under Chinese contract law. However, in a similar vein as the Economic Contract Law principles, a failure in performance of this obligation only entitles the seller to sue for monetary non-performance remedies, such as damages or contractual fines.[1147] This applies equally to cases where the duty to take delivery and/or to provide the necessary cooperation arises from the principle of good faith. This is because obligations founded on the good faith principle are said to be unsuitable for enforced performance.[1148]

184. *Comparative analysis* – The contract law of the Netherlands and China draw a distinction between the general availability of enforced performance for a failure in delivery of the goods and the situation where the buyer fails to take delivery of the goods. The two jurisdictions act on the principle that, while the seller is obliged to deliver the goods, the buyer has no such express duty to take delivery of the goods. This may be different where the courts of the Netherlands and China see reason to implicitly impose an obligation to take delivery on the buyer, or to assume such an obligation (*e.g.* in the form of a duty to cooperate) in view of the standards of reasonableness and fairness and good faith respectively. It appears, however, that the default regimes of both jurisdictions do not envisage an actionable obligation of the buyer to take delivery. This is because a failure in performance of an obligation to take delivery on the grounds set out above merely results in a situation of *mora creditoris*. This qualification brings about certain consequences for safeguarding the seller against harm caused by the refusal to take delivery of the goods. Potential consequences are: the threshold for the duty of care of the seller is lowered, the seller may sell the goods, or claim for monetary compensation (not damages), or both when this is appropriate in view of the circumstances of the case.

The contract law of Singapore takes a different approach by expressly and implicitly imposing the obligation to take delivery on the buyer in view of its positive duty to accept the goods. Nonetheless, also under Singapore contract law, the applicable principles merely result in a non-actionable duty of the buyer. Moreover, there is no alternative legal route as the buyer is not subject to a general duty to cooperate. Hence, the three investigated jurisdictions all assume that the buyer to a commercial sales contract is subject to a non-actionable duty to take delivery of the goods. Consequently, it appears that the court adjudicating the case mentioned under paragraph 180 shall not grant the seller's claim to assist the latter with the modalities required for making delivery if the contract is covered by the contract law regime of any of the three investigated jurisdictions.

1147 Art 33(2)(2), 34(2)(5) ECL; Bing Ling 2002 (n 229) para 8.028; s 7.5.
1148 Art 110(2) CCL; Bing Ling 2002 (n 229) para 8.028.

At a legal and practical level, it is also of immense importance to take note of potential gaps where a commercial sales contract entails the carriage/shipment of goods, while the payment of the purchase price becomes due during transit. In this situation, if the seller is not able to seek recourse to the civil law instrument of suspension of performance (*i.e.* delivery of the goods on arrival), and common law concepts of the seller's lien and right of *stoppage in transitu*,[1149] the seller may be left empty handed when the buyer refuses to pay the agreed purchase price and takes delivery of the goods upon arrival.

The non-actionable nature of the buyer's duty to take delivery has a significant impact where the buyer's obligation to pay the purchase price only becomes due after delivery of the goods and the buyer refuses to take delivery.[1150] Taking this into consideration, along with the fact that international trade is the backbone of the three subject jurisdictions, it is important to note that the CISG and DCFR have taken a completely opposite approach by adopting an express duty of the buyer to take delivery of the goods in conjunction with the notion that all obligations of the buyer are subject to the same remedies.[1151] This means in effect that an aggrieved seller is entitled to claim for enforced performance of the buyer's obligation to take delivery. A similar result may be achieved under the PICC, PECL and the draft PACL on the basis of the principle that the buyer is under an enforceable duty to cooperate, which means that the buyer can be required to engage in actions to facilitate the seller's obligation to deliver the goods.[1152] The aforementioned approaches may be used as a source of inspiration by the national legislators of the subject jurisdictions in order to develop a solution for the above-mentioned contingent obligations of the parties to a commercial sales contract.

1149 The concept of the seller's lien allows the unpaid seller to secure its right to payment by retaining possession regardless of the passing of title. The concept of *stoppage in transitu* is a form of suspension of performance after performance which is useful where the handing over of the goods brings about the legal delivery and the transfer of title (note that transfer of possession does not necessarily coincide with transfer of property). In this situation, the seller may prevent the physical handing over of the goods if specific requirements are fulfilled. The concept of *stoppage in transitu* is also adopted by the CISG in art 71(2).

1150 S 4.4, 5.3.

1151 Art 53, 60 CISG; Schwenzer 2016 (n 91) para 41; Arts IV.A.-3:101(b) Comment C, IV.A.-3:301 Comment A DCFR.

1152 Art 5.1.3 PICC; Vogenauer 2015 (n 19) Art 5.1.3 para 10; Arts 1:202, 8:101, 9:102 PECL; Art 1(2) draft on non-performance PACL, see Lee 2016 (n 16) 146, 193.

## 5.4 Discrepancy in quantity and quality

### 5.4.1 Introduction

185. The foregoing section shows that for a comparative analysis of the availability of enforced performance, a distinction must be made between a situation of non-delivery and where the seller delivers goods which do not conform to the contract. It is recalled that the fulfilment of the delivery obligation does not require that the goods possess the features as agreed in the contract. But this does not mean that the buyer has lost its performance interest. Therefore, this section will discuss whether the default regimes of the subject legal systems envisage the protection of the buyer's performance interest by means of enforced performance - which requires the seller to put the defect right by repair or by making a fresh delivery. Considering the contrasting doctrinal foundations under civil and common law of the availability of enforced performance,[1153] a sub-question that arises is whether these differences impact the ability of the buyer to compel the seller to cure a defect in the goods related to discrepancies in quantity and quality at an international level. A comparative discussion of solutions offered for a non-conforming delivery reveals an important divergence between the two major legal families. Generally, civil law jurisdictions follow the promissory theory which encompasses the notion that the seller, when entering into a sales contract, promises to deliver the goods of the agreed quality and quantity.[1154] This specific undertaking (promise) of the seller to deliver goods in accordance with the terms of the contract is usually codified in a statutory duty,[1155] which serves as the basis for the obligation of the seller to inform the buyer about a deviation of the promised features of the goods (*caveat venditor principle*). The seller's obligation to deliver the goods in accordance with the terms of the contract is also the basis for legal compulsion of the seller to cure a defective performance.[1156] By contrast, common law acts on the *caveat emptor* principle, which literally means 'let the buyer be aware'.[1157] It is, therefore, of little surprise that Singapore contract law is not familiar with a specific notification duty of the buyer as mentioned above. Another important point in this regard is that the contract law of Singapore acts on a system of guarantee liability.[1158] This means in effect that a seller may cure a defective performance in order to prevent liability in damages (*i.e.* the primary response to a failure in performance), but the buyer cannot rely

1153 Ch 4.
1154 NL: art 7:17(1)(3) DCC; CHN: arts 150, 153, 156 CCL.
1155 Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) para 328; Tjittes 2018 (n 2) 423.
1156 NL: art 7:21 DCC; CHN: arts 107, 111 CCL; See for the general distinction between civil and common law in this regard: Treitel 1998 (n 55) 44.
1157 Tjittes 2018 (n 2) 420.
1158 Treitel 1998 (n 55) 44.

on specific actions to demand cure of a defective delivery in a commercial sales context.[1159] These conflicting viewpoints require specific attention in the case of a commercial sales transaction across civil and common law countries which are members of the CISG, such as the Netherlands, Singapore and China. The rationale is that the law of the country where the buyer claims actual cure of goods may overrule the availability to cure a defective delivery where a sales contract is subject to the CISG.[1160]

186. Another main point of divergence surrounding the assessment of the availability of enforced performance in this study is more practical than dogmatic, but no less important. This concerns differences in the classification of cases of non-conformity and non-delivery and the legal consequences arising therefrom.[1161] For example, when a legal system classifies a discrepancy in quantity as a non-conformity, the availability of enforced performance is usually significantly stricter than legal systems which classify such a case as a non-delivery. This is because the rules on conforming delivery generally oblige the buyer to inspect the goods on delivery and to notify the seller of any defects discovered. That said, the discussion below demonstrates that a buyer could be subject to a notification duty, although a shortfall in goods is not considered as a non-conformity. Furthermore, the differences in classification also may result in a situation where a claim for outstanding goods in country X has a different limitation period when compared to the situation for a buyer located in country Y.

187. In light of the above, the analysis below reviews the availability of a claim for delivery of goods which are missing,[1162] repair and replacement under the contract law of the Netherlands, Singapore and China.[1163] It is also discussed whether there are specific constraints (*e.g.* reasonableness considerations); and if so, to what extent they influence the availability to enforce correction of a defective delivery. Furthermore, specific attention is given to the 'mere' duties of the buyer to examine the goods and to notify the seller about defects and to what extent non-performance of these duties affects the availability to claim for cure.[1164]

1159 Treitel 1998 (n 55) 44.
1160 Art 28 CISG; Treitel 1998 (n 55) 45.
1161 Schwenzer, Hachem and Kee 2012 (n 13) paras 31.09, 31.10.
1162 S 5.4.2.
1163 S 5.4.3.
1164 S 5.4.4.

### 5.4.2 *Shortfall in goods*

188. *Preliminary* – In a commercial sales contract, different quantitative values can be used to clarify the scope of the seller's delivery obligation. For example, specific parameters for the identification of a unique batch of premium olive oil. Also general phrases can be used, such as the sale of the entire crop of fruit in a designated year, or the sale of trees on a specified plot of land (*e.g.* a timber sales contract). Should the seller fail to deliver the goods in accordance with the agreed quantity parameters, the question arises whether the aggrieved buyer is entitled to claim for enforced performance of the delivery of the outstanding goods, and to what extent the availability of such a claim is influenced by the legal classification of the seller's non-performance. The following discussion reveals that three situations can be identified in this regard. First, legal systems which regulate discrepancies in quantity as cases of non-conformity and subject the buyer to a specific notification duty (in addition to the general exceptions for enforced performance). The second category consists of legal systems which equate under-delivery with cases of non-delivery, although it establishes specific notification duties where the seller fails to deliver the goods in conformity with the contractual stipulations. The third situation concerns legal systems which equate cases of non-performance (non-delivery) with a non-conforming performance, without any separate notification duty of the buyer.

> *Illustration* – In November 2018, a trader in cocoa contracts to sell a quantity of high quality organic cocoa to a party located in a different jurisdiction and to deliver this by 1 February 2019. However, the trader only delivers half of the ordered cocoa to the buyer and refuses to deliver the outstanding part due to other delivery obligations. Given the growing market demand for this product, the buyer is not able to obtain this type of cocoa from another supplier, although the initial seller still has a significant stock at its premises. In view of this, the question arises to what extent a claim for enforced performance of delivery of the outstanding goods is available.

189. *Domestic approaches* – Under Dutch contract law, a buyer is legally obliged to deliver the goods in accordance with the agreed quantity.[1165] A failure in performance of this obligation makes a case for non-conformity.[1166] Consequently, the aggrieved buyer is entitled to claim for the delivery of the missing goods (be they generic or specific),[1167] provided that the former acted in accordance with its duty to notify the seller in a timely

1165 Art 7:17(1)(3) DCC.
1166 Art 7:17(3) DCC.
1167 Art 7:21(1) DCC.

manner about the discrepancy in quantity.[1168] The buyer is, however, not bound to the limiting preconditions which apply to a claim for repair and replacement.[1169] This means in effect that a claim for enforced performance in the form of delivery of the outstanding goods is not subject to the principle of proportionality and subsidiarity. Nonetheless, it is suggested that the subsidiarity principle should apply in the exceptional situation that another legal measure is rendered a less far-reaching performance remedy.[1170] This viewpoint, however, contradicts the doctrinal principle that a buyer is free to opt for other judicial actions where appropriate.[1171] Moreover, it is submitted here that the absence of specific constraints on the action for a discrepancy in quantity fully accords with the fact that it is a simple failure in performance of a delivery obligation, which does not amount to specific difficulties such as the return transport of defective goods.[1172] Nonetheless, under the Dutch sales law regime, a claim for goods which are missing is constructed as a case of non-conformity and, therefore, differs from an action for enforced performance which (from a conceptual perspective) does not require a failure in performance. Nonetheless, a claim for enforced performance in the form of an order for delivery or cure by repair or replacement is in all instances rooted in the contractual and statutory right of the buyer to be provided with the goods in accordance with the contractual stipulations.

190. The sales law of Singapore follows the traditional common law approach by treating discrepancies in quantity as a failure of the seller's delivery obligation.[1173] In other words, the approach taken by the sales law of Singapore is to treat discrepancies in quantity as a partial failure to deliver the goods (*i.e.* partial delay in delivery), and not as a non-conformity. The consequence is that the buyer is not burdened with a notification duty in order to preserve the availability of obtaining an order for enforced performance.[1174] It also means that the standard process for enforced performance applies where the buyer decides to claim for delivery of missing goods. Hence, a court shall only grant a claim for the delivery of goods which are missing if the goods are specific or ascertained and if it is

1168 Art 7:23(1) DCC; See also art 6:89 DCC. This statuory provision entails a general notification duty for a defective performance.

1169 Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 424, 425; see s 5.4.3 for a more detailed discussion about the requirements for preservation of a claim for repair and replacement.

1170 Stolp (n 536) 254.

1171 Dutch Parliamentary History Book 7 (n 1074) 141; Compare Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 387.

1172 Schwenzer 2016 (n 91) art 46, para 21.

1173 SGA, s 27; Hunter 2017 (n 7) 7.1.

1174 Despite the non-bindingness of judicial precedent from other Commomwealth countries, reference is made to the Australian case *Castel Electronics Pty v Toshiba Singapore Pte Ltd* (2010) FCA 1028. It was considered that the domestic requirements for correct delivery are equated with art 35 CISG. Hence, a delivery may be regarded as defective where the goods do not correspond to the contract or the requirements set out in the CISG (*i.e.,* quality, quantity and packaging); Hunter 2017 (n 7) para 7.20.

appropriate and justified to do so.[1175] Enforced performance of the seller's obligation to delivery generic goods can also be granted when procurement of substitute goods is practically unobtainable, and the court establishes that damages are not an adequate remedy [138–149]. Aside from this narrow notion of the availability of enforced performance, a claim for the delivery of too few goods is further subject to the limitations discussed in chapter 6. Nonetheless, the aggrieved buyer is not left empty handed where the seller delivers a lesser quantity of commodity goods than it contracted to sell. In this situation, the buyer who does not deal as a consumer, may reject them in the event of a serious shortfall.[1176]

191. Chinese contract law provisions on conformity are largely based on the CISG.[1177] Unfortunately, the process of borrowing provisions from the Convention appears to have led to uncertainty in the qualification of cases concerning a shortfall in goods.[1178] The starting point under the contract law of China in this regard is the provision that a contract shall generally contain clauses on the quantity and quality of the subject matter of the contract.[1179] In contrast to clauses on the required quality of goods and the consequences where the delivered goods fail to satisfy the contract,[1180] the law does not specify a duty for the seller to deliver the goods in compliance with the agreed quantity nor the available performance remedies in cases of a shortfall in goods.[1181] This may suggest that Chinese contract law treats discrepancies in quantity as a non-delivery, and not as a case of non-conformity. Nonetheless, the aggrieved buyer is subject to a specific statutory duty to notify the seller about any non-compliance in quantity.[1182] This means in effect that where the buyer acts in accordance with the aforementioned notification duty, the buyer retains the right to claim for enforced performance of delivery of the outstanding goods.[1183] In other words, it appears that under-delivery of the goods makes a case of non-delivery under the contract law of China, although specific limitations apply where a claim for enforced performance is brought to court.

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1175 SGA, s 52(1).

1176 SGA, s s30(1)(2A)(a); Shenoy and Loo 2013 (n 13) para 22.115.

1177 André Janssen and Samuel CK Chau, 'CCL and Unidroit Principles' in DiMatteo and Chen 2017 (n 19) 450, 466.

1178 *Ibid.*

1179 Art 12(3)(4) CCL.

1180 Arts 111, 153 CCL.

1181 Art 153 CCL; Art 5.1.6 PICC employs the concept of average quality, but this entails a different standard than the concept of conformity in art 35(1) CISG and art I V.A.–2:101, art IV.A.–2:301 DCFR Conformity with the contract.

1182 Art 158 CCL.

1183 Art 107 CCL; André Janssen and Samuel CK Chau, 'CCL and Unidroit Principles' in DiMatteo and Chen 2017 (n 19) 379; Bing Ling 2002 (n 229) para 8.082.

192. *Comparative analysis* – Although the three investigated jurisdictions, as well as the unification instruments, all adopt principles for a defective performance,[1184] there is a significant disparity when considering the qualification of cases of a shortfall in goods. The need to address this issue and to strive for a uniform approach derives from the far-reaching consequences following from the applicable thresholds for obtaining an order for delivery of the missing goods. In other words, the aggrieved buyer may lose its right to claim for outstanding goods when it does not realise that the law governing the contract classifies a shortfall in goods as a non-conformity and thus imposes a specific notification duty on the buyer. The same applies when the seller mistakenly assumes that a shortfall in goods is not subject to a notification duty because the statutory principles are merely concerned with remedies for discrepancies in quality. The overarching power of domestic rules in the realm of CISG-contracts is another risk factor which undermines the protection of the buyer's performance interest at the international level. The general rationale of a notification duty for a shortfall in goods is that the seller must be provided with an opportunity to restore its failure in performance.[1185] One could question if this reason aligns with the loss of a claim for a conforming performance upon the expiry of a limitation period, because an important aspect of this barrier to enforced performance is similar to the objective of the buyer's notification duty. That is, to protect the seller against stale claims. Nevertheless, a case could be made that the seller is negatively affected where the buyer claims for the outstanding goods after an unreasonably long period, but before the expiry of the applicable (relative) limitation period.

193. The approach to under-delivery found in Dutch contract law is to treat discrepancies in quantity as a non-conformity, which brings about a specific notification requirement for the buyer. This also means that a claim for enforced performance of delivery of the missing goods cannot be equated with the general availability of obtaining a claim for enforced performance, as the latter (theoretically) does not require a failure in performance.[1186] Nonetheless, in both situations (complete non-delivery and non-conforming delivery), the contractual right to performance is the source of the action for enforced performance. The situation under the contract law of China is less clear, although it is assumed that discrepancies in quantity classify as a non-delivery, which means that the general exceptions for enforced performance apply. Nonetheless, Chinese contract law establishes a specific notification duty for the buyer for situations of under-delivery. Another interesting point is that the classification of non-delivery does

1184 Art 35(1) CISG; Art 7.2.3 PICC; Art 9:102(1) PECL; Art III.-3:201 DCFR; Art 1 Draft Articles on Non-Performance PACL.
1185 Comment A under art III.-3:107 DCFR.
1186 Ss 4.2.2, 4.4.2.

not align with the dogmatic notion that a claim for enforced performance derives from the act of contract making and may, therefore, be brought to court before an infringement of a statutory or contractual right. The contract law of Singapore takes a similar approach in the sense that discrepancies in quantity are treated as non-delivery, although the aggrieved buyer is not subject to a (specific) notification duty.[1187] Hence, the aggrieved buyer is entitled to claim for enforced performance in the form of delivery of the outstanding goods, provided that the goods are specific or ascertained from the contract, and in other proper circumstances, and damages are inadequate.[1188] This, in effect, means that the cocoa trader in the example mentioned under paragraph 188 can be ordered by the court to deliver the outstanding amount of cocoa under the contract law of the investigated legal systems, provided that domestic prerequisites are fulfilled.[1189] That said, in view of the differing perspectives on the notification duty of the buyer, it is submitted here that the divergence in the dogmatic classification of discrepancies in quantity by the three subject jurisdictions results in a different degree of protection of the interests of the aggrieved buyer to obtain the very thing it bargained for.

194. From a theoretical perspective, the approaches taken at the international level also differ significantly. The most important instrument for commercial sales qualifies discrepancies as a non-conforming delivery and encompasses specific requirements and duties of contracting parties, such as the obligation to give notice of lack of conformity.[1190] Under the DCFR and the draft PACL, discrepancies in quantity qualify as a non-performance, but they each adopt a specific notification requirement where the goods delivered are not in accordance with the values set out in the contract.[1191] Although the PICC and PECL mention the occurrence of a defective performance, they also classify discrepancies in quantity (and quality) as a general failure in performance.[1192] Importantly, the language of the applicable principles suggests that the buyer is not subject to specific notification duties for a defective performance. Nevertheless, it is held that the PICC encompasses a duty for the buyer to give notice of defects within a reasonable time on loss

1187 See s 5.4.4 for a detailed discussion about the underpinnings of the absence of a notification duty in the contract law of Singapore.

1188 S 4.4.3.

1189 S 4.4; In the case where the type of cocoa qualifies as a commodity, enforced performance can be granted when it is practically unobtainable to purchase substitute goods at the market (paras 138, 149).

1190 Arts 35(1), 39 CISG.

1191 Art III.-3:107(1) DCFR entails a duty of the buyer to inform the seller about a non-conforming delivery, the right to claim for a conforming delivery is subject to the general rules on enforced performance as set out in art III.-3:302 DCFR; In a similar vein, art 3 Draft Articles on non-performance PACL bring about a notification duty. The other exceptions to claim for a conforming performance follow from the general rules on the availability of enforced performance as laid down in, *i.a.*, arts 1, 7 of the Draft Articles on Non-Performance PACL.

1192 Arts 7.2.2, 7.2.3 PICC; Art 1:301, 9:102(1) PECL; Art III.-3:201 DCFR.

of a claim for enforced performance.[1193] The considerations above expose a myriad of approaches, indicating that there is no general consensus on the issue of qualification of a scenario of discrepancies in quantity and the legal consequences deriving therefrom.

The proposition submitted here is that those involved in international commercial sales contracts looking for an alternative to bridge the gap between national perspectives must carefully assess the applicable principles under the unification instruments to find the most appropriate and acceptable outcome for both parties. When considering the objective of the present comparative research, it is maintained here that the interests of the parties to a commercial sales contract are best protected by the CISG (*i.e.* the seller's interest in being protected against abuse and the buyer's performance interest). This is because the parties can easily determine what is required due to the express reference to a situation of discrepancies in quantity, by regulating this scenario in a separate framework for non-conforming goods, and by setting out the legal consequences where one of the parties fails to act in accordance with the stipulated duties.[1194]

### *5.4.3 Repair and replacement*

195. *Preliminary* – This section discusses the availability of enforced performance in the form of repair and replacement in cases where the quality of the goods delivered is not in conformity with the contract and the applicable law. An analysis of this topic is perilous due to the disagreement between the civil and common law traditions on whether an aggrieved party to a commercial sales contract should be entitled to enforced performance at all and, if so, to what extent limitations apply, or whether enforced performance is only available in exceptional situations (section 4.4). In order to bring more clarity to the matter, this section does not merely discuss the opposing viewpoints and whether they originate in the civil or common law traditions, but delves into the intricacies of the entire framework of the rules on non-conformity and the availability of enforced performance in the form of cure where the goods delivered deviate from the applicable conformity standards. This approach is justified by the absence of any balanced solution in the unification instruments identified and the potentially grave consequences where the parties are not aware of the discussed differences between the investigated legal systems. For example, certain civil law jurisdictions differentiate between the available judicial actions for defective goods (delivery of a *peius*) and delivery of different goods (delivery of an *aliud*). Difficulties from the distinction between cases of a non-conforming delivery and non-delivery may arise where the goods could be assessed as generic and specific (*e.g.* olive oil or coffee from a specific

1193 Vogenauer 2015 (n 19) art 7.2.2 para 58.

1194 The discussion in this section implies that the same can be said of Dutch contract law, as the latter has adopted similar provisions for a scenario where the seller fails to deliver the agreed quantity.

region or harvest year). In circumstances where such goods do not comply with the applicable conformity requirements, a case could be made for non-conformity, but it may also qualify as a non-delivery. Aside from determining the available remedies in both situations, understanding the approach taken by a legal system is also of paramount importance because different legal barriers apply to cases of non-delivery and non-conformity (*e.g.* examination and notice requirements, and limitation periods).

> *Illustration 1* – A vehicle manufacturer, located in country X, enters into a sales contract with an international transport company, located in country Y. The sales contract stipulates that the vehicle manufacturer is obliged to deliver 100 electric trucks. After delivery, the buyer notices that the manufacturer delivered hybrid trucks. This, in effect, means that the buyer shall not be able to lower the costs of petrol as envisaged and the buyer is not entitled to apply for specific governmental grants.

> *Illustration 2* – Company A (seller), located in country X, agrees to sell a specified amount of minerals, to Company B, located in country Y. Company A delivers the minerals with its accessories (*i.e.* documentary evidence of the conditions under which the minerals have been extracted), but inspection of the accessories shows that the minerals were not extracted from the designated source. The buyer argues that the minerals do not comply with the quality requirements and therefore claims for a substitute delivery, although the minerals were physically in conformity with the contract.

196. The discussion below focusses first on the characteristics of the conformity scheme and whether different standards apply to contracts which specify the quality of the goods and contracts which are silent on the matter. It then looks at the classification of judicial actions for repair and replacement, to what extent their availability is affected by specific constraints, and whether the availability of cure by replacement can be frustrated where the seller insists on repair of the goods.[1195] This comparative analysis is essential given that the solution offered by the CISG is not very effective due to the principle that domestic restrictions can be invoked against a claim for enforced performance of an obligation under a commercial sales contract which is subject to the Convention.[1196] The premise that this principle also applies in case of non-conformity follows from its position in the General Provisions of the CISG which governs the various (interrelated) forms of enforced performance of the seller's obligation.[1197]

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1195 Treitel 1998 (n 55) para 376.

1196 See the preconditions in arts 46(1), 28 CISG; Schwenzer 2016 (n 91) art 46, para 17.

1197 Art 46 CISG shows that the drafters of the Convention adopted a broad notion of the concept of enforced performance. That is, enforced performance entails a general right to require performance of the sellller's obligations, and in the case of non-conformity; a right to require delivery of substitute goods and repair.

> *Illustration 3* – A textile manufacturing company, located in country X, buys a specific and unique sustainable dyeing machine from a technology company, located in country Y. After four weeks, the machine can no longer be used due to an incurable defect. The buyer claims for enforced performance in the form of the installation of a replacement machine by the initial seller. The buyer substantiates the claim for enforced performance with the argument that its financial position is too limited to acquire a similar machine from another technology company.

> *Illustration 4* – A producer of machinery for the aerospace, energy and medical industry concludes a sales contract with a party in the commercial sector. The contract encompasses the sale of a specific and unique machine. After delivery, however, the buyer notices that the machine is inoperable and defective. In this situation, the buyer is not interested in returning the machine because uninstalling and dismantling the thing would cause great inconvenience. Taken together, the buyer claims for repair of the machine.

197. *Domestic approaches* – Dutch contract law differentiates between the conformity standards for commercial sales contracts which are silent on the matter and commercial sales contracts which specify the features and required quality of the goods to be delivered. The first situation may arise where commercial parties conclude a contract for the sale of generic goods (*e.g.* palm oil, rice or grain).[1198] Absent of a party agreement on the quality standards of the goods, recourse must be had to the principle that if the thing due is only determined as to kind and if there exists a difference of quality within the specified kind, the seller may not deliver goods of less than average good quality.[1199] With this statutory rule, the legitimate interests and reasonable expectations of the aggrieved buyer are the main sources to determine the conformity standards in the absence of a party agreement.[1200] Dutch contract law takes a different approach where a commercial contract encompasses the sale of specific goods and where the features of generic goods are specified in the contract.[1201] In these instances, the seller is obliged to deliver the goods in accordance with the specifications of the contract.[1202] It is assumed that the goods are not in conformity with the contract if they do not have the characteristics which the buyer is entitled to expect under the contract, taking into account the nature of the goods and the statements made

1198 De Jong, Krans and Wissink 2018 (n 194) 60, 81.

1199 Art 6:28 DCC; Sieburgh, *Asser 6-I* (n 363) para 236.

1200 Art 6:248(1) DCC; AC van Schaick in Schelhaas 2002 (n 19) 276.

1201 MM van Rossum, 'commentaar op artikel 17 Boek 7 BW' in CG Breedveld-de Voogd and SE Bartels (eds), *Groene Serie Bijzondere overeenkomsten* (Wolters Kluwer 2017); Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 325.

1202 Art 7:17(1) DCC (based on arts 18 , 19(1) ULIS); see also art 35 CISG.

by the seller about them.[1203] In this regard, the buyer may expect that the goods have the characteristics necessary for normal use and the presence of such quality expectations the buyer had no reason to doubt, and that the goods have the characteristics for the particular use foreseen in the contract.[1204] The goods are also not in conformity with the contract where the seller delivers goods other than those agreed in the contract (delivery of an *aliud*).[1205] Hence, Dutch contract law has not adopted the traditional civil law distinction between the causes of non-conformity.[1206] This means in effect that where the seller supplies defective goods (*peius*) or something completely different (*aliud*) than stipulated in the contract, the rules on non-conformity apply. In these instances, the aggrieved buyer may sue for an order for enforced performance which may require the seller to put the defect right or to deliver substitute goods, provided that the applicable preconditions are fulfilled.

Where the contract (in)directly specifies the quality of the goods, an aggrieved buyer is entitled to demand performance in the form of an order for repair or replacement of the non-conforming goods. These actions are sometimes described as subforms of the right to obtain an order for enforced performance when non-conforming goods are delivered.[1207] This approach is understandable when considering the broad discretionary power of the buyer to make use of its right to claim enforced performance, and cure by repair and replacement. Nonetheless, the right to enforced performance of the delivery obligation follows directly from the act of promise making and should, therefore, not be equated with a right to claim for a cure by repair and replacement which is the statutory response to non-conformity. In this light, it is also unsurprising that the independent legal concept of repair and replacement is subject to specific restrictions and that these bring about specific duties for the buyer (section 5.4.4). The distinction between a claim for enforced performance and a claim for a cure also results in different limitation periods (section 6.4). As for the specific constraints on the buyer's right to cure, the latter is only entitled to claim repair provided that the seller technically and economically can reasonably comply therewith.[1208] Alternatively, a buyer could demand a replacement, unless the variance from what was agreed is too insignificant to justify this.[1209] The threefold assessment to be made is whether repair is possible, whether an order for repair or replacement would have an adverse impact on the seller (proportionality),[1210] and if there is a less far-reaching performance remedy which could also accomplish the objective of

1203 Art 7:17(1)(2) DCC.
1204 Art 7:17 (2) DCC.
1205 Art 7:17(3) DCC.
1206 Schwenzer, Hachem and Kee 2012 (n 13) para 31.15.
1207 Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 380; Mak (n 527) 120; Stolp (n 536) 188.
1208 Art 7:21(1)(b) DCC, Hartkamp 2011 (n 80) para 256.
1209 Art 7:21 (1)(a)(b) DCC.
1210 Stolp (n 536) 189, 250; Dutch Parliamentary History Book 7 (n 1074) 136.

the contract (subsidiarity).[1211] If these requirements are met, the seller may be obliged to repair and replace the goods within a reasonable period, and without causing serious inconvenience to the buyer, taking into account the nature of the thing and the particular use of it specified in the contract.[1212] The discretionary power of the buyer to claim cure by replacement and repair is, however, restricted by the seller's right to cure a non-conformity (after the time for performance and regardless of the severity of the non-conformity) as long as the seller offers to compensate the aggrieved buyer's damages and costs and the performance obligation of the seller is not removed by, for example, avoidance of the contract.[1213]

198. The Singapore Sale of Goods Act is familiar with a number of rules related to the required quality of goods delivered under a commercial sales contract. These statutory provisions do so in a manner distinct from the two other subject jurisdictions due to the English common law origin of Singapore sales law. As a result, the rules on conformity are designated as express and implied warranties.[1214] In basic common law terminology, conformity standards stipulated in the contract are addressed as express warranties, and the Singapore Sale of Goods Act brings about implied warranties. As for the latter, the starting point for the present discussion is that the goods supplied under a commercial sales contract are of satisfactory quality.[1215] Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any discretion of the goods, the price (if relevant) and all the other relevant circumstances.[1216] The aforementioned implied rules on the conformity of the goods apply equally to generic and specific goods. Furthermore, no distinction is made between the delivery of an *aliud* and *peius* because the focus is on the occurrence of a failure in performance and not the exact cause (*e.g.* delivery of defective goods and delivery of different goods). Taking this into account, the express reference to non-delivery in the provision for specific performance,

1211 Stolp (n 536) 192; Dutch Parliamentary History Book 7 (n 1074) 134, 135.

1212 Art 7:21(3) DCC.

1213 Art 6:86 DCC; See art 6:269 DCC for the situation where the seller insists on curing the non-conformity after the aggrieved buyer claimed for avoidance of the contract; Haas 2009 (n 206) 265, 266; De Jong, Krans and Wissink 2018 (n 194) 258; It is important to mention that Dutch contract law considers cure of non-performance by repair and replacement of the thing deliverd as a method of providing the seller the very thing it contracted for. A different approach is to consider cure by repair and replacement as a form of damages because the seller bears the incurred costs.

1214 SGA, s 53(3); Chong et al 2016 (n 125) paras 10.8.21–10.8.23; see also Hunter 2017 (n 7) para 6.1; Anson's Law of Contract (n 360) 152, 153; Adam M Giuliano, 'Nonconformity in the Sale of Goods between the United States and China: The New Chinese Contract Law, the Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods' (2006) 18(1) Florida Journal of International Law 331, 341–342.

1215 SGA, s 14(2); Chong et al 2016 (n 125) para 10.3.21.

1216 SGA, s 14(2A).

and the fact that damages are the default legal response to remedy a failure in performance of a commercial sales contract which does not involve consumers, (partially) explains why a Singapore court shall not make a decree for repair or replacement where the seller fails to deliver the goods in accordance with the express and implied conformity standards.[1217] This does not mean that the aggrieved buyer is not entitled to sue for enforced performance (which may require to repair the goods or to make a fresh delivery) where the seller delivers defective goods. This proposition will be discussed in more detail below.

As previously mentioned, the contract and sales law of Singapore is based on the common law system of England, which is not familiar with enforced performance in the form of repair and replacement for non-conforming delivery under a commercial sales contract. As for the latter, the present research does not concern the availability of repair and replacement where a 'business to business transaction' qualifies as a consumer sale [14].[1218] For the purposes of the present study, it suffices to note in this regard that a failure in performance of the applicable non-conformity standards arising from a commercial sales contract (*i.e.* express warranties) and from the law (*i.e.* implied warranties) only entitles a business purchasing goods to claim for performance in the form of damages when the purchaser does not qualify as a consumer in the specific transaction. It appears, however, that the discretionary power of Singapore courts (in the realm of commercial sales) to provide a decree for enforced performance is not restricted to cases of non-delivery of specific and ascertained goods.[1219] It is suggested that this statutory restriction does not affect the discretionary power of Singapore courts to grant an order for enforced performance in cases of non-delivery which fall outside the ambit of the Singapore Sale of Goods Act.[1220] This approach implies that Singapore courts may provide an order for enforced performance of non-delivery of generic goods, provided that it is impracticable for the aggrieved buyer to obtain substitute goods and damages are inadequate.[1221] It appears, however, that the aforementioned extension of the discretionary power of the courts to cases which fall outside the ambit of section 52 of the Singapore Sale of Goods Act does not go so far as to allow the court to provide a decree for performance which

1217 Phang et al 2012 (n 112) paras 23.124, 23.124; Hunter 2017 (n 7) para 6.4; Schwenzer, Hachem and Kee 2012 (n 13); Treitel 1998 (n 55) 44.

1218 Phang et al 2012 (n 112) paras 23.119, 23.124; Schwenzer, Hachem and Kee 2012 (n 13) para 6.23, 43.38; SGA, s 52(1); S 12C of the Consumer Protection (Fair Trading) Act (Chapter 52A) (Rev Ed 2009) allows a business purchasing goods to demand replacement of repair of non-conforming goods where it qualifies as a consumer under ss 12(1)(a) and (b) of the Unfair Contract Terms Act (Chapter 396) (Rev Ed 1994), see s 12A(2) the Consumer Protection (Fair Trading) Act (Chapter 52A) (Rev Ed 2009). In view of the principles set out in these statutory provisions, it is important to bear in mind that the Singapore Court of Appeal adopted a broad definition of situations (intended use of the goods) where a business purchasing goods may be regarded as a consumer and thus is entitled to claim for repair and replacement, see para 14.

1219 SGA, s 52(1); Phang et al 2012 (n 112) paras 23.119, 23.124.

1220 Phang et al 2012 (n 112) para 23.119; Anson's Law of Contract (n 360) 610.

1221 Phang et al 2012 (n 112) para 23.124; SGA, s 52(1).

requires the seller to put a defective delivery right by repair or replacement of the goods. As Singapore judges are entitled to deviate from the traditional English law position where appropriate, it is worth noting that in US case law a broader notion of the concept of enforced performance is adopted.[1222] For example, in exercising its discretion, a court adjudicating a dispute under the UCC reached the conclusion that forcing the seller to repair a malfunctioning machine is justified because the buyer already paid for the machine, and is unable to raise money to buy a substitute machine from another seller.[1223] Nonetheless, from a recent Singapore contract law treatise it follows that the concept of enforced performance does not include repair and replacement as special forms of performance for cases where the goods sold under a commercial sales contract deviate from the quality standards arising from express and implied warranties.[1224] It must be noted that the legislation for consumer sales has departed from this restricted approach as Singapore legislators made it clear that an aggrieved buyer may apply for repair or replacement if the goods which are delivered by a commercial seller deviate from the applicable conformity standards.[1225]

199. Chinese contract law has adopted an extensive scheme with rules on conformity of the goods supplied under a commercial sales contract. The starting point for determining the scope of these rules is the notion that the parties are obliged to deliver the goods in conformity with the terms of the contract.[1226] This principle is further articulated in the statutory provision that the seller is obliged to deliver the goods in compliance with the agreed quality standard.[1227] The assessment of whether the goods are in conformity to the contract should be made in view of the later discussed broad interpretation of the concept of non-conformity and defective goods as adopted by the CISG and PICC respectively. This is because the drafters of the contract law of China draw inspiration from the unification instruments in this regard. It may, therefore, be assumed that delivery of defective goods (*peius*) and delivery of different goods (*aliud*) are governed by the non-conformity rules.[1228] In cases where the contract is silent on the matter or the provisions

1222 Shael Herman, 'Specific Performance: a Comparative Analysis' (2003) 7(1) Edinburgh Law Review 5; Shael Herman, 'Specific Performance: a Comparative Analysis' (2003) 7(2) Edinburgh Law Review 194.

1223 See the US case *Stephan's Machine & Tool Inc v D&H Machinery Consultants Inc* [1979] Ohio Ct App, (1979) 417 NE2d 579.

1224 In Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 208 it is clearly stated that a claim for repair and replacement can only be brought to court under the CPFTA.

1225 Singapore Consumer Protection (Fair Trading) Act (Cap. 52A), s 12C; The so-called Lemon Laws are added to the aforementioned Consumer Protection Act, effective 1 September 2012.

1226 Art 8 CCL.

1227 Art 153 CCL.

1228 Art 7.2.3 PICC acknowledge the availability of enforced performance by cure in the form of repair and replacement, but the PICC does not encompass separate rules for non-conformity.

of the contract are not clear about the required features of the goods, Chinese contract law stipulates that the parties may agree on supplementary terms through negotiation; if a supplementary agreement cannot be reached, such terms shall be determined in accordance with the relevant provisions of the contract or transaction practices.[1229] Should it prove to be impossible to determine the quality requirement along the lines of the aforementioned principles, the seller is obliged to deliver the goods in accordance with the state standard or industry standard. In the absence of such standards, the quality of the goods must comply with customary standards or any particular standard consistent with the purpose of the contract.[1230] Unfortunately, the conformity standards arising from this three-step approach (*i.e.* (i) party agreement, (ii) business usage, (iii) specific standards) do not provide the same level of clarity as the CISG,[1231] which is one of the main sources of inspiration for the drafters of the Chinese contract law. As for the legal consequences of a deviation of the conformity standards (*e.g.* the goods are defective or different goods are delivered than agreed in the contract), the aggrieved buyer is entitled to sue for enforced performance by means of repair and replacement of the goods. In sum, the Chinese contract law does not differentiate between non-conformity of specific and generic goods, nor does it make a distinction between the classification of delivery of different goods and delivery of defective goods. Both situations appear to fall under the non-conformity rules.

Where the seller delivers non-conforming goods, the aggrieved buyer may, in light of the nature of the goods and the extent of its loss reasonably choose to request cure in the form of repair or replacement.[1232] The courts are given the discretionary power to grant these remedies for non-conformity if awarding an order for enforced (continued) performance of a delivery obligation is practically meaningless.[1233] As for the hierarchy between the remedies to cure a non-conformity, it is held that an aggrieved buyer is entitled to demand replacement only in the event of a serious or incurable defective performance.[1234] So, it appears that a claim for replacement is not available if the defects are insignificant and can be repaired.[1235] This viewpoint derives from the notion that repair of defective goods is less burdensome for the seller than replacement.[1236] Aside from these

1229 Art 61 CCL.

1230 Art 62(1) CCL.

1231 Art 35 CISG; Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis of Formation, Performance, and Breach' in DiMatteo and Chen 2017 (n 19) 479.

1232 Arts 107, 111, 154 CCL; Bing Ling 2002 (n 229) paras 8.023, 8.024 8.026; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 35.

1233 Art 15 the Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Administrative Litigation Law of the People's Republic of China, as adopted at the 1,648th meeting of the Judicial Committee of the Supreme People's Court on April 20, 2015, effective from 1 May 2015.

1234 Bing Ling 2002 (n 229) paras 8.024, 8.084.

1235 Bing Ling 2002 (n 229) para 8.084; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 36.

1236 Bing Ling 2002 (n 229) para 8.084.

considerations, it is said that the remedies of repair and replacement are a part of the concept of enforced performance,[1237] because they are able to place the buyer in the position as if the contract was properly performed.[1238] However, the premise that repair and replacement can be brought to court as a form of enforced performance is contested to the effect that – on a doctrinal level – the right to obtain an order for enforced performance arises from the act of promise making and the judicial measures of repair replacement from a defective performance.[1239] Lastly, it is important to mention that there is some controversy about the availability of the remedy of replacement for non-conformity.[1240] The starting point is that where the seller does not deliver the goods in compliance with the agreed quality standards, the aggrieved buyer may demand that the seller bears the liability for its non-performance in the form of delivery of replacement goods.[1241] However, it is argued that a sales contract concerning specific goods cannot be subject to a claim for replacement goods, because the delivery of an alternative, which also could satisfy the aggrieved buyer, is said to fall outside the scope of the contractual obligations of the seller.[1242]

The alternative view is, simply put, that if the claim entails substitute goods, which are of a comparable nature and represents an equal value compared to the goods as described in the contract, a claim for replacement could be awarded.[1243] The latter is justified with the reasoning that delivery of not entirely the same goods could also comply with the interest the parties have in the fulfilment of the contract.[1244] For example, a diving company purchases ten wetsuits, which were displayed by a manufacturer of diving gear at a trade fair in China. Although the subject matter of this sales transaction is specific, the purpose of the contract could also be fulfilled if the buyer receives substitute goods in the form of unboxed wetsuits. In light of the foregoing, it is held that the contract law of China leaves room to sue for replacement of goods which are not completely in accordance with the specifications of the goods as described in the contract.[1245] In this light, the court could consider whether the legal relief of replacement would make the buyer indifferent and if the effect of awarding a claim for replacement is within the limitations of the impairment rule.

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1237 Chen (Lihu) and Zhu (n 970); Zheng Xiaochuan and Lei Mingguang, 'On the "Continue to Fulfil" the Rethinking' (2003) iss 3 Hebei Law Science 67 (郑小川，雷明光．对"继续履行"的再思考[J]．河北法学).

1238 Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 35; Bing Ling 2002 (n 229) para 8.026.

1239 Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 36.

1240 Hao Liyan (n 731).

1241 Arts 111, 153, 155 CCL.

1242 Hao Liyan (n 731).

1243 *Ibid.*

1244 *Ibid.*

1245 *Ibid.*

200. *Comparative analysis* – The issue of repair and replacement plays a significant role in the present research as it goes to the very essence of the differences in availability of enforced performance of a commercial sales contract in the subject legal systems. In this regard, there are three key issues which deserve particular scrutiny because they may cause contention between contracting parties and they emphasise the importance of obtaining more uniformity in the field of conformity at the national and international levels. The first and main point of divergence arises from the scope and understanding of the concept of enforced performance. The most narrow notion of the concept of enforced performance in the realm of commercial sales is present in the legal system of Singapore, which restricts the discretionary power of the courts to provide a decree for enforced performance to cases of non-delivery of specific and ascertained goods, and generic goods which fall outside the ambit of the sales law of Singapore, and the court establishes that damages are not adequate. Thus, although a seller is obliged to undertake that the goods sold are in accordance with the quality standards arising from the contract and the law (*i.e.* express and implied warranties respectively) enforcement of this obligation generally takes the form of damages.[1246] The approach taken under Dutch and Chinese contract law completely departs from this restrictive notion of enforced performance by providing the aggrieved buyer with a right to require the seller to cure a non-conforming delivery by repair and replacement. Nonetheless, there is also a major conceptual difference between the two countries' legal systems. To fully grasp this distinction it must first be noted that under Dutch contract law the statutory right to demand enforced performance of obligations in general (*e.g.* gratuitous, unilateral and reciprocal obligations) stands on a different statutory footing than a claim for cure by repair or replacement which may be brought to court to cure a non-conforming delivery under a commercial sales contract. By contrast, the contract law of China acts on the notion that the default regime for enforced performance governs situations of non-delivery and non-conformity. In other words, a claim for enforced performance in response to the seller's failure to deliver the goods and a cure for defective delivery both arise from the same legal provision under the contract law of China. As a result, the preconditions for enforced performance directly apply to a claim for repair and replacement of non-conforming goods. This means in effect that such a claim (governed by Chinese contract law) is subject to the general statutory limitations for enforced performance, that is, impossibility in law or in fact, where the subject matter of the contract is unfit for compulsory performance and where the aggrieved buyer does not require performance within a reasonable time.[1247]

1246 Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis of Formation, Performance, and Breach' in DiMatteo and Chen 2017 (n 19) 466.

1247 Art 111 CCL.

The unification instruments identified encompass a similar understanding of the relation between enforced performance of the seller's delivery obligation and an order to cure a non-conforming delivery by means of repair and replacement.[1248] For example, the CISG adopted the principle that enforced performance is not available where the buyer has resorted to a remedy which is inconsistent with the application for enforced performance. This restriction also applies where the aggrieved buyer requires repair or replacement in response to a non-conformity in the goods delivered.[1249] Hence, a claim for enforced performance in response to a non-delivery and non-conformity under Dutch law stands on a different doctrinal footing than similar claims under Chinese contract law and CISG-contracts.

That said, there is a very practical common denominator between the Dutch and Chinese contract law, that is; the right to require the seller to replace the delivered goods is only available in severe cases of non-conformity. This limitation follows from the assumption that an order for replacement of defective goods will most likely have a greater financial impact on the seller than when the seller is only required to repair the goods. The PICC and DCFR adopted a similar approach by limiting the right to require replacement where such an undertaking is unreasonably burdensome or expensive.[1250] The CISG goes a step further by requiring that the non-conformity must represent a fundamental failure in performance. This restriction follows from the reasoning that the delivery of substitute goods in international trade is expected to generate excessive costs because the seller is required to bear the costs of providing substitute goods and the risk of transport.[1251] To put this into context, it may be assumed that in the example mentioned under paragraph 196 (illustration 3), Dutch and Chinese contract law, as well as the CISG and DCFR, allow the courts to provide the textile manufacturing company with a judicial order for replacement of the dyeing machine due to the incurable defect and the limited financial resources of the buyer to acquire a similar machine on the market within a short timeframe. The courts may come to similar conclusions when adjudicating the second example (illustration 4), in the sense that the buyer may be granted an order for enforced performance which requires the seller to put the defect right by repair of the machine. In view of this, Dutch and Chinese contract law, as well as the unification instruments identified, are also on the same page when considering the most fundamental requirements.

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1248 Art 46 CISG; Schwenzer, Hachem and Kee 2012 (n 13) paras 43.08, 43.09; Arts 7.2.2, 7.2.3 PICC, Vogenauer 2015 (n 19) art 7.2.3 para 1; Arts 1:301, 9:102(1) PECL; Art III.-3:302 Comment C DCFR; Arts 1, 7 of the Amendment Draft on Non-performance PACL, see Lee 2016 (n 16) 193, 198.

1249 Schwenzer 2016 (n 91) art 46 paras 7, 17, 39.

1250 Arts 7.2.2(b), 7.2.3 PICC; Vogenauer 2015 (n 19) art 7.2.3 para 13; Art III.–3:302(3)(b) DCFR, Comment C clarifies that a conforming performance may be achieved by, *e.g.*, repair and delivery of a replacement.

1251 Art 46(2) CISG; Schwenzer 2016 (n 91) art 46, para 23.

This means in effect that a claim for repair is merely subject to reasonableness and appropriateness considerations and the limitations discussed in section 5.4.4.[1252]

201. The second point of consideration is that the approach taken by Dutch contract law stands apart to a certain extent because it makes a distinction between the conformity standards for commercial sales contracts which specify the quality of the goods and contracts which concern a transaction of goods only determined as to kind. In the latter case, the law of obligations brings about the standard that the seller may not deliver goods of less than average quality of the specified kind.[1253] Nonetheless, in both situations, the aggrieved buyer is entitled to claim for repair or replacement under the sales law principles. This may cause confusion amongst those not familiar with the structure of Dutch contract law. Where a commercial sales contract does not provide for the features of the goods, the PICC also obliges a seller to deliver goods of a quality that is reasonable and not less than average. The major difference to Dutch contract law is that the PICC clarifies, in an overarching principle, that non-performance of this obligation entitles the aggrieved buyer to apply for enforced performance which includes repair and replacement.[1254]

Another issue that warrants particular attention in this regard is the ambiguous three-step approach adopted in the contract law of China for cases where a commercial sales contract is unclear or does not specify the features and required quality of the goods.[1255] That said, Dutch and Chinese contract law have reached a significant level of uniformity by abandoning the distinction between the rules on delivery of different goods (*aliud*) and delivery of purely defective goods (*peius*). The CISG and the DCFR also equate the two forms of non-performance.[1256] Adopting a broad definition of non-conformity allows the aggrieved buyer to apply for enforced performance by means of repair and replacement in similar cases. Although the PICC, PECL and the draft PACL have not adopted specific rules on sales contracts, their broad notion of non-conformity removes the necessity to undertake an extensive assessment of the exact cause of a failure in performance in order to determine the availability of a cure for non-conforming goods.[1257] Taken together, it

1252 Art 46(3) CISG; Schwenzer 2016 (n 91) art 46, para 40; Arts 7.2.2(b), 7.2.3 PICC, Vogenauer 2015 (n 19) art 7.2.3 para 10; Art 9:102(2) PECL; Art III.-3:302 DCFR; Arts 1, 7 Amendment Draft on Non-performance PACL, see Lee 2016 (n 16) 193, 198.

1253 Art 5.1.6 PICC.

1254 Arts 7.2.2, 7.2.3 PICC.

1255 *I.e.,* determining the quality standards by party agreement, and if this fails, by business usage. As last resort, the quality standard can be determined by having recourse to specific standards.

1256 Art 35 CISG; Schwenzer 2016 (n 91) art 35, para 4; Villy de Luca, 'The Conformity of the Goods to the Contract in International Sales' (2015) 27(1) Pace International Law Review 163; Art IV.-2:301, Comment E DCFR.

1257 Arts 7.1.1, 7.2.2, 7.2.3 PICC, see Vogenauer 2015 (n 19) art 7.2.3 paras 1, 7, 13; Arts. 8:101, 9:102(2) PECL, JM Smits in Schelhaas 2002 (n 19) 325; Art 1 Amendment Draft on Non-Performance PACL, see Lee 2016 (n 16) 193.

appears that under the legal systems mentioned above, the deviation of the agreed features of the goods in the two examples mentioned under paragraph 195 (*i.e.* delivery of hybrid cars instead of true electric cars and the delivery of minerals from a different origin than stipulated), allows for enforced performance which requires the seller to put the defect in performance right by making a fresh delivery. At a theoretical level, there is however an important drawback when looking more closely at the PECL, and the draft PACL as both unification instruments do not clarify whether a decree for performance may require the seller to set a defect right or to deliver substitute goods.[1258] It may, however, be argued that such a provision is unnecessary because repair and replacement are special forms of a performance order.[1259]

202. The third point of divergence becomes apparent when considering the constraints on the buyer's right to require replacement in the case of a severe form of non-conformity, although the seller claims that it is able to put the defect right by repair. The key point in this regard is that under Chinese contract law there is no concrete limitation on the buyer's freedom to choose for cure by replacement where the seller argues that it is able to cure a severe non-conformity by repair. The seller is only granted a right to cure in case of an early delivery.[1260] By contrast, where a commercial sales contract is subject to Dutch contract law, the seller is entitled to defeat a claim for replacement of the goods by offering cure by repair of (non-) fundamental non-conformity provided that the seller offers to pay damages and costs, and the contract is still in existence.[1261] The CISG operates along the same lines by limiting the right of the aggrieved buyer to claim for replacement if the seller insists on cure by repair.[1262] This limitation arises from the notion that where repair is possible, the requirement of a fundamental non-conformity for obtaining an order for replacement is not fulfilled.[1263] Although under different conditions, the PICC, PECL and DCFR also restrict the aggrieved buyer's right to demand replacement where the non-performing seller insists on repair of the non-conforming goods.[1264]

203. On an overall assessment, the approach taken by the unification instruments towards the availability of enforced performance where the goods deviate from the conformity

1258 Art 7.2.3 PICC clarifies that the right to performance includes in appropriate cases the right to require repair, replacement or other cure of defective performance, unless the right to performance is excluded under art 7.2.2 PICC.

1259 Vogenauer 2015 (n 19) art 7.2.3 para 1.

1260 Arts 71, 72 CCL.

1261 Art 6:86 DCC.

1262 Arts 46(3), 48(1) CISG; Schwenzer 2016 (n 91) art 46 paras 32, 35 and art 48 para 20.

1263 Arts 46(3), 48(1) CISG; Schwenzer 2016 (n 91) art 46 paras 32, 35 and art 48 para 20.

1264 Art 7.1.4 PICC, see Vogenauer 2015 (n 19) art 7.1.4 para 5; Art 8:104 PECL; Arts III.-3–201 Comment A, IV.A.–2:203 DCFR.

standards does not reflect a compromise between the approaches found in the three subject jurisdictions. By contrast, the availability of enforced performance in the form of repair and replacement under the unification instruments identified are completely unknown actions in the sales and contract law of Singapore. Nonetheless, the rules on conformity under the CISG reflect, to a certain extent, a merger of the basic principles underlying the availability of enforced performance in the investigated three jurisdictions. That is, the CISG grants the aggrieved buyer the remedy of requiring repair and replacement of non-conforming goods, but enforced performance in the form of repair is only available (contrary to the approach taken by Dutch and Chinese contract law) where the lack of conformity constitutes a fundamental failure. The regulation of the availability of obtaining a cure as remedies and the requirement of a fundamental failure reflects to a certain degree the common law tradition as present in the contract and sales law of Singapore. The traditional common law reluctance to adopt enforced performance is also satisfied to a certain extent by the principle that the aggrieved buyer is not entitled to force the seller to replace the non-conforming goods where the latter prefers cure by repair.

### *5.4.4 Inspection and notification duties*

204. *Preliminary* – A potential limitation to the availability of requiring a performance remedy (*i.e.* delivery of missing goods, repair and delivery of replacement goods) may arise from the default rules on inspection and notification.[1265] In the present research, the analysis of the impact of a duty to inspect and to notify the seller in cases of a defective performance stands apart from the discussion about a duty of the buyer to request performance within a certain time limit.[1266] This is because the time limit for giving notice about any defects discovered and a request for a conforming performance do not necessarily coincide. For example, the CISG adopted an indirect duty of the buyer to notify the seller about any defects discovered on pain of loss to rely on a non-conformity.[1267] As for the actual claim for a conforming performance, the aggrieved buyer may require repair and replacement in conjunction with a notification about the defects discovered or within a reasonable time thereafter.[1268] This means in effect that an aggrieved buyer may be required to take into account three time limits, that is, a time limit for inspection, a time limit for notification and a time limit for requesting a conforming performance. The importance of distinguishing

1265 It should be noted that for international sales transactions different rules may apply for determining whether the buyer has a right or is subject to a duty to inspect the goods (generally decided by the law governing the contract), and the actual process of inspection. The latter may be governed by the law where the contract is performed, see Schwenzer, Hachem and Kee 2012 (n 13) paras 34.30–34.30.

1266 S 6.3.

1267 Art 39(1) CISG.

1268 *E.g.,* art 46(2)(3) CISG.

a notification duty and the requirement of requesting enforced performance within a certain time limit also follows from the fact that the latter could be limited to cases where the buyer requests for repair and replacement.[1269] As for the following discussion on the intricacies of the rules on inspection and notification, specific consideration is given to three points: the legal sources of a potential duty to inspect the goods and to notify the seller about any defects discovered, the applicable time limits and the legal consequences.[1270] For the sake of clarity, it should be noted that the discussed inspection and notice requirements are only limitations on legal actions and are not actionable by the seller.

> *Illustration* – Company A, a wholesale dealer of outdoor garments, located in country X, buys a new range of jackets from a manufacturing company, located in country Y. On 30 December, the manufacturer delivered the jackets at the warehouse of the wholesale dealer, where labels were attached and the jackets were packed for distribution to various retail chains. After distribution on 26 January, the manufacturer receives the first complaints about the quality of the zippers. In this situation, the wholesale dealer failed to inspect the jackets directly on receipt. Only after a lapse of a significant period of time did the wholesaler inform the manufacturer about the discovered defects. It was, therefore, questioned whether the wholesale dealer had lost its right to claim for a conforming delivery.

205. *The (indirect) obligation to inspect the goods* – The contract law of the Netherlands is not familiar with a statutory duty on the buyer to examine the goods.[1271] Nonetheless, the obligation to notify the seller (promptly) after the buyer has, or reasonably should have discovered the defect on pain of loss to rely on a non-conformity, presupposes a requirement to inspect the goods in order to preserve the right to obtain a conforming performance by delivery of the missing goods, repair or delivery of replacement goods.[1272] A similar conclusion can be drawn for the contract and sales law of Singapore, although it does not recognise a claim for repair or replacement in a commercial context. For commercial sales the starting point is a buyer's right to inspect the goods for the purpose of ascertaining

1269 *E.g.,* art 46(2)(3) CISG, although s 6.3 will show that the contract law of the three investigated jurisdictions, as well as the PICC, PECL, DCFR and the draft PACL, all adopt the principle that the availability of enforced performance is affected where the buyer fails to request for performance within the applicable time limit.

1270 Other important questions concern the point in time at which the time limit for inspection and notification begins and whether inspection takes place before or after the delivery of the goods, although it goes beyond the scope of this study to discuss these issues.

1271 Where the seller has provided the buyer with a guarantee, the buyer is under no obligation to inspect the goods; *Van Dalfsen v Kampen* Dutch Supreme Court 14 November 2007, ECLI:NL:HR:2008:BF0407, NJ 2008, 588; Tjittes 2018 (n 2) 431, 451.

1272 Arts 6:89, 7:23(1) DCC.

whether the goods are in conformity with the contract.[1273] It may be said that the loss of the remedy to cure a defective performance (*i.e.* damages) where the buyer fails to inspect the goods, presupposes a duty on the buyer to make use of its right to inspect the goods.[1274] Hence, under the contract law of the Netherlands and Singapore, the obligation of the buyer to inspect the goods is indirect. The contract law of China provides more clarity on the matter by establishing a statutory duty of the buyer to inspect the goods on receipt.[1275] This approach is most in line with the CISG and the DCFR which include specific rules on the duty of the buyer to inspect the goods.[1276]

206. *Time limit for inspection of the goods* – Dutch contract law does not expressly establish a time limit for the inspection of goods delivered, but it follows from case law that the buyer is required to inspect the goods as soon as can reasonably be expected in the circumstances of the case upon loss of the right to claim for a cure.[1277] In this regard, the complexity of the investigation, and the nature and detectability of the defects are important factors for determining the time limit for inspection of the goods.[1278] Although the contract law of China entails a specific provision on inspection, it does not go further than stipulating that the buyer shall inspect the subject matter in a timely manner.[1279] That having been said, it is clear that both jurisdictions have adopted a flexible approach, although the approach taken by Dutch contract law and the use of the phrase 'timely' by the Chinese contract law indicate a shorter time limit than adopted by the contract law of Singapore. It appears that the latter favours a less restrictive (and thus more buyer-friendly) approach. This premise follows from the reasoning that the buyer is (indirectly) required to reject the goods within a reasonable time, which presupposes that a corresponding inspection of the delivered goods is performed by the buyer within that period.[1280]

The CISG also takes a more buyer-friendly approach towards the time limit for inspection of the goods because it expressly establishes that the buyer should inspect the

1273 SGA, s 34.

1274 SGA, s 35(4); Lee 2016 (n 16) 766.

1275 Art 157 CCL; Bing Ling 2002 (n 229) para 8.024; Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis of Formation, Performance, and Breach' in DiMatteo and Chen 2017 (n 19) 488.

1276 Art 38(1) CISG; Art IV.A-4:301 DCFR; The PICC, PECL and draft PACL have not included specific provision on sales contract which explains the absence of detailed provision about inspection of the goods delivered and notification of any defects discovered.

1277 Arts 6:89, 7:23(1) DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 544–557.

1278 *Pouw v Visser* Dutch Supreme Court 29 June 2007, ECLI:NL:HR:2007:AZ7617, NJ 2008, 606; *Ploum v Smeets II* Dutch Supreme Court 25 March 2011, ECLI:NL:HR:2011:BP8991, NJ 2013, 5; *Van de Steeg v Rabobank* Dutch Supreme Court 8 February 2013, ECLI:NL:HR:2013:BY4600, NJ 2014, 497; *Nieuwe Dam and Pereboomsloot v VVE et al* Dutch Supreme Court 19 November 2010, ECLI:NL:HR:2010:BN7084, NJB 2010, 2202.

1279 Art 157 CCL.

1280 SGA, s 35(4).

goods within as short period as practicable in the circumstances.[1281] The approach taken by the DCFR also seems to qualify as more buyer-friendly as it adopts the principle that a buyer should examine the goods, or cause them to be examined, within as short a period as is reasonable in the circumstances.[1282] That having been said, the common denominator between the subject legal systems is that they all (implicitly) act on the notion that the precise time period for carrying out an inspection should be determined under consideration of the circumstances of the case.[1283]

207. *Notification of the seller about any non-conformities discovered* – The notice requirements in Dutch and Chinese contract law, as well as the CISG and DCFR, qualify as a non-actionable duty of the buyer. This means in effect that where the aggrieved buyer fails to notify the seller about any defects discovered, it loses the right to claim for enforced performance in the form of a fresh delivery or repair on the basis that the delivered goods do not conform to the contract.[1284] The contract law of Singapore does not expressly recognise such a duty of the buyer to notify the seller of defects.[1285] Nonetheless, the principle that the buyer is deemed to have accepted the goods where it does not reject them,[1286] presupposes that the rejection is made in conjunction with a notification of defects (though damages are the only remedy). That having been said, at a purely technical level the statutory requirement to actively reject the goods does not directly bring about a duty to inform the seller about the defects discovered. In practice, this divergence from the Dutch and Chinese contract law, as well as the CISG and DCFR, is most likely not of particular relevance because a claim for cure usually requires disclosure of the discovered defects.

208. *Time for notification* – An important common denominator between the legal systems is that they do not stipulate a fixed period for notification, although there are significant differences between the statutorily defined timeframes. The contract law of the Netherlands and China have adopted the strictest approach. This proposition follows from the use of the phrase 'promptly' and 'timely' in Dutch and Chinese contract law respectively.[1287] This timeframe for notification of the seller is only relevant where the buyer is under a duty to

1281 Art 38(1) CISG; Schwenzer 2016 (n 91) art 38 para 2.

1282 Art IV.A.-4:301 Comment A and B DCFR.

1283 NL: Schelhaas et al *Bijzondere overeenkomsten* (n 1070) para 48; SGP: Hunter 2017 (n 7) para 7.17 and *Sun Qi v Syscon Pte Ltd* [2013] SGHC 38; CHN: art 17 Judicial Interpretation of Sales Contracts (n 174); Lee 2016 (n 16) 316; Art 3(1) Draft Articles on Non-Performance PACL, see Lee 2016 (n 16) 193; Art 7.2.2(2) PICC, see Vogenauer 2015 (n 19) art 7.2.2 para 52–53.

1284 Arts 6:89, 7:23(1) DCC; Tjittes 2018 (n 2) 450; Art 158 CCL; Art 46(2)(3) CISG; Art IV.A.-4:301 Comment C DCFR.

1285 Art 158 CCL; SGA, s 35(4).

1286 SGA, s 35(4).

1287 Arts 6:89, 7:23(1) DCC; Art 158 CCL.

inspect the goods,[1288] and for situations where the buyer discovers a defect. As the sales law of Singapore has taken a more buyer-friendly approach, it is not surprising that it expressly uses the phrase 'a reasonable time'. It must, however, be noted that the reasonable time relates to a notification of a rejection of the goods and does not clarify whether a different time limit applies for notifying the seller about the defects.[1289]

The CISG and the DCFR also establish a reasonable period, but this period is directly related to a notification of the lack of conformity.[1290] At the international level, the use of the phrase 'reasonable time' is rather unfortunate due to its open-ended nature and the divergence between the time limits at the national level. As a result, national courts can be inclined to interpret the reasonable time limit in view of their own domestic law.[1291] This situation runs counter to the ambition of the investigated jurisdictions to encourage cross-border trade by bringing about legal certainty in the realm of international commercial sales.

209. *Legal consequences* – It appears that Dutch and Chinese contract law adopt the strictest consequences when the buyer fails to notify the seller of any defect discovered. This means in effect that notification of the discovered defects is required to preserve all available remedies to cure a non-conforming delivery, such as the right to obtain a performance order for delivery of the missing goods, repair and replacement of non-conforming goods.[1292] Put differently, the buyer who fails to notify the seller about the discovered defect loses the right to claim for enforced performance in the aforementioned forms and to sue for damages to cure the monetary harm.

A similar approach is taken by the CISG and DCFR which obliges the buyer to give notice of a lack of conformity on pain of losing the right to require performance under the contract, to demand delivery of substitute goods, to effect repair and to claim damages.[1293] It may, therefore, be said that the notice requirement under Dutch and Chinese contract law, as well as by the CISG and DCFR, is a strong weapon of the seller to defeat a claim to cure the impact of a non-conforming delivery. The sales law of Singapore takes a completely different approach when considering the legal consequences of a failure to

1288 In both jurisdictions, the buyer is not under an inspection duty where the seller provided information about the absence or presence of certain features of the goods. The notification duty of the seller about the features of the goods must also be noted.

1289 This consideration is of relevance as a second time limit is adopted by § 2–607(3)(a) UCC.

1290 Art 39(1) CISG; Art IV.A.-4:302 DCFR.

1291 Schwenzer, Hachem and Kee 2012 (n 13) paras 34.67, 34.68.

1292 NL: Arts 6:89 7:23(1) DCC; MBM Loos in Schelhaas 2002 (n 19) 357; SE Bartels and AA van Velten, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 5. Zakenrecht, Eigendom en beperkte rechten* (Wolters Kluwer 2017) paras 548–549; De Jong, Krans and Wissink 2018 (n 194) 210; CHN: Arts 157, 158 CCL.

1293 Art 39(1) CISG; Art IV.A.-4:302(2) DCFR.

reject non-conforming goods (the buyer is not expressly required to notify the seller about the defects). This is because enforcement of the obligation to deliver goods free from certain defects generally takes the form of damages. Another reason is that the sales law of Singapore has taken the approach that the buyer has a right to inspect the goods and notify the seller in case of any non-conformity.[1294] Where the buyer fails to do so, the buyer is deemed to have accepted the goods, and it subsequently loses the right to avoid the contract; the right to claim damages is unaffected.[1295] This rule can be traced back to the previously mentioned *caveat emptor* principle.[1296] That having been said, in all the subject legal systems, a failure of the buyer to inspect the goods and to notify the seller only brings legal consequences for the buyer.

210. *Comparative analysis* – An important exception to the availability of a cure in case of a non-conformity is rooted in the rules on inspection of the goods and (timely) notification of the defects discovered. At the national and international levels, there is however a significant divergence between the imposition of the applicable rules and how they operate. Whereas the Dutch and Chinese contract law approach can be described as seller-friendly due to their restrictive time limits for inspection and notification, the CISG and DCFR clearly favour the buyer's side by adopting open-ended time limits. The same can be said from the approach taken by the contract law of Singapore, although the similarities are notably limited. This follows from the fact that under the Dutch and Chinese contract law, as well as the CISG and DCFR, the rules on inspection and notification arise in the context of the preservation of the buyer's right to enforced performance, which is counterbalanced by the principle that the buyer loses its right to claim for enforced performance and damages when it fails to (correctly) notify the seller about the discovered defects. By contrast, under the sales law of Singapore the concept of inspection and notification should be interpreted in a completely different context, that is, a buyer's right to inspect the goods and to reject them within a reasonable time. In other words, exercising (or failing to exercise) the right to inspect the goods and to notify the seller about defects are no part of the assessment of whether enforced performance should be granted. Taken together, these considerations reveal that the divergence between the three investigated legal systems is not resolved under the CISG. It is therefore of paramount importance for those involved in international sales contracts to pay close attention to the discussed differences (in conjunction with section 6.3) to strike the right balance between the buyer's and seller's interests. This is of particular relevance where the contract concerns the sale of perishable goods. Moreover, it must be borne in mind that under Dutch and Chinese contract law, as well as under the

1294 SGA, s 34.
1295 SGA, s 35(4).
1296 Para 185.

unification instruments, the overarching reasonableness and good faith standards may also preclude the buyer from obtaining an order for repair and replacement in the case of an unjustifiable failure to notify the seller about the discovered defects for an unwarranted period of time which seriously affect the interests of the seller. This, in effect, means that in the example mentioned under paragraph 204, the wholesaler most likely has lost its right to claim for a conforming delivery. The insights provided above are, however, merely helpful at a practical level and do not remove the legal barriers arising from the discussed differences between the rules on inspection and notification. It is, therefore, suggested here that the national legislators of the three investigated jurisdictions address this unresolved issue in due course in view of the findings set out above, their position as a trade hub and their commonly shared ambition to become an important hub for international commercial (sales) disputes.

### *5.4.5 Conclusions*

211. The central issue of this section concerns the question of whether enforced performance (in the form of an order for delivery, repair or replacement) is available in the case the goods delivered by the seller do not conform to the contract in quantity or quality, and, if so, with which degree of flexibility this claim can be granted in order to protect the buyer's performance interest and to protect the seller against abuse. The analyses provided for in this section show that Dutch and Chinese contract law give the most protection at the national level, and the CISG and DCFR at the international level. Nonetheless, there are still blatant and subtle dogmatic and practical differences between the rules on conformity employed by these legal systems. This may cause significant legal uncertainty for those involved in international commercial sales transactions. In particular, when considering the diametrically opposed approach taken by the contract law of Singapore and the intermediate approaches found in the PICC, PECL and draft PACL, the impact of these differences makes a strong case for further harmonisation of the rules for discrepancies in quantity and quality of the goods. The most progress can be made by adopting a broad interpretation of the concept of non-conformity and enforced performance, in line with clear and balanced rules on examination and notification, in particular for the applicable time periods.

In view of the above-described proposition, it is of paramount importance to first make note of the key common core of the contract law of the Netherlands and China, and the unification instruments identified in this section. That is, a claim for enforced performance is not subject to the *caveat emptor* principle.[1297] This in effect means that the legal systems

1297 Schwenzer, Hachem and Kee 2012 (n 13) paras 31.03–31.08.

mentioned above, do not assume that a buyer to a commercial sales contract purchases the goods as they are delivered, in the sense that the consequences of a deviation of the contractually agreed values are assigned to the buyer. Today, the question of whether enforced performance is available depends on the classification of cases where the goods do not conform with the contract and any specific requirements that apply.

With regard to cases where the seller has delivered less than agreed, there is an important common core of the subject legal systems, but there are also fundamental differences. The common core is that the default regime of the three investigated jurisdictions, as well as the unification instruments, envisage a claim for enforced performance in the form of the delivery of the outstanding goods, provided that such a claim is not barred by general limitations and counter-exceptions.[1298] Nevertheless, the approach found in the contract law of the Netherlands and China brings about that the aggrieved buyer is required to notify the seller where the delivered goods do not conform to the contractual stipulations, on pain of loss of the right to enforced performance and damages. This is notwithstanding the fact that the Dutch contract law explicitly categorises a discrepancy in quantity as a non-conforming delivery, which is contrary to the Chinese contract law approach of classifying such a scenario as non-delivery. The approach taken by the contract law of Singapore differs in that discrepancies in quantity are treated as a failure to comply with a delivery obligation, but it does not establish an explicit notification duty for the buyer as a prerequisite for the preservation of a claim for enforced performance. The buyer is merely provided with a right to inspect the goods and to notify the seller about any defects discovered on pain of loss of the right to reject the goods and to avoid the contract. The availability of enforced performance is, however, significantly limited under the contract law of Singapore in comparison to the Dutch and Chinese contract law.[1299] There are two main reasons for this proposition. First, the default contract law regime of Singapore does not envisage enforced performance of non-monetary obligations in the realm of commercial contracts, unless a special situation exists. The second reason derives from the narrow interpretation of the concept of enforced performance.[1300]

The issue of distinguishing non-conformity and non-delivery where the seller delivers goods less than agreed also returns at the international level. This is because the approaches taken by the unification instruments vary significantly in that regard, suggesting that there is no consensus on the matter. Nevertheless, the proposition here is that in cases of a shortfall in goods the CISG provides the most protection against abuse in view of the seller's interest, and protection of the performance interest of the buyer. This is because the CISG explicitly classifies a discrepancy in quantity as a non-conforming delivery and

1298 See Ch 6 for a detailed discussion about the barriers to enforced performance.
1299 S 4.4.3.
1300 S 5.4.3.

by regulating this scenario in an overall framework of clear rules for cases where the goods do not conform to the contract. The same could be said of Dutch contract law, although parties from a different legal tradition and not familiar with the Dutch cultural notions of contracting may not feel entirely comfortable with the broad scope of the sales law principles.[1301]

212. With regard to the availability of enforced performance where the features of the goods deviate from those required under the contract, there is a fundamental division between the investigated legal systems. This follows from the fact that the Dutch and Chinese contract law, as well as the CISG, DCFR and draft PACL, make a distinction between the applicable rules for two different causes of a failure in performance, that is, non-delivery and delivery of goods which are not in conformity with the contract. As for the latter, the Dutch and Chinese contract law are aligned with the unification instruments mentioned above in the sense that they employ a broad interpretation of the concept of conformity. This means in effect that delivery of defective goods (*peius*) and delivery of different goods (*aliud*) may invoke a claim for repair and replacement respectively. Acknowledging and understanding the aforementioned cause-oriented approach is of significant importance as the buyer is subject to a strict notification duty where the features of the goods deviate from those required under the contract. In other words, the aggrieved buyer loses its right to a judicial order for repair and replacement, and even damages, where it fails to notify the seller about the defects.[1302]

At the international level, the CISG, DCFR and draft PACL encompass a similar notification requirement, although they have taken a more buyer-friendly approach towards the applicable time periods. Another important point of divergence follows from the remarkable exemption adopted by the DCFR, which exempts the buyer's notification duty in the case of a discrepancy in quantity, and the buyer may reasonably assume that the seller shall deliver the outstanding goods.[1303] It appears that this principle is not necessary as a similar result can be achieved by the general principle of good faith. It is noteworthy that the PICC and PECL also adopt a broad interpretation of the concept of enforced performance by recognising the aggrieved party's right to claim for enforced performance in the form of cure. Nonetheless, such actions are not subject to a specific notification requirement as described above. This is of little surprise as the two unification instruments are not familiar with the concept of non-conformity, although they allow for enforced performance in the form of cure by repair and replacement.

1301 S 3.3.

1302 The buyer's duty to notify the seller, presupposes that examination must take place. This notion is laid down in arts 157, 158 CCL, Art 38 CISG; Art IV.A.-4:301 DCFR.

1303 Art IV.-4:303 DCFR.

In contrast to the approach taken by the legal systems mentioned above, the contract law of Singapore does not distinguish between various forms of infringement of a legal right. This means in effect that where the seller fails to perform its contractual obligations, the default rules on the availability of enforced performance apply.[1304] These rules bring about that the contract law of Singapore does not recognise cure of a defective performance by repair and replacement for commercial sales. Moreover, when the aggrieved buyer claims for enforced performance of the seller's delivery obligations because the latter delivered something completely different than agreed,[1305] the buyer is not subject to an express notification duty.[1306] Nonetheless, the buyer may lose its right to claim for a remedial measure when it fails to inspect the goods and notify the seller about any defects discovered. Despite the diametrically opposite approach taken by Dutch and Chinese contract law when considering the available remedial measures to cure a defective performance, it may not be assumed that enforced performance of cure by repair and replacement is unrestrictedly available in the latter two jurisdictions. Rather, specific requirements apply, which favour repair over replacement as the latter is, in both jurisdictions, considered a more costly measure. Furthermore, the general limitations to enforced performance may play an essential role where, for example, a claim for cure by repair or replacement amounts to an abuse of rights.[1307] Consequently, for the assessment of the actual ability of the subject legal systems to protect the buyer's and seller's interest in obtaining a conforming delivery, the considerations in the following chapter are of significant importance.

213. The discussion above concerns the most pronounced dogmatic difference between the scope of the concept of enforced performance in the subject legal systems, but the discussed divergence between the rules on non-conformity also brings about an important practical consequence. That is, the moment at which non-conformity of the goods needs to be ascertained. A discussion about this matter requires an understanding of the concept of legal delivery and to what extent this undertaking brings about a transfer of risk from the buyer to the seller.[1308] This is because the time for ascertaining whether the goods conform with the contractual stipulations and the risk passes to the buyer can be related

1304 S 4.4.3.

1305 The delivery of an *aliud* qualifies as a non-conforming delivery under Dutch and Chinese contract law, as well as the CISG. Consequently, a strict notice requirement applies for a claim for enforced performance of cure by replacement.

1306 SGA, s 34 provides the buyer a right to inspect the goods and to notify the seller of defect on loss of the right to reject the goods and to avoid the contract. In this situation, the buyer is merely subject to an indirect examination duty.

1307 See s 6.2.4 for a detailed analysis of the rules on hardship; See art 3:13(1) DCC and the principle of good faith under Chinese contract law for a situation where a claim for enforced performance of a cure amounts to an abuse of rights.

1308 S 5.2.

to the time of legal delivery (*e.g.* physical or constructive transfer of possession, dispatching the goods or putting them at the buyer's disposal), but also to the passage of property. In this regard, Dutch and Chinese contract law have taken the approach that the moment of ascertaining the conformity of goods coincides with the transfer of risk (hence, the time of legal delivery of the goods).[1309] In a similar vein, it appears that the contract law of Singapore takes the approach that the time of ascertaining the conformity of the goods could coincide with the time of legal delivery because at that point in time the buyer is able to assess whether there are reasons to reject the delivered goods.[1310] When the parties are not aware of the time at which non-conformity must be established under the law governing the contract, they could be exposed to losing their right(s) to claim for cure for the non-conformity when they fail to examine the goods at the designated moment and it is not possible to establish whether a later detected defect falls under the responsibility of the seller or is caused by, for example, environmental factors in the warehouse of the buyer. That having been said, to answer the question as to when a non-conformity has become apparent to the aggrieved buyer, recourse must be made to the above-discussed differing viewpoints on the requirements of examination and notification.[1311]

## 5.5 Conclusions

214. The present chapter reveals a dramatic division between the perspectives of the investigated jurisdictions on the availability of enforced performance in three different situations of non-performance in the realm of international commercial sales contracts. The discussion shows that the underpinnings of the applicable principles are rooted in the traditional civil and common law views on the desirability of enforced performance. These historical roots and the inseparable preference for favouring the seller's or buyer's interests, bring about three significant dissimilarities which influence the overarching assessment of the actual availability of enforced performance of non-monetary obligations under a commercial sales contract.

The first difference follows from a distinct view of the respective subject legal systems on the substance of the seller's delivery obligation and the objective of the applicable substantive rules for enforced performance. Thus, where the rules for enforced performance of the seller's delivery obligation are primarily focussed on protection of the buyer's performance interest in the contract law of the Netherlands and China, the protection of the seller's interest is prioritised in the contract law of Singapore and to a certain extent

1309 NL: Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 332, see for the obligation to delivery the goods art 7:10 DCC; CHN: arts 153–155 CCL; Art 36(1) CISG; Art IV.A.-2:308(1) DCFR.
1310 SGA, ss 16, 18, 20.
1311 S 5.4.4.

also under the unification instruments. Nonetheless, Dutch contract law's focus shifts to the protection of the seller's interest in the case where the buyer sues for delivery before the stipulated time for delivery. That having been said, the dormant strict interpretation of the adage *pacta sunt servanda* underlying the Dutch and Chinese default regimes on the availability of enforced performance legitimises a statutory clarification of the exclusive nature of the instrument of enforced performance in the case the seller entirely fails to deliver the goods (*i.e.* non-delivery). This situation should be distinguished from the later discussed situation of the delivery of *aliud* and *peius* which may give rise to enforced performance by means of making a fresh delivery or by repairing a defect.[1312] Apart from the dogmatic considerations above, enhancing the understanding of the effect of the principles on the time for delivery is also of significant legal and practical importance for establishing the full scope of the consequences of a failure to deliver the goods at the agreed time. This is because the time for delivery may play a critical role in determining the passage of risk, and the time for determining the conformity of the goods.[1313]

The second difference concerns a disagreement between, on one hand, the three investigated jurisdictions, and on the other hand, the unification instruments identified. The lack of consensus follows from differing perspectives on the ability of the seller to force the buyer to take delivery. On this point, the three investigated jurisdictions agree that the buyer is merely subject to a non-actionable duty to take delivery (or to cooperate). Although the Dutch and Chinese contract law provide the traditional civil law escape route in the form of the principle of reasonableness and fairness, and good faith respectively. It is advocated here that this open-ended legal principle is a crucial balancing instrument for Dutch and Chinese contract law considering their favourable perspective on the protection of the buyer's performance interest in the case of non-delivery. In other words, the earlier discussed Dutch and Chinese contract legal notion that the seller's delivery obligation requires a physical or constructive change of possession, is counterbalanced by reasonableness and good faith considerations, which may allow the court to assume an enforceable obligation of the buyer to cooperate by taking delivery of the goods.

At a practical level, the differing approaches to the buyer's duty to take delivery may cause significant issues when the contract involves the carriage in goods. In this situation the unpaid seller may be exposed to a substantial financial risk where the dispatch of the goods does not bring about legal delivery and the buyer refuses to take delivery on arrival of the goods. It is therefore of paramount importance that parties to a commercial sales contracts involving the carriage of goods take full account of the understanding of the

1312 S 5.4.

1313 Ss 5.2, 5.4; Internal consequences relate to the relationship between the seller and the buyer. The external consequences relate to the law applicable to the contract.

concept of delivery and the buyer's duty to take delivery under the law governing a potential dispute between the parties.

The last and most important point of divergence is the availability of different forms of enforced performance in the case the seller fails to comply with its obligation to deliver goods which possess the features as agreed in the contract. This division can also be traced back to the interpretation of the bindingness of a contractual promise and the ability of the buyer to obtain the very thing it bargained for. The contract law of Singapore has taken the strictest approach because the buyer to a commercial sales contract is not able to require enforced performance in the form of cure by repair and replacement. This stands in contrast with Dutch and Chinese contract law, which take a broader, more buyer-friendly approach by allowing for enforced performance in the form of cure by repair and replacement in the case the seller delivers an *aliud* or *peius*. This approach is counterbalanced by seller-friendly notification requirements (*i.e.* 'promptly' and 'timely'). The unification instruments are also familiar with a right to repair and replacement, but they balance the interests differently by adopting buyer-friendly notification requirements (*i.e.* notification within a reasonable time). In practice, this distinction is however not that clear due to innumerable factors affecting the performance of contractual rights arising under international sales contracts. In view of this, it is interesting to note that Singapore contract law (in line with most common law jurisdictions) also encompasses the concept of a reasonable period (for examination and rejection of the goods).[1314] Another important difference in this regard follows from the thresholds for requiring enforced performance in the form of cure by replacement. Whereas Dutch and Chinese contract law, as well as the PICC, PECL, DCFR and draft PACL, only allow this claim in severe cases of non-conformity, the CISG requires a fundamental failure in performance. The latter is clearly of common law descent. The differences between Dutch and Chinese contract law and the other unification instruments are negligible given the general nature of the earlier mentioned limitation on obtaining an order for replacement and the abstract nature of the present discussion.

At a practical level, however, commercial parties should take into account that the rules on conformity are not stand-alone principles, as this research reveals that they must be read in line with the domestic notion of the concept of a legal delivery. This is of particular importance for those involved in commercial sales contracts across the borders of the three investigated jurisdictions as these legal systems act on the principle that the time for ascertaining the conformity of the goods occurs at the same time as the transfer of risk of loss from the buyer to the seller. The time for ascertaining conformity may differ when the parties agreed to a different regime by adopting, for example, the Incoterms® FOB (Free on Board: the risk of loss or damage to the goods passes when the goods are on board

1314 SGA, s 35; see also Schwenzer, Hachem and Kee 2012 (n 13) para 34.64.

the vessel) and FAS (Free Alongside Ship: the risk of loss of or damage to the goods passes when the goods are alongside the ship). The Incoterms® CFR (Cost and Freight) and CIF (Cost Insurance and Freight) also adopted the principle that the risk of loss or damage to the goods passes when the goods are on board the vessel. The parties to a commercial sales contract are allowed to include a regime which is more suitable for their situation. For example, the parties could agree that the risk passes after the goods are delivered and unloaded at a specific terminal. So, the moment of the passing of risk requires close attention as it does not necessarily coincide with the conclusion of the contract nor the transfer of title. Although a misunderstanding in this regard may negatively affect the availability of obtaining an order for enforced performance of the seller's obligation, it should not be confused with assessment of the time available for the non-conformity to become apparent to the buyer.

The analysis of the operative part of the national and international sales law provided above reveals that every principle protects a certain interest which is generally counterbalanced by another principle. This means in effect that any undertaking to consolidate the differing national approaches requires a careful examination of the interrelationships between the applicable principles. This suggestion goes a step further than the existing efforts to bridge the gap between the civil law notion that enforced performance is available as of right and the common law default regime which only envisages enforced performance in exceptional situations. Put differently, the discussion above demonstrates that stand-alone solutions to eliminate the most controversial divergence between the two major legal families are ineffectual in the realm of commercial sales contracts. It is, therefore, of paramount importance to take a holistic approach by looking at the general contract and sales law provisions when considering harmonisation of the differing viewpoints on the availability of enforced performance of non-monetary obligations under a commercial sales contract.