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

Kemp, P.C.M.

6 Barriers to the availability of enforced performance

6.1 Introduction

215. The contract law of the Netherlands, Singapore and China are all familiar with limitations on obtaining an order to enforced performance of the obligation to bring about a certain state of affairs under a commercial sales contract. Nonetheless, the respective distinct traditional understandings of rights and remedies make it necessary to distinguish two approaches. First, Dutch and Chinese contract law act on the notion that enforced performance of a contractual right is generally available, albeit that the legal right to enforced performance is subject to certain exceptions. The contract law of Singapore adopts the approach that enforced performance is a discretionary instrument of the court to force a promisor to comply with the contract, which is only available in specific circumstances when not affected by counter-exceptions. It is these distinct approaches which lend force to the preliminary premise that the Dutch and Chinese contract law systems seem to allow an order for enforced performance of a contractual right in more cases than under the contract law of Singapore. In the following, it is investigated whether this assumption is justified when taking into account the limitations on enforced performance under the contract law of the Netherlands and China, and the counter-exceptions under the contract law of Singapore (*i.e.* the limitations on enforcement of specific non-monetary obligations, which are traditionally considered suitable for enforced performance).

216. The interpretation and application of the limits on obtaining an order to enforced performance of a contractual right differ tremendously per jurisdiction, due to the aforementioned fundamental differences in approaches and specific domestic economic, social and legal developments. For example, the profound influence of the European Union on the ability to obtain an order to enforced performance of a sales contract subject to Dutch law, and the principle in Singapore that it is at the discretion of Singapore courts to adjust the requirements and bars for awarding a claim for actual performance if the conditions of modern life and economics have changed.[1315] In China, the problems with limits on obtaining an order to enforced performance appear to arise from the disconnection

1315 <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-1>. accessed 27 March 2016.

between the domestic contract law principles and the interpretation in practice,[1316] political interference and the lack of up to date foreign business legal expertise.[1317] In view of this, it is said that the missing link is the proper implementation of the statutory principles in the entire judicial system together with a continuous process of quality control on decisions of the court.[1318]

217. This section starts with the most important and best known barrier to enforced performance of a contractual right, that is, impossibility of performance of actionable obligations (section 6.2). This barrier centres around external impediments rendering performance of a contractual right impossible, whether objective or subjective. There are, however, also important internal impediments deriving from a prolonged demand for enforced performance. Accordingly, section 6.3 discusses the legal consequences of a delayed request for delivery while section 6.4 focusses on the impact of specific limitation periods. In addition to these (external and internal) barriers to enforced performance, attention is also paid to two less known limiting factors, that is, a duty to mitigate damages in the form of a precautionary cover transaction and the argument of constant supervision on performance (section 6.5 and 6.6). Both impediments may have a significant impact in practice, where it concerns a commercial sales contract across the borders of the three investigated jurisdictions, and in general when a contract is concluded between parties from civil and common law backgrounds respectively. The discussion about a duty to mitigate and the constant supervision argument aims to enhance the understanding of the underlying principles and to reveal that they are reflected in different rules at the national and international levels.

6.2 Impediments

6.2.1 Introduction

The notion of impediments for enforced performance entails various legal concepts, such as objective and subjective impossibility, (fundamental, radical, exceptional and drastic) change of circumstances, frustration of purpose, hardship, disproportionality and commercial impracticalities. In order to clarify the role and function of these doctrinal

1316 Yin Lily Zheng, 'It's Not What Is on Paper, but What Is in Practice: China's New Labor Contract Law and the Enforcement Problem' (2009) 8(3) Washington University Global Studies Law Review 596.

1317 Jainfu Chen, *Chinese Law, Context and Transformation* (Martinus Nijhoff Publishers, 2008) 661 *ff*; Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions* (Cambridge University Press 2010) 69.

1318 Jainfu Chen 2008 (n 1317) 653.

formulas, three specific situations are discussed in this section. The first situation looks at the scenario where performance is impossible from the outset (section 6.2.2). This form of initial impossibility could occur when the goods have already perished at the time of contracting, or an already existing specific legal prohibition makes it impossible to perform the contract. To assess the availability of enforced performance once the impediment is removed or by an order for delivery of replacement goods, this section investigates the extent to which initial impossibility affects the validity of the contract.

219. Where initial impossibility does not affect the validity of a sales contract, it is discussed whether the consequences of initial impossibility are equated with the rules on non-performance occurring after the formation of the contract. Lastly, it is examined to what extent the availability of obtaining an order for enforced performance is affected by the knowledge of the seller – who was aware of the impediment to performance at the time of contracting. In view of this interrogative approach, special consideration is given to the difference between where performance of a sales contract is impossible due to a legal prohibition (*e.g.* a national prohibition on the import or export of certain goods) and impossibility caused by a physical and practical barrier(s) for performance (*e.g.* the goods are lost during transition and recovery would require a large-scale operation). The reason being that invalidation of the contract due to initial impossibility removes the necessity to determine the enforceability of the contract by means of the rules on non-performance. More importantly, the examination of the legal response to initial impossibility *vis-à-vis* third-party rights reveals a prominent difference between the impact of civil and common law principles embedded in the three investigated legal systems.

220. The second situation considers subsequent impossibility of performance in light of various objective and subjective impediments for performance (section 6.2.3). Analysing these categories of impossibility is of significant relevance for situations where the aggrieved party is still interested in obtaining the goods once the physical or legal barrier for performance is lifted. In this light, it is investigated how cases of objective and subjective impossibility of performance are grouped. It is also examined whether a distinction is made between foreseeable and unforeseeable impossibility and between partial and temporarily impossibility.

221. The third situation involves situations where performance may still be possible, although with disastrous results for the party who is obliged to perform. It is, however, not always easy to draw a line between a situation where enforced performance should not be available due to an excessive change in the monetary equilibrium of the contract, and the situations mentioned above, of initial and subsequent impossibility (section 6.2.2 and 6.2.3). Where performance is totally impeded by impossibility, the obvious legal

response is that an order for enforced performance is not available. For commercial sales, the legal response should be different where the monetary equilibrium of the contract alters after the conclusion of the contract, in the sense that it results in a gross disparity between costs and benefits of the contract, or put differently, where performance becomes excessively onerous because of a (for the promisor unforeseen) change of circumstances. In such a case, issues of enforcement arise when the aggrieved party did not lose its interest in enforced performance of, for example, a delivery obligation or an obligation to take delivery. In this light, section 6.2.4 provides an analysis of the possible causes of a change in the monetary equilibrium of a commercial sales contract, their impact on availability of obtaining an order for enforced performance, and how these findings relate to the principle of *rebus sic stantibus* (*i.e.* enforcement of performance is not available because extraordinary circumstances arising after conclusion of the contract render performance literally or virtually impossible). It should be mentioned that the doctrines applicable in a situation where performance is rendered unreasonably burdensome or expensive or where enforcement of performance is impossible due to an insurmountable financial obstacle, to some extent shade into each other, since they both refer to a situation of a change of circumstances after the conclusion of the contract. However, when considering the impact on the availability to obtain an order for enforced performance, major differences arise, particularly in cases of temporary and partial impediments for performance.

6.2.2 Initial impossibility

222. *Preliminary* – In the present research, the concept of initial impossibility focusses on situations where performance of the seller's obligation to deliver the goods and the buyer's obligation to take delivery is objectively impossible for all time due to an uncontemplated impediment which was present at the time of the formation of the contract.[1319] Determining the enforceability of an obligation in these instances may be perceived as purposeless because performance is simply impossible. In certain situations, however, the aggrieved party may still be interested in upholding the contract and thus the delivery obligation, in order to acquire the goods once a temporary impediment (in fact or in law) is removed. This assessment is also of relevance for situations where the parties may be interested in enforcement of ancillary duties (see section 4.5) and situations where there are reasons to allow a claim for damages. In view of these considerations, the following aims to determine to what extent the investigated legal systems treat initial impossibility as a situation which only makes the performance unenforceable, or where the existence of the obligation retrospectively or prospectively ceases to exist. Particular attention is given to the question

1319 Where an initial impediment renders the performance of a contract more onerous is discussed in s 6.2.4.

of whether the seriousness of the misapprehension to the ability of performing the contract is of any relevance. This consideration is of significant importance in the situation where the non-performing party wishes to escape its obligation even though the misconception does not go to the core of the promises made by the parties. This form of initial impossibility is one of the most complicated areas of law to compare. As shown below, this is due to the various ways domestic and international law regulate issues on initial impossibility of fact and law.[1320]

> *Illustration* – An exporter of dairy products, located in country A, and a retail cooperation, located in country B, conclude a contract for the purchase and sale of milk powder under the general conditions for the international trade in dairy products (MPC). However, unknown to both parties, the moment they entered into the contract, a temporary import ban prohibits the import of milk powder. In addition, it is held by the exporter that both parties share the same misimpression concerning the availability of milk powder which satisfies the safety standards of country B. In this situation of initial impossibility in law and in fact, the question arises whether the delivery obligation ceases to exist which makes it impossible to obtain an order for enforced performance, or that this form of initial impossibility in fact and in law merely suspends performance until the impediments are removed.

223. *Domestic approaches* – Dutch contract law does not make a distinction between the situation where performance is impossible from the outset (initial impossibility) and after the conclusion of a contract (subsequent impossibility).[1321] In both situations, the same rules apply in determining whether the contractual right for performance is impeded to such an extent that a claim for enforced performance is not available to the aggrieved party. In general, Dutch contract law adopts a wide notion of the concept of impossibility, which means that a contractual right to performance is not protected by a statutory right to claim for enforced performance in the case of objective and subjective impossibility.[1322]

Where performance is classified as objectively impossible, this means that no one is able to perform the assumed obligation. Subjective impossibility involves situations where performance is rendered practically,[1323] morally or legally impossible for the party who is

1320 See also Schwenzer, Hachem and Kee 2012 (n 13) paras 17.01–17.03.

1321 De Jong, Krans and Wissink 2018 (n 194) 135; De Vries 1984 (n 207) 17; GT de Jong, *Niet-nakoming van verbintenissen* (Monografieën BW n B33, Kluwer 2017) s 9.1; Stolp (n 536) 235; Smits 2008 (n 871) 18.

1322 De Jong, Krans and Wissink 2018 (n 194) 135.

1323 *E.g.,* a Dutch trading company sells a number of antique designer dresses to a Chinese museum. However, the ship carrying the antique dresses is lost in a heavy storm. Despite the fact that the container is airtight and could be recoverd, this would require an unreasonable amount of effort of the seller. Therefore, enforced performance of the contract is regarded as practically impossible.

obliged to perform (someone else may be able to perform).[1324] Both forms of impossibility can be divided into final and temporary impossibility, and whole and partial impossibility.[1325]

As previously mentioned, judicial execution of a contractual right to performance is not available where performance is impeded. This may result in an impasse, which can be resolved by various legal principles. Where the impediment is caused by an attributable failure in performance of the promisor, a claim for damages is the most obvious remedy.[1326] In combination or as a stand-alone solution, the promisee could also opt (claim or counterclaim) for suspension as a stepping stone towards termination of the contract,[1327] and for avoidance of the contract on the basis of the argument that the contract is established under the influence of an error and it would not have been concluded had there been a correct assessment of the facts. A contract can be voided where: a fundamental mistake is caused by incorrect information – unless the defendant was entitled to rely on the information;[1328] the claimant, in view of what it knew or ought to have known regarding the misconception, should have informed the mistaken party;[1329] a contract is concluded on the basis of mutual and fundamental mistaken assumption (common mistake).[1330]

Where impossibility is caused by unforeseen circumstances the court may, on request of either of the parties, modify the effects of a contract or set it aside in whole or in part, if the impediment for performance is of such a nature that the other party, given those circumstances, cannot expect the unaltered contract to continue to be valid and enforceable in accordance with generally held standards of reasonableness and fairness.[1331] Where performance is permanently impeded due to unforeseen circumstances, only the contractual right to performance is not enforceable, the right itself does not cease to exist.[1332]

In addition to the case study provided under paragraph 222, the following example may also help to clarify the impact of this principle on the enforceability of a delivery obligation. A Dutch company (seller) and a Singapore company (buyer) conclude a contract for the sale and delivery of a batch of 250 bottles of exclusive red wine which was already on its way to Singapore when the parties started their negotiations. However, the day before

1324 De Vries 1984 (n 207) 18; De Jong 2017 (n 1321) s 9.3; Haas 2009 (n 206) 249; Sieburgh, *Asser 6-I* (n 363) paras 338 *ff*, 343, 355, 382; BJ Broekema-Engelen, 'commentaar op artikel 74 Boek 6 BW' para 2–4 in RJQ Klomp and HN Schelhaas (eds), *Groene Serie Verbintenissenrecht* (Wolters Kluwer 2011); Stolp (n 536) 236, 237; Smits 2008 (n 871) 18; De Jong, Krans and Wissink 2018 (n 194) 135.

1325 See for different classifications of impossibility <https://www.cisg.law.pace.edu/cisg/biblio/southerington.html> accessed on 3 March 2019.

1326 Art 6:74 DCC.

1327 Arts 6:264, 6:265 DCC; De Jong, Krans and Wissink 2018 (n 194) 135.

1328 Art 6:228(1) DCC.

1329 Art 6:228(2) DCC.

1330 Art 6:228(3) DCC.

1331 Art 6:258(1) DCC; Sieburgh, *Asser 6-I* (n 363) para 372; De Jong, Krans and Wissink 2018 (n 194) 133.

1332 Sieburgh, *Asser 6-I* (n 363) para 373.

the conclusion of the contract, the vessel lost the container with the bottles of wine, but the communication on this issue only reached the parties a week later. Under Dutch contract law, this situation of initial impossibility in fact (caused by non-existence of the goods) generally does not affect the existence of the delivery obligation, but it merely removes the right of the buyer to enforcement as long as delivery is impeded.[1333] Thus, if the seller produces red wine of the same quality the next year, the buyer may sue for enforced performance if this is permitted under the terms of the initial agreement.[1334] In view of the foregoing, it is important to note that where performance is only temporarily impeded, the court may grant a claim for enforced performance under the condition that actual execution is available once the impediment to performance is lifted.[1335]

Aside from misconceptions rendering a contractual right to performance permanently impossible (be it objective or subjective) from the start of the contract, there are other specific situations of initial impossibility in law which may invalidate the entire contract with the consequence that a contractual right ceases to exist. For example, if the obligations stipulated in a commercial sales contract are an infringement of the principle of good morals and public policy,[1336] or the agreed performances are contrary to other mandatory statutory provisions.[1337]

224. The starting point under the contract law of Singapore is that enforced performance is not available where the parties have reached an agreement (offer and acceptance coincide perfectly), but the delivery of the goods, as understood by both parties, is impossible in fact or law from the outset.[1338] In these instances, a commercial sales contract may be void under the law of Singapore due to a common mistake where the impediment to performance makes it impossible to fulfil the shared purpose of the contract, where neither party is at fault,[1339] and have undertaken the risk of non-performance.[1340] The doctrine of common mistake also requires that the alleged initial impediment to performance in fact or in law must render the subject matter of the contract fundamentally different from the thing the parties envisaged as the basis constituting their contract.[1341] There are two general principles

1333 MM van Rossum in Schelhaas 2002 (n 19) 197.

1334 Art 6:248(2) DCC.

1335 Art 3:296 DCC; De Jong, Krans and Wissink 2018 (n 194) 136; Sieburgh, *Asser 6-I* (n 363) 373.

1336 Art 3:40(1) DCC.

1337 Art 3:40(2) DCC.

1338 This concerns the requirement that the mistake must be shared by both parties and relate to facts or law before the contract was concluded; *Ho Seng Lee Construction Pte Ltd v Nian Chuan Construction Pte Ltd* [2001] 2 SLR(R) 184; *Wong Lai Keen v Allgreen Properties Ltd* [2009] 1 SLR (R) 148; Phang et al 2002 paras 10.008, 10.090–10.092, 10.102.

1339 *Ho Seng Lee Construction Pte Ltd* (n 1338); Phang et al 2002, para 10.100.

1340 *Ho Seng Lee Construction Pte Ltd* (n 1338); see also the English case *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 WLR 255; Phang et al 2012 (n 112) para 10.098.

1341 *Ho Seng Lee Construction Pte Ltd* (n 1338); Phang et al 2002s para 10.103.

underlying this narrow test. First, the courts are primarily concerned with the protection of the sanctity of a contract.[1342] Second, the doctrine of mistake only applies where an unexpected and exceptional mistake lies at the root of the contract.[1343] Aside from a situation of a common mistake, in circumstances where the goods have already perished at the time when the contract is made, the sales law of Singapore entails the principle that the contract is void.[1344] The considerations in *Chop Ngoh Seng v Esmail and Ahmad Bros* are illustrative in this regard.[1345] In this case, the parties had entered into a contract for the supply of fifty bales of gunny bags to be delivered in Singapore.[1346] When the ship, which in fact sailed from Calcutta the day after the contract was signed, arrived in Singapore, the fifty bales of gunny bags were not on board and never had been. Neither party to the contract was aware of the fact that the subject matter of the contract of sale did not exist at the time the contract was entered into. The court held that the contract was for the sale of specified goods on a specified ship arriving at Singapore on or about a specified date and as the goods were not on board the ship, performance was impossible from the outset rendering the contract void.[1347]

Considering a situation of initial legal impediment caused by a common mistake, the existence of the obligation could also be affected on application of the aforementioned principles. For example, a Singapore wholesaler (buyer) and a Dutch producer of meaty snacks (supplier) conclude a continuing sales contract for the delivery of Dutch croquettes without the required approval of the relevant authorities. In this situation, if approvals are not forthcoming, the contract is not frustrated,[1348] as is often presumed, but performance cannot be enforced due to initial legal impossibility.[1349] In other words, the law's response to common mistake of law and fact is similar, that is, the delivery obligation ceases to exist.

1342 *Ho Seng Lee Construction Pte Ltd* (n 1338) SLR(R) 184 [71]; Phang et al 2012 (n 112) para 10.094; this approach differs slightly from the approach of English common law, *i.e.,* a party should be entitled to rely on the doctrine of mistake only in exceptional circumstances. See the English cases *Associated Japanese Bank (International) Ltd* (n 1340); *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 at 706 [86]; *Bell v Lever Brothers Ltd* [1932] AC 161 at 224; Anson's Law of Contract (n 360) 300 *ff.*

1343 *Adani Wilmar Ltd v Cooperative Centrale Raiffeisen-Boerenleenbank BA ("Rabobank Nederland")* [2002] 2 SLR (R) [52]; Phang et al 2012 (n 112) para 10.095.

1344 SGA, s 6. This Act was made applicable by the Application of English Law Act in Singapore on 12 November 1993 (Sale of Goods Act (Cap 393, 1994 Rev Ed). The AELA 1993 clarified the application of English law in Singapore. For sales contracts this meant that the UK Sale of Goods Act (which was first adopted in 1993 and modified in 1979) continued to be a part of the law of Singapore in the form of the Sale of Goods Act (Cap 393, 1994 Rev Ed). Before the AELA 1993, the reception of English commercial law appears to derive from section 5, Civil Law Act (Cap 43, 1988 Rev Ed). See also the comments in footnote 118.

1345 *Chop Ngoh Seng v Esmail And Ahmad Bros* [1948] 2 MLJ 93.

1346 *Ibid.*

1347 *Ibid.*

1348 Only where the impediment arises after the conclusion of the contract does the doctrine of frustration apply; Phang et 2012 (n 112) paras 10.072, 19.057.

1349 *Lim Xue Shan v Ong Kim Cheong* [1990] 2 SLR(R) 102.

Aside from a common mistake (in fact or in law) at common law, a situation of initial impossibility may also be governed under Singapore law by the doctrine of common mistake in equity.[1350] From the perspective of a temporarily initial impossibility in fact or in law following from a common mistake, the latter provides much more flexibility since it allows the courts to provide a judicial order on terms which are appropriate in light of the temporary nature of the initial impediment.[1351]

In summary, a Singapore court may release the non-performing party from its obligations where an initial impediment in fact or in law occurred at or before the contract was formed, by declaring the contract void in common law (*e.g.* where the goods already ceased to exist),[1352] or (in contrast to the English position) avoided in equity (potentially on terms),[1353] unless the court construes the contract as placing the risk of the initial impossibility on one or both parties.[1354] Considering the more narrow requirements for common mistake at law,[1355] it is held that the aggrieved party should first plea for application of the doctrine of common mistake at law and, secondly, for application in equity.[1356] At this point, it must be noted that the doctrine of mistake and the later discussed doctrine of frustration may be pleaded by the promisor where the impediments for performance display factual similarities (section 6.2.3). However, the doctrine of mistake applies where the initial impossibility (caused by a common mistake in fact or law) occurs before the making of the contract, whereas the doctrine of frustration may discharge the obligation to perform (by bringing the contract to an end) due to an impediment to performance that occurred after the making of the contract. A contract continues to bind the parties if it is not brought to an end by frustration.

A performance obligation may also become unenforceable under Singapore contract law where a contract is declared void at common law (*i.e.* offer and acceptance do not coincide) due to a unilateral mistake of fact or law.[1357] In this situation, three requirements

1350 *Chwee Kin Keong v* Digilandmall.com *Pte Ltd* [2005] SGCA 2, (2005) 1 SLR(R) 502; Phang and Goh 2012 (n 318) para 405; Phang et al 2012 (n 112) para 10.133; It appears that English law does not accept a doctrine of common mistake in equity, see Anson's Law of Contract (n 360) 315–316 and Phang et al 2012 (n 112) para 10.133.

1351 *Chwee Kin Keong* (n 1350) SGCA 2; Phang et al 2002 (n 112) para 10.116; Phang and Goh 2012 (n 318) para 403–405; See also the considerations in the English case *Associated Japanese Bank* (n 1340) WLR 255 at 275.

1352 *Ho Seng Lee Construction Pte Ltd* (n 1338); *Associated Japanese Bank* (n 1340); Phang and Goh 2012 (n 318) paras 385, 386.

1353 *Chwee Kin Keong* (SGCA) (n 1350); Phang and Goh 2012 (n 318) paras 385, 386.

1354 Phang et al 2012 (n 112) paras 10.017–10.023; Phang and Goh 2012 (n 318) para 357; the distinction between mistake at common law and equity is especially important in cases of sub-sale due to the additional requirements for avoidance in equity.

1355 *I.e.,* at the conclusion of the contract, both parties assume that performance is possible, there must be no warranty, performance must be impossible and the parties should not be at fault of non-performance.

1356 Phang and Goh 2012 (n 318) para 404.

1357 Phang et al 2012 (n 112) para 10.142; Phang and Goh 2012 (n 318) para 418.

must be fulfilled to render an obligation permanently unenforceable because the contract simply never came into being.[1358] First, the initial impediment to perform must relate to the terms of the contract.[1359] For example, an error in the amount of goods offered which concerns a term of the contract. The second requirement is that the initial impediment must be fundamental to the contract.[1360] The third requirement is that the other party must have actual knowledge of the initial impediment following from misapprehension as to the facts or law.[1361] Instances of constructive knowledge may be sufficient where the non-performing party seeks dismissal of performance by bringing to court the defence of a unilateral mistake in equity.[1362] Subsequently, the contract may be avoided by the court which would render the performance obligation unenforceable.

225. The contract law of China adopts an unambiguous statutory principle stipulating that enforced performance is not available in instances of impossibility in law or in fact.[1363] It appears that this provision applies in cases of initial and subsequent impossibility.[1364] The notion that enforced performance is excluded in instances of initial impossibility is, however, not sufficient to determine the actual impact on the availability to obtain an order for enforced performance once the factual or legal impediment is removed. This requires an assessment of the situations in which initial impossibility affects the existence of the obligation. The general approach taken is that a significant misconception at the beginning of a contract entitles the seller to require avoidance of the contract. In cases where the claim is granted, the performance obligation ceases to exist. For example, a commercial sales contract could be avoided due to a significant misconception as to the nature of the contract, the identity of the other party, the kind of goods, the quality, specification and quantity of the goods.[1365]

1358 Phang et al 2012 (n 112) para 10.162; Phang and Goh 2012 (n 318) para 426; It appears that English law only requires that the unilateral mistake relate to the terms of the contract and that the mistake must be fundamental; See the English case *Smiths v Hughes* [1871] LR 6 QB 597.

1359 *Chwee Kin Keong* (SGCA) (n 1350); Phang and Goh 2012 (n 318) para 427; Phang et al 2012 (n 112) para 10.163.

1360 *Chwee Kin Keong v* Digilandmall.com *Pte Ltd* [2004] SGHC 71, (2004) 2 SLR(R) 594 [107]; Phang and Goh 2012 (n 318) para 459; Phang et al 2012 (n 112) para 10.166.

1361 *Chwee Kin Keong* (SGCA) (n 1350); Phang and Goh 2012 (n 318) para 432; Phang et al 2012 (n 112) para 10.169.

1362 *Chwee Kin Keong* (SGCA) (n 1350) SLR(R) 50, [44]; *Wellmix Organics (International) Pte Ltd v Lau Yu Man,* [2006] 2 SLR(R) 117, [66]-[68]; Phang and Goh 2012 (n 318) para 433; Phang et al 2012 (n 112) para 10.171.

1363 Art 110 (1) CCL; Bing Ling 2002 (n 229) para 4.087; Lutz-Christian Wolff, 'Impossibility of Performance and Contract Validity' in DiMatteo and Chen 2017 (n 19) 290, 291.

1364 Lutz-Christian Wolff, 'Impossibility of Performance and Contract Validity' in DiMatteo and Chen 2017 (n 19) 294.

1365 Bing Ling 2002 (n 229) para 4.074; Chen-Wishart, 'Invalidity in Chinese and English Contract law' in DiMatteo and Chen 2017 (n 19) 268–273.

In certain situations of initial impossibility in law, the binding force of a contract is (entirely or partially) removed from the moment the parties entered into the contract by invalidation of the entire contract.[1366] For example, the initial impossibility is the result of an act of fraud or coercion by one party to damage the interests of the state, malicious collusion conducted to damage the interest of the state, or an illegitimate act concealed by the contract.[1367] A contractual obligation may also be removed by invalidation of the contract if the initial impossibility in law derives from a common mistake.[1368]

The category of initial impossibility at law also governs cases where the enforceability of a contract depends on government approval, albeit that it is seldom clear from the outset whether approval is a prerequisite for establishing a valid contract or that absence of approval merely bars the aggrieved party from obtaining an order for enforced performance because the contract has not obtained effectiveness (yet).[1369] An opaque legal requirement, which may amount to initial impossibility in law, is the requirement of permission of (local) authorities to enter the Chinese market because it is often not apparent whether approval ex-ante or ex-post is required. Only consultation with the relevant authorities can give a reasonable degree of certainty about the effect of the approval requirement on the enforceability of the contract. For example, if a Dutch manufacturer of vitamins and dietary supplements and a Chinese retail chain conclude a contract for the delivery of a new range of memory and immune boosting supplements, the contractual promises made by the parties may never be enforceable if it later emerges that anticipatory approval of the relevant authorities was a precondition of the validity of the contract. However, if approval is only required to obtain effectiveness, the existence of the contract is not affected and the parties may claim for enforced performance (at a later point in time). This reasoning is fully in line with the Chinese contract law approach that initial impossibility in fact or law renders performance unenforceable for the duration of the impediment, and that invalidation is a matter of exception to the security of transactions between two commercial parties.[1370]

226. *Comparative analysis* – The three subject jurisdictions all act on the notion that performance cannot be enforced in cases of initial impossibility in fact and in law. However, they all structure the applicable principles in entirely different ways, making it treacherous

1366 Art 56 CCL; Lei Chen and Larry A DiMatteo, 'History of Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 22; Shiyuan Han, 'Liabilities in Contract Law of China: Their Mechanism and Points in Dispute' (2006) 1 *Frontiers Law China* 121, 142.

1367 Arts 52 (1–3), 54(1)(2) CCL.

1368 Art 54(1) CCL.

1369 Bu 2013 (n 226) 47.

1370 Bing Ling 2002 (n 229) para 4.087; Lutz-Christian Wolff, 'Impossibility of Performance and Contract Validity' in DiMatteo and Chen 2017 (n 19) 290–291, 295

ground to determine whether there is any common core, or if and how the legal systems differ. Nonetheless, this undertaking is of paramount importance in revealing the extent to which a legal system is capable of adjusting its response and not just by invalidating a contract on the mere basis of initial impossibility. The starting point here is the simple observation that the concept of initial impossibility is not specifically regulated in the contract law of the Netherlands, Singapore and China. This does not mean that initial impossibility has no consequences in these jurisdictions. On the contrary, it is broadly accepted that there are specific situations (albeit they differ per jurisdiction) where a performance obligation ceases to exist due to an initial impossibility. Dutch and Chinese contract law follow a very straightforward approach in this regard, namely, a contract may be avoided which has been entered into under the influence of a misconception and which would have not been concluded otherwise. Putting this premise into context: where initial impossibility is caused by a substantial mistake, this could cause a commercial sales contract to be avoided, meaning in effect that any delivery obligation ceases to exist. It follows that in cases where the misconception is not substantial, both jurisdictions apply the rule that only a performance obligation is unenforceable. A similar approach is taken by the PICC, PECL and DCFR, by stipulating that a contract is not simply invalidated because performance was impossible at the time of conclusion of the contract.[1371] The same viewpoint is indirectly adopted by the CISG and draft PACL.[1372] The contract law of Singapore is stricter in its response to an initial impediment caused by a common or unilateral mistake in fact or law. In these instances, an obligation may become permanently unenforceable on application of the doctrine of mistake in common law or equity, rendering a contract void or avoided respectively. Either way, it does not leave an obligation in a place where it is merely unenforceable. However, the complexity of the doctrine of mistake at common law and its narrow scope might be considered as a drawback, although it appears that the contract law of Singapore has moved towards a less restrictive system by allowing a defence of common and unilateral mistake in equity.

In view of the considerations above, it must be noted that the rules on initial impossibility, caused by mistake, in the contract law of the Netherlands and China, puts significant emphasis on a holistic assessment of the declarations and conduct of the parties

1371 Arts 3.3.1(1), 7.2.2(a), 7.2.3 PICC, see also Vogenauer 2015 (n 19) p 891, para 18, p 890, para 9; Art 4:102 PECL and art II.–7:201 DCFR.

1372 Schwenzer 2016 (n 91) art 4 para 33, art 46 paras 12, 13, art 79 para 13; Hüseyin Can Aksoy, *Impossibility in Modern Private Law* (Springer International Publishing 2014) 117; Art 7 Draft Articles on Non-Performance PACL stipulates that an order for performance may not be required where performance is impossible in law and in fact. It may be assumed that this provision also applies in cases of initial impossibility because there are no provisions which might suggest that initial impossibility would invalidate a contract.

in light of the surrounding circumstances.[1373] In contrast, the contract law of Singapore generally protects the sanctity of the contract by following a factual assessment of the common expressed intentions of the parties.[1374] Nonetheless, common to all investigated jurisdictions, as well as the PICC, PECL and DCFR,[1375] the mistake must be relevant in order to affect the enforceability of a performance obligation, albeit the thresholds differ significantly.

The CISG did not adopt a general threshold for an initial impossibility arising from a mistake, but it entails rules for various forms of mistake.[1376] This means in effect that when a commercial sales contract is subject to the CISG, a performance obligation is only affected by domestic law where the Convention has not established rules.[1377] However, it is at this very point that things get even more complicated, because similar impediments may have a different impact on the enforceability of a performance obligation at the domestic level. For example, the distinct situation where government permission is required may call for invalidation of the contract, but this form of initial impossibility could also merely mean that performance cannot be enforced.[1378] The latter approach is useful in cases where it is possible to obtain permission at a later point in time. In this respect, it is important to recall that the CISG is not familiar with a regime for initial impossibility caused by an infringement of statutory prohibitions.[1379] To put the relevance of this lacuna in the context of an international commercial sales contract: a manufacturer in country X (seller) of raw materials for plastics and an importer in country Y conclude a sales contract for the delivery of a certain type of polyester for the production of sportswear. However, country Y renders a contractual obligation invalid if the deal entails the importation of the agreed type of polyester. This situation of the initial impossibility of performance arising from a domestic legal prohibition, rendering the contract invalid under the law of country Y, is not governed by the CISG. By contrast, the PICC innovated in 2003 in this regard by including a set of

1373 NL: *Batavus v Vriend's Tweewielercentrum* (n 307) para 3.4; *Bunde v Erckens* (n 312); *Van Beers v Van Daalen*(n 307); *ABN AMRO v Malhi* Dutch Supreme Court 5 April 2002, ECLI:NL:PHR:2002:AD8186, NJ 2003, 124; see also Tjittes 2018 (n 2) 265, 362; CHN: art 125 CCL, see also Larry A DiMatteo and Jingen Wang, 'CC and CISG: A Comparative Analysis' in DiMatteo and Chen 2017 (n 19). 480; the CISG also adopted the subjective theory (art 8 CISG).

1374 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* (n 383); Phang and Goh 2012 (n 318) para 993.

1375 Art 3.2.1 PICC (erronous assumption: one party must be in error by having an incorrect or incomplete understanding of the facts or the law which already existed at the time the contract was concluded, see Vogenauer 2015 (n 19) art 3.2.1, paras 3–9; Art 4:103 PECL (fundamental mistake as to facts or law); Art II.–7:201 DCFR (mistake in fact or law must make contract fundamentally different)).

1376 Arts 8(1), 27, 71 CISG; the Convention also does not allow rescission of a sales contract on the basis of mistake as to the properties of the goods, Schwenzer 2016 (n 91) art 4 para 36.

1377 Schwenzer 2016 (n 91) art 4 para 36.

1378 *E.g.,* arts 6.1.17(1), 6.1.17(2) PICC.

1379 Schwenzer 2016 (n 91) art 4 para 39; Art 3.3.1(1) PICC; Vogenauer 2015 (n 19) 471.

rules for initial impossibility as the result of legal prohibitions.[1380] However, the PICC did not clarify the matter as it refers to the relevant mandatory domestic rules to determine the effect on the contractual obligations.[1381] Only for situations where applicable legal barriers, or any other source in the judicial system of the law of origin of the relevant mandatory rule does not prescribe the effect on a contract, the PICC indicate that the aggrieved party may seek recourse for the remedies for non-performance.[1382]

In other situations where initial impossibility is treated as a mistake by application of statutory principles or by the doctrine of mistake, the contract may be avoided or declared void, but the matter and required seriousness of the misconception differ significantly among jurisdictions. Other differences follow from the more restrictive approach of Dutch and Chinese contract law and the casuistic approach of the contract law of Singapore. Taking all these elements into consideration, it is not surprising that for the situation of initial impossibility in law and fact described under paragraph 222, different solutions may arise at the national level, depending on the seriousness of the legal and factual misapprehension of the contracting parties. Nonetheless, it can be said that the broad outlines of the mistake rules of Dutch and Singapore contract law show some similarities with the PICC,[1383] and to a certain extent with the PECL and DCFR.[1384] The rules on mistakes in the contract law of China show fewer similarities with unification instruments because it has taken an approach in this regard which is more appropriate for domestic circumstances.

6.2.3 Subsequent impossibility

227. *Preliminary* – Subsequent impossibility is an interesting feature from a comparative perspective because civil and common law regulate the consequences of impossibility in an entirely different way.[1385] In order to determine to what extent the three investigated jurisdictions differ in this regard, the following assesses the legal response in two scenarios of impossibility, namely, the situation where delivery of the goods is completely impossible for everybody (objective impossibility), and where delivery is only impossible for a particular seller (subjective impossibility) due to, for example, practical, moral or legal impediments. The key issue concerns the question whether a claim for enforced performance remains intact where the delivery of the goods is impossible due to an

1380 Art 3.3.1(1) PICC.
1381 *Ibid.*
1382 *Ibid.*
1383 *E.g.,* art 3.2.2(1)(a) PICC (arts. 6:228(1) DCC) and art 3.2.2(2)(b) (art 6:228(2) DCC); However, art 3.2.1(1)(b) PICC has no parallel under Dutch law.
1384 Art 4:103 PECL; Art II.-7:102 DCFR.
1385 Schwenzer, Hachem and Kee 2012 (n 13) paras 45.26, 45.42.

impediment beyond the control of the seller and which it could not reasonably be expected to have taken into account at the time of the conclusion of the contract. In other words, is enforced performance of a delivery obligation available where the seller has gained exemption for damages on the basis that the non-delivery was caused by an unforeseeable impediment beyond its control? This analysis is most relevant for instances of a subjective impossibility (*e.g.* delivery of the goods is rendered more onerous), and where delivery is temporarily impossible.

> *Illustration* – A warehouse containing a nutrition company's stock of pharmaceutical products is destroyed by fire, causing an impediment to deliver various types of vitamins which were stored at this particular warehouse. A significant part of the stock were generic vitamins, but some of the stock was specifically developed and produced for a client. For both product groups (generic and specifically produced vitamins), the nutrition company is capable of producing new vitamins, which makes it possible to fulfil its delivery obligation at a later point in time. However, the nutrition company wishes to be released from its delivery obligations due to changed market circumstances. Nonetheless, the aggrieved buyers (for a similar commercial reason) insist on performance

228. *Domestic approaches* – As previously mentioned, Dutch contract law is not familiar with a distinction between initial and subsequent impossibility. Therefore, the discussion about initial impossibility under Dutch contract law [223] should be regarded as inserted and repeated here. Nonetheless, some specific observations about a situation of subsequent impossibility are provided below. It first has to be reiterated that a contractual obligation is objectively impossible if no one would be able to perform the contract in accordance with the agreed terms, thus rendering a claim for enforced performance simply pointless. For example, the goods have perished before the agreed time for delivery,[1386] performance is legally impossible, and a failure to comply with an essential element of the agreement (compare with frustration of purpose) means that the impediment for performance goes to the root of the contract.[1387] In situations where performance is objectively impossible, it is argued that the court is entitled to deny a claim for enforced performance on its own motion on the basis that the aggrieved party lacks sufficient interest in enforcement.[1388] It

1386 De Vries 1984 (n 207) 18, 19; *Van der Leest v Gemeente Veghel* Dutch Supreme Court 4 September 2008, ECLI:NL:HR:2008:BD3127, NJ 2010, 272; De Jong 2017 (n 1321) s 9.2; The same applies for Singapore. See Phang et al 2012 (n 112) para 19.031.

1387 De Vries 1984 (n 207) 18, 19; De Jong 2017 (n 1321) s *11.3; Endlich v Construction Machinery* Dutch Supreme Court 22 October 2004, ECLI:NL:PHR:2004:AO9494, NJ 2006, 597; Sieburgh, *Asser* 6-I (n 363) para 383.

1388 Art 3:303 DCC; Haas 2009 (n 206) 244–246; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 374; Sieburg, *Asser 6-II* (n 532) para 344; Jongbloed (n 530) paras 5, 6.

is further widely acknowledged that the court shall order the claimant to reimburse the defendant in respect of all costs incurred in the proceeding if the former lacks sufficient interest in bringing the action to court. This general practice is said to be sufficient to prevent promisees from claiming for enforced performance without realistic prospects that performance becomes possible at one point.[1389]

An example of a situation of a subjective legal impossibility is that where only one specific manufacturer of bicycles is banned from importing its products due to past violations of trade regulations or for political reasons. Although it is recognised that subjective impossibility may (temporarily) free a non-performing party from its contractual performance obligations on the basis of the principle that a person has no right of action where he lacks sufficient interest,[1390] in the case of subjective impossibility, a claim for enforced performance can also be barred by the principles of reasonableness and fairness, although the thresholds for allowing this are set very high.[1391] Moreover, if the aggrieved party claims for enforced performance in the situation that performance is merely temporarily impossible, the court may provide an order for enforced performance subject to the condition that enforcement becomes available at the moment the barrier for performance is lifted.[1392] This is understandable as Dutch contract law places the right to require enforced performance ahead of the action to obtain monetary compensation. This notion is reflected in the principle that the court is not given the discretionary power to deny a claim for enforced performance on its own motion.[1393] In view of the above, it must be mentioned that a claim for enforced performance could also be denied if performance imposes a disproportional burden on the non-performing party, which would render enforced performance unacceptable according to standards of reasonableness and fairness.[1394] This type of impediment for obtaining an order for enforced performance, however, is not a part of the concept of objective and subjective impossibility in Dutch contract law (section 6.2.4).

Where the court establishes that performance is permanently impeded, the aggrieved party only loses its right to claim enforced performance.[1395] The obligation to perform does not cease to exist on this account. This means, in effect, that the aggrieved party remains entitled to claim restitution, reversion and suspension of its own performance.[1396] More

1389 Nispen (n 867) 27.
1390 Art 3:303 DCC; Broekema in *Groene Serie Verbintenissenrecht* (n 1324) para 7.
1391 Dutch Parliamentary History Book 6 (n 207) 262; Art 3:296(1) DCC; Stolp (n 536) 234.
1392 Art 3:296(2) DCC; De Jong, Krans and Wissink 2018 (n 194) 136.
1393 Sieburgh, *Asser 6-I* (n 363) para 372; Haas 2009 (n 206) 181; Stolp (n 536) 246.
1394 De Vries 1984 (n 207) 18; *Mulitvastgoed v Nethou* (n 568); Stolp (n 536) 238.
1395 Dutch Parliamentary History Book 6 (n 207) 486, 488; De Vries 1984 (n 207) 21; De Jong 2017 (n 1321) Ch 10; Sieburgh, *Asser 6-I* (n 363) paras 371, 373; Haas 2009 (n 206) 181; Smits 2008 (n 871) 19.
1396 Arts 6:203; 6:262, 6:263, 6:377, 6:378 DCC; De Jong 2017 (n 1321) Ch 10; Sieburgh, *Asser 6-I* (n 363) paras 371, 373.

importantly, the mere removal of the right to claim enforced performance means that the goods, which may already have been delivered, cannot be reclaimed by the non-performing seller,[1397] the reason being that the legal basis of the delivery obligation is not affected. Where performance is only temporarily impossible and the time of performance is not essential to a sales transaction, the court may allow a claim for enforced performance on the condition that enforcement is suspended for the duration of the impediment.[1398] The same applies to partial impossibility to such an extent that the right to claim enforced performance is removed for that part affected by the impediment.[1399]

In certain situations of subjective impossibility due to unforeseen circumstances, the right to enforced performance of the principal obligation may be limited by alteration of the terms of the contract or setting aside of the contract in whole or in part.[1400] The court is allowed to do so (upon the demand of one of the parties) on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or termination may be given retroactive effect. Furthermore, the modification or the setting aside shall not be pronounced by the court to the extent that it is common ground that the person invoking the circumstances should be accountable for them or if this follows from the nature of the contract. Nonetheless, where non-performance is excused for damages because the cause of the impediment is not attributable to non-performance, the aggrieved party does not necessarily lose its right to claim enforced performance. This is particularly important for cases where performance is only temporarily impeded. Hence, the ability to exercise the right to claim enforced performance is not related to the statutory regime for exemption from liability in damages.[1401] In any case, where performance is subjectively impossible, the non-performing party may be released from its performance obligation when it successfully seeks relief via the aforementioned actions for modification or termination of the contract.

1397 Art 6:203 (1) DCC; Dutch Parliamentary History Book 6 (n 207) 488; De Vries 1984 (n 207) 21.

1398 Compare art 3:396 (2) DCC: Sieburgh, *Asser 6-I* (n 363) paras 372, 378; De Jong 2017 (n 1321) Ch 12; Smits 2008 (n 871) 19.

1399 Sieburgh, *Asser 6-I* (n 363) para 372; Smits 2008 (n 871) 19; J Hijma, 'Koopprijsvermindering' (2018) 7202 WPNR 566.

1400 Art 6:258 DCC; De Jong 2017 (n 1321) Ch 10.

1401 De Jong, Krans and Wissink 2018 (n 194) 95; JM Smits argues (Schelhaas 2002 (n 19) 342) that an action for enforced performance is considered as no longer useful where damages are exempted because the non-performaning party is not at fault of the impediment to performance and the impediment does not fall within its sphere of risk. It must, however, be noted that impediment to enforced performance and limitations on damages are differently framed in Dutch contract law. Furthermore, the reasoning that an action for enforced performance is no longer useful where damages are exempted does not apply where performance is merely subjectively or temporarily impossible because in these instances it could still be justified to require a non-performing party to deliver the promised goods, albeit that the court is given the discretionary power to impose certain conditions for enforcement, such as compensation of costs, or delivery at a later point in time.

229. The following seeks to determine and explain the response of Singapore contract law when the performance of a contractual obligation becomes objectively or subjectively impossible after the parties entered into a commercial sales contract. For the contract law system of Singapore, it is of primary significance to determine the scope of the impediment of objective impossibility by distinguishing any reasonably foreseeable or any unforeseeable cause for non-performance. A claim for enforced performance might be denied by the court based on the theory of objective impossibility, if the cause of the impediment was foreseen or reasonably foreseeable by the parties at the moment the contract was made.[1402] In this situation, the parties are not automatically discharged from their obligations by operation of the doctrine of frustration due to the fact that the root of the contract is not affected.[1403] By contrast, it is assumed that the non-performing party provided for the impossibility of the contract, and thus accepted the risk of its occurrence. As a result, objective impossibility of performance is merely a barrier for claiming enforced performance, and the aggrieved party may sue for damages on the basis that the promisor did not fulfil its contractual obligations.

Where an unforeseeable impediment for performance arises after the contract was made, a claim for enforced performance shall not be awarded if the agreed performance is radically changed by a physical, legal or commercial impossibility.[1404] Thus, objective impossibility is not required.[1405] The decisive condition is that the purpose of the contract is frustrated due to an unforeseeable change in circumstances.[1406] For example, a claim for enforced performance of a non-monetary obligation is generally not available after the conclusion of a commercial sales contract when a timely delivery is of essence but delivery of the goods is temporarily impeded because: the subject matter of the transaction has perished;[1407] the goods are simply unavailable;[1408] or the goods cannot be obtained by both parties from the intended source.[1409] In *Alliance Concrete Singapore v Sato Kogyo*,[1410] the doctrine of frustration played a key role. In this case, a Singapore supplier for ready-mixed concrete (RMC) entered into a contract with a Singapore contractor for the purchase and

1402 Phang et al 2012 (n 112) paras 19.131, 19.142.

1403 Phang et al 2012 (n 112) para 19.080 *ff.*

1404 *E.g., Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 1 SLR (R) 945 (SGCA); *Win Supreme Investment (S) Pte Ltd Joharah bte Abdul Wahab* [1996] 3 SLR (R) 583 [33]; Phang et al 2012 (n 112) para 19.131 *ff;* See for the categorisation *Adani Wilmar* (n 1343) SLR(R) 216 [44]; Phang and Goh 2012 (n 318) para 1374.

1405 Phang and Goh 2012 (n 318) paras 1377, 1378.

1406 Phang et al 2012 (n 112) para 19.043; Yip Man and Goh Yihan, 'Dealing with Unforeseen Circumstances: Contractual Construction and Equitable Adjustment' (2004) 1 Journal of Business Law 89.

1407 Compare the English case *Taylor v Caldwell* [1863] 3 B & S 826; Phang and Goh 2012 (n 318) para 1378.

1408 *Lim Kim Som v Sherriffa Taibah* [1994] 1 SLR(R) 233 (SGCH); Phang and Goh 2012 (n 318) para 1379.

1409 *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] SGCA, 35, 3 SLR 857; Phang and Goh 2012 (n 318) paras 1381–1384.

1410 (n 1409).

sale of a certain amount of RMC. The parties contemplated that Indonesian sand would be used in the preparation of the RMC. However, after the conclusion of the contract, the Indonesian government announced a ban on the export of sand. Aside from a very limited amount of sand which was available in Singapore, the supplier had no other source of sand for the production of RMC. Given the failure of the common intended source, the Singapore Court of Appeal held that the supplier was released from its obligation to deliver RMC on application of the doctrine of frustration.[1411]

It is a question of construction of the contract whether the contract is brought to an end by frustration or continues to bind the parties. As for the operational impact, the doctrine of frustration automatically releases the parties from their performance obligations when the impediment occurs,[1412] albeit only with prospective effect.[1413] There is one noteworthy statutory provision which reflects the principles of the doctrine of frustration on the existence of the obligation to perform as set out above. This is the rule in the Singapore Sale of Goods Act which stipulates that if performance is impossible because the goods, without any fault on the part of the seller or the buyer, perished before the risk passed to the buyer, the court may refuse a claim for enforced performance on the demand of the aggrieved party.[1414]

In certain situations where the impediment to performance is caused by a legal barrier, the doctrine of frustration allows the court to discharge the obligation to performance by invalidating the contract even though there has been no total failure in consideration.[1415] The Frustrated Contracts Acts provides the principles for the situation where the promisee has (partially) paid the purchase price before the occurrence of the impediment.[1416] It does, however, not apply in the case a commercial contract for the sale of specific goods is avoided under the Sale of Goods Act because, without any fault on the part of the seller or the buyer, the goods have perished before the risk passed to the buyer, or to any other contract for the sale, of for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.[1417]

An unforeseeable event which makes performance impossible for the duration of a certain time, thereby radically changing the contract, may remove the obligation to

1411 *Alliance Concrete Singapore Pte Ltd* (n 1409) [62-65], [70], [96], [101].
1412 Phang et al 2012 (n 112) paras 19.003, 19.083.
1413 Phang et al 2012 (n 112) paras 19.028–19.042, 19.080–19.082; Phang and Goh 2012 (n 318) para 1416.
1414 SGA, s 7.
1415 *Glahe International Expo AG v ACS Computer Pte Ltd* [1998] 2 SLR(R) 764 (SGHC); Phang and Goh 2012 (n 318) para 1376, 1419, 1420.
1416 Frustrated Contracts Act, Cap. 115, 1985 Rev Ed; Phang and Goh 2012 (n 318) paras 1419-1426.
1417 Frustrated Contracts Act (n 1416), s 3(5); Section 7 Sale of Goods Act (Cap 393, 1994 Rev Ed); Phang and Goh 2012 (n 318) para 1427.

perform.[1418] A delay in performance may also result in suspension of the principal obligation until the impossibility ceases. For example, a temporary restriction of Singapore on the import of poultry and poultry products from the Netherlands due to an outbreak of Bird Flu.[1419] In cases where the non-performing party argues that performance is subjectively impossible in whole, in part or temporarily, the complete frustration of the common purpose of the contract needs to be established.[1420]

230. The contract law of China acts on the general principle that in the case a contractual obligation is not fulfilled, the aggrieved party is entitled to demand enforced performance,[1421] unless performance has become impossible in law or in fact.[1422] For example, a Chinese government ban on the importation of dairy products from the Netherlands makes it impossible for a Dutch company to deliver its cheese to a Chinese retail chain. Under Chinese contract law, the Dutch company is not entitled to claim for enforced performance. Aside from this straightforward example of an objective impossibility in law, the contract law principles do not provide detailed guidance on determining the actual fate of the right to claim enforcement where performance is rendered subjectively impossible. This requires an assessment of the legal response to various forms of impossibility. For instance, it is stipulated that the aggrieved party is not entitled to request enforced performance if the subject matter of the obligation is unfit for compulsory performance or the performance expenses are excessively high.[1423] The contract law of China also provides an exemption for enforced performance in whole or in part where the impediment could not be foreseen, avoided *and* overcome.[1424] In addition, the People's Supreme Court made it clear that a performance obligation may be modified or declared void, if requested by one of the parties, where an unforeseeable major change in circumstances, not being a business risk and not caused by *force majeure*, and, which occurred after the parties entered into the contract, would impose an obviously unfair burden on the promisor if performance is enforced, or

1418 *Chua Chay Lee v Premier Properties Pte Ltd* [2002] 2 SLR(R) 464 [25] (SGCA); *Premier Properties Pte Ltd v Tan Soo Tiong & ors,* [2000] SGHC 12, [17]-[18].

1419 <https://www.customs.gov.sg/~/media/cus/files/circulars/ca/2016/circular_ai%20the%20netherlands%20dated%2003%20nov%2016.pdf> accessed on 5 February 2018.

1420 Phang et al 2012 (n 112) para 19.051 *ff.*

1421 Bing Ling 2002 (n 229) paras 4.087, 4.090.

1422 Art 110(1) CCL; Bing Ling 2002 (n 229) para 8.072; Liming 2016 (n 224) 249; Bu 2013 (n 226) 72; Zhang 2006 (n 41) 300; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 28; Lutz-Christian Wolff, 'Impossibility of Performance and Contract Validity' in DiMatteo and Chen 2017 (n 19) 291.

1423 Art 110(2) CCL; See s 6.2.4.

1424 Art 117 CCL; Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis' in DiMatteo and Chen 2017 (n 19) 497–498.

when the promisor cannot realise the purpose of the contract.[1425] In other words, a subjective impossibility due to a change in circumstances is not an exemption for enforced performance, but it enables the parties to claim for modification and termination of the contract. This rule has its legal basis in the principle of fairness which needs to be assessed in light of the particularities of the case. The application of the latter principle is subject to the strict supervision of the Higher People's Court, and its application shall be reviewed by the Supreme People's Court where necessary.[1426] The exclusion of a *force majeure* under the change of circumstances rule gives rise to the premise that where a change of circumstance is caused by *force majeure* the right to enforced performance may be exempted under the earlier mentioned (strict) regime for *force majeure*.[1427] In other words, the contract law of China has taken the approach that a seller may be relieved from its liability (for damages and enforced performance) where the impossibility arises from a *force majeure* which was unforeseeable, unavoidable and could not be overcome. Where the impediment arises from a change of circumstances, the non-performing seller is not automatically released from its delivery obligation, but may seek relief via modification or termination of the contract.

Considering all of the above, it may be assumed, as a general rule, that a claim for enforced performance may be denied where the performance of a delivery obligation has become objectively or subjectively impossible after the formation of a commercial sales contract.[1428] This reveals that the rules on subsequent impossibility could affect the ability to claim enforced performance of the seller's delivery obligation if the purpose of a commercial sales contract cannot be achieved (*i.e.* the contract is frustrated). The legal effect of objective and subjective impossibility is that a claim for enforced performance may be denied by the court on the demand of the non-performing party.[1429] The seller is, however, not automatically relieved from its obligations where performance is impeded. This suggests that the contractual obligation to perform continues to exist despite its

1425 Art 26 Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China; Notice of the Supreme People's Court on Correctly Applying the Interpretation II of Several Issues concerning the Contract Law of the People's Republic of China so as to Serve the Primary Objectives of the Party and the State (Notice on Correctly Applying Judicial Interpretation II Contract Law).

1426 Notice on Correctly Applying Judicial Interpretation II Contract Law (n 1425).

1427 Art 117 CCL; Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis' in DiMatteo and Chen 2017 (n 19) 499.

1428 Bing Ling 2002 (n 229) paras 8.011, 8.072; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 28, 29; Bu 2013 (n 226) 72.

1429 The promisor is obliged to prove the existence of an impossibility of performance; Hedayatollah Shenasaei, Maggie Qin and Faramarz Shirvani, 'Limitations of Specific Performance in the China Contract Law and the Convention on Contracts for the International Sale of Goods' (2007) 5(1) International Journal of Management and Commerce Innovations 772.

unenforceability.[1430] In this light, it is held that the court may order that the right to request enforced performance is only partially or temporarily exempted.[1431] That being said, the Supreme People's Court has not yet clarified the impact of the impossibility of performance on the existence of the contractual obligation to perform and whether a contractual obligation may revive again once the impediment for performance perishes.

231. *Comparative analysis* – The contract law of the Netherlands, Singapore and China have each taken different approaches to the situation where an impossibility in performance arises after the formation of a commercial sales contract. However, where the impediment to deliver the goods is permanent and objective in nature, it is obvious that (regardless of the fault of the non-performing party) enforced performance is not available in the three jurisdictions. Nonetheless, there is an interesting divergence among the investigated legal systems with respect to the situation where performance is only temporarily impossible and where an impediment arises from a subjective impossibility. The starting point in this regard is that both Dutch and Chinese contract law act on the notion that enforced performance is not available where performance is objectively or subjectively impossible, albeit that both jurisdictions regulate the applicable principles entirely differently. Under Dutch contract law, the applicable tests for exemption of performance do not answer the question of whether the non-performing seller is released from liability in damages. In other words, the non-performing party is not automatically relieved from performance where it is exempted from liability in damages on the basis of an event which is not the fault or responsibility of the non-performing party. By contrast, the contract law of China adopts the principle that a non-performing party is not liable (for damages and enforced performance) where an impediment (objective or subjective) could not be foreseen, avoided and overcome. It appears that the CISG and PICC are more in line with Dutch contract law in this regard.[1432] The CISG has adopted the principle that application of the exemption for damages does not prevent either party from exercising any right other than to claim damages.[1433] Although this principle has no practical meaning in cases where performance is objectively impossible for everyone, it shows that an aggrieved buyer does not lose its right to delivery and, thus, may sue for enforced performance once the barrier for performance has disappeared. This viewpoint is in line with the PICC which adopted the

1430 This contrast with the current German law (the early Chinese Civil Code was modelled on the German legal code), which has taken the approach that a performance obligation is dispensed with due to performance impossibility; See Lutz-Christian Wolff in DiMatteo and Chen 2017 (n 19) 293.

1431 Bing Ling 2002 (n 229) para 8.014; Liming 2016 (n 224) 250–251; Lutz-Christian Wolff, 'Impossibility of Performance and Contract Valdity' in DiMatteo and Chen 2017 (n 19) 293.

1432 Art 79(5) CISG; Schwenzer 2016 (n 91) art 79 para 53; The question as to whether a claim for enforced performance is available in cases of *force majeure*, and performance is rendered subjective or temporarily impossible, is a matter of art 7.2.2 and not art 7.1.7 PICC; Vogenauer 2015 (n 19) art 7.2.2 para 3, 43–44.

1433 Art 79(5) CISG.

rule that the right to performance cannot be enforced for the duration of the impossibility.[1434] In cases where the impediment only effects a part of the agreed performance, or performance is only temporarily unavailable, the court applying the PICC may exclude the affected part if the obligations of the seller are divisible,[1435] or may exclude the obligation to perform for the duration of the impediment.[1436]

For situations of subjective impossibility adjudicated under the CISG, it is argued that a seller, involved in a commercial sales transaction, is only released from its obligation to perform in very specific situations since a seller bears the risk of the fulfilment of the contract.[1437] This principle was applied by the ICC Court of Arbitration in Basel, which dealt with a case where an Austrian seller of chemical fertiliser was not exempted from performance because it did not provide the Swiss buyer with the necessary instructions for the fulfilment of the contract.[1438] In a similar vein, the Schiedsgericht der Handelskammer in Hamburg (Germany) considered that the seller was not exempted from performance in case of difficulties in delivery due to the seller's financial problems, or due to financial problems of the seller's supplier (even when connected to the act of public authority in the supplier's country). These instances of subjective impossibility are not considered an impediment beyond the seller's control, but belong to the seller's area of risk.[1439] Considering the above, impossibility of performance may remove the right to require enforced performance, albeit that the threshold in case of subjective impossibility may differ according to case-specific complexities. That said, more clarity on the grounds on which a claim for enforced performance should be denied may prevent local courts from seeking recourse to their discretionary power to refuse a claim for enforced performance where national limitations apply.[1440] The latter is relevant because domestic approaches differ and, therefore, their application in cross-border sales disputes could affect the CISG objective to develop uniform law and legal certainty regarding the remedial outcome(s) for parties involved in international commercial sales transactions.

In contrast to the Dutch and Chinese impact-based approaches (*i.e.* the impact on the availability of enforced performance may differ where delivery of the goods is completely, temporarily and partially impeded), as well as the CISG and PICC, the contract law of Singapore adopts the traditional common law focus on a breach of contract and damages. Within this stance, a distinction is made between impossibility amounting to an ordinary

1434 Art 7.2.2(a) PICC; Vogenauer 2015 (n 19) art 7.2.2(a) para 15.

1435 Vogenauer 2015 (n 19) art 7.2.2(a) para 14.

1436 Vogenauer 2015 (n 19) art 7.2.2(a) para 19.

1437 Schwenzer 2016 (n 91) 739 para 12.

1438 ICC Arbitration Case n 8128 (1995) <http://www.unilex.info/case.cfm?id=207> accessed on 8 February 2018.

1439 Schiedsgericht der Handelskammer, Hamburg, Germany, 21 March 1996, <http://www.unilex.info/case.cfm?id=195> accessed on 8 February 2018.

1440 Art 28 CISG.

non-performance, and where performance is frustrated. Where the applicable requirements for frustration are met, this latter relieves the non-performing seller from liability in damages, and subsequently from its performance obligation. The contract law of Singapore is familiar with exemption for objective and subjective impossibility, but the scope of these categories is more restricted compared to the approaches taken by Dutch and Chinese contract law. For example, where the doctrine of frustration exempts a non-performing seller from liability in damages, a claim for enforced performance shares the same fate, even if the impossibility is only temporarily. The PECL and DCFR and draft PACL follow the Singapore approach in cases where performance is permanently (objective or subjective) impossible.[1441] The comments on the applicable provisions suggest that in these instances a non-performing party is excused for damages and enforced performance if the impediment to performance is not the fault or responsibility of the non-performing party.[1442]

On the basis of an overall assessment of the considerations above, it may be said that the different tests for different causes of impossibility in the contract law of the Netherlands and China provide a certain level of flexibility which is necessary to adapt adequately to today's rapidly changing cross-border trade environment. However, this approach may also lead to legal uncertainty where performance is considered subjectively impossible. Singapore contract law provides contracting parties more clarity upfront in this regard, but the narrow scope of the rules for impossibility could impair the performance interest of an aggrieved buyer where performance is merely subjectively or temporarily impossible, such as in the example mentioned under paragraph 227. In this situation, the delivery of the vitamins is temporarily impossible because the company's stock is destroyed by fire. Nonetheless, it appears that where the court establishes that delivery of the specifically developed vitamins can be delivered at a later point in time, Dutch and Chinese contract law allows for an order for delivery on the condition that, for example, performance becomes enforceable once the manufacturer has produced enough to fulfil its delivery obligation. Although Singapore contract law is not familiar with the notion of a temporary impediment, it appears that an aggrieved buyer might not lose the ability to claim for enforced performance at a later point if the time for delivery is not of the essence. Nonetheless, where the time for delivery is essential to the contract, the aggrieved buyer may claim for damages, but it loses the ability to claim for enforced performance because delivery is considered as permanently impossible. Consequently, it is submitted here that the approach taken by Dutch and Chinese contract law, as well as the unification instruments, provides the courts with a greater degree of flexibility in the sense that it

1441 Art 8:108, Comment D PECL; Art III.-3:104, Comment D DCFR; Art 29 Draft Articles on Non-Performance PACL; See Lee 2016 (n 16) 184.

1442 Art 8:108, Comment D PECL; Art III.-3:104, Comment D DCFR; Art 29 Draft Articles on Non-Performance PACL, Lee 2016 (n 16) 184.

allows for a temporarily exemption of enforced performance where this is desired by the aggrieved buyer. On the other hand, it also reinforces the buyer's right to enforced performance, which does not resonate with the Singapore favourable look on protection of the seller's interest.

6.2.4 *Hardship and performance being unreasonably burdensome or expensive*

232. *Preliminary* – The present section deals with the impact of instances of hardship and performance being unreasonably burdensome or expensive. Both concepts must be distinguished from the impediments of objective and subjective impossibility discussed above. This is because a more onerous undertaking than contemplated does not impede the execution of a contract but nonetheless may affect the availability of enforced performance, although on the basis of different conceptual foundations at the national and international levels. In the following, the exemption of an unreasonably burdensome or expensive undertaking applies where performance is so onerous that it could be contrary to good faith to require it.[1443] The term hardship used here applies where the occurrence of an event fundamentally alters (*i.e.* radically changes) the equilibrium of a contract because either the cost of performance has increased or because the value of the performance a party receives has diminished.[1444] The two situations mentioned above typically coincide, but the legal response(s) can be quite different. For instance, take a sales contract which obliges the seller to deliver a certain amount of goods each quarter for a period of five years. After one year, an unforeseeable and significant rise in the price of oil occurs which makes performance of the contract more onerous than anticipated. Suppose that no gross disproportion exists between the parties' interests in performance of the contract, although undeniably performance has become more onerous due to a change in circumstances. This situation might not render performance unreasonably expensive (which would exempt enforced performance), but it could affect the availability of enforced performance of the initial obligation by other far-reaching measures, such as judicial alteration of the terms for performance. The present section aims to provide a better understanding of the key issues of both concepts in this regard, which is of particular relevance for long-term commercial sales contracts.

1443 This definition is used here because it is in line with the approach taken by the PICC, which is regarded as a neutral instrument in the realm of international contract law; Vogenauer 2015 (n 19) art 7.2.2, para 25.

1444 This definition is used here because it is in line with the approach taken by the PICC, which is regarded as a neutral instrument in the realm of international contract law; Vogenauer 2015 (n 19) art 6.2.2, para 1.

> *Illustration* – A weaving mill of an artisanal jeans manufacturer breaks down due to an electrical short circuit. The manufacturer considers buying a similar weaving mill in Japan in order to fulfil its contractual obligations under a sales contract with an internationally renowned fashion brand. However, this would require a heavy investment of the manufacturer's money and time to deal with the supplier in Japan, to negotiate the price and to clear customs in the exporting and importing countries. On the other hand, the renowned fashion brand has a significant interest in the delivery of the jeans (albeit with delay) due to its own contractual obligations with its regional agents, which in turn have contracted with local retailers. In this situation, the question arises to what extent the availability of obtaining enforced performance may be affected by the subsequent imbalance of the equilibrium of the contract.

233. *Domestic approaches* – Under Dutch contract law, the performance of a delivery obligation is not rendered subjectively impossible where performance has become unreasonably burdensome or expensive and where an event fundamentally changes the equilibrium of the contract.[1445] Nonetheless, the right to enforced performance may not be honoured by the court where performance requires an unreasonable effort or expense, even if the promisor is responsible.[1446] A claim for enforced performance could also be denied where performance would unreasonably burden the promisor and performance is not more beneficial to the promisee than another remedy.[1447] Where an event alters the equilibrium of a contract, an order for enforced performance may also not be available where performance is excessively onerous.[1448] In the above-described scenarios, a claim for enforced performance may not be granted on the basis of the so-called derogatory effect of the standard of reasonableness and fairness if the impact is manifestly unacceptable.[1449] For example, enforced performance could be denied when performance requires disproportional offers of the promisor due to, for example, a significant increase in the manufacturing costs. This hardship principle also plays a role where an unforeseen change in circumstances has affected the monetary equilibrium of the contract in the sense that performance has become excessively expensive for the seller or the value of the bargain has diminished entirely.[1450]

1445 De Vries 1984 (n 207) 18.

1446 *Oosterhuis v Unigro* Dutch Supreme Court 21 May 1976, ECLI:NL:PHR:1976:AC5738, NJ 1977, 73; MBM Loos in Schelhaas 2002 (n 19) 354.

1447 *Multi Vastgoed* (n 568); MBM Loos in Schelhaas 2002 (n 19) 355.

1448 Arts 6:2(2), 6:248(2) DCC; Haas 2009 (n 206) 137; Hartlief and Tjittes (n 569) 1464; De Vries 1984 (n 207) 17; De Jong, Krans and Wissink 2018 (n 194) 31–33.

1449 Arts 6:2(2), 6:248(2) DCC; De Jong, Krans and Wissink 2018 (n 194) 31–33.

1450 *Kriek v Smit* Dutch Supreme Court 12 June 1987, ECLI:NL:HR:1987:AC2558, NJ 1988, 150; Sieburgh, *Asser 6-III* (n 203) 439, 441–443; P Abas, *Rebus sic stantibus: een onderzoek naar de toepassing van de clausula*

234. There are, however, no clear thresholds for determining when the costs of performance have become unreasonably disproportionate and where the financial equilibrium has changed to such an extent that enforced performance is not available. By contrast, these situations are assessed on a sliding scale of the seriousness of their impact (*i.e.* the adverse (monetary) consequences of enforced performance) in view of the seriousness of the infringement, the interest of the aggrieved party in enforced performance, the interest of the non-performing party to remedy via a less burdensome remedy,[1451] and the specific circumstances of the case (*e.g.* guarantees and the agreed price).[1452] In a well-thought out attempt to provide more clarity on the matter it is suggested that the right to enforced performance is removed where (due to an unforeseen change in circumstances) the costs of performance exceed 130% with respect to the objective interest of the aggrieved party in the performance of the contract.[1453] This is, however, not a generally accepted principle.

The aforementioned sliding scale to determine the availability of enforced performance justifies a discussion about the acceptance of the common law efficient breach doctrine. This doctrine entails the principle that an aggrieved party is only entitled to the remedy which has the least adverse impact on the agreed obligations as a whole (principle of subsidiarity) and which does not result in an imbalance between the interests of the aggrieved and the non-performing party (principle of proportionality).[1454] If strictly applied, this could enable the promisor to abandon the contract if the monetary equilibrium of the contract has changed in such a way that the execution of the contract would result in a disproportionate financial burden. It is, however, noted that the same result could be achieved by application of the derogatory effect of the standards of reasonableness and fairness,[1455] and by application of the statutory principle that a contract may be set aside, on the basis of unforeseen circumstances of such a nature that the other party, according to the standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form.[1456] Thus, aside from the earlier mentioned derogatory effect of the standard of reasonableness and fairness, the right to enforced performance could also be affected by the hardship principle through modification or (partial)

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rebus sic stantibus in de rechtspraak van enige Europese landen (Kluwer 1989) 226 *ff*; P Abas, 'Enige gedachten over de gedeeltelijke ontbinding (aanpassing) in de zin van art 6:258 BW' (1998) 6307 WPNR 211.

1451 See for an example of the application of the sliding scale for determining the availability of enforced performance: *Multi Vastgoed* (n 568) para 3.6. In this case the seriousness of the failed performance was not taken into consideration by the court because the performance was contractually guaranteed and, therefore, essential to the agreement.

1452 Stolp (n 536) 241, 242.

1453 Haas 2009 (n 206) 143.

1454 Stolp (n 536) 41; L Visscher, 'De rangorde van remedies voor wanprestatie: subsidiariteit en proportionaliteit versus efficiëntie' (20017) 54(9) NTBR 385.

1455 Art 6:248(2) DCC.

1456 Art 6:258(2) DCC requires a manifestly unacceptable impact.

termination of the contract.[1457] Where the seller fails to deliver the goods in accordance with the contract and where the court most likely shall not award a claim for enforcement because this would result in an unreasonably burdensome or expensive performance,[1458] the buyer could opt for setting aside the contract in whole or in part.[1459] This legal inroad may (partially) release the buyer from its obligation to pay the purchase price.[1460] Nonetheless, a similar result can be achieved via suspension, and subsequently, termination of the contract.[1461]

That having been said, the bar for limitation of the right to enforced performance, on the basis of the principles mentioned above, is set high since a contractual promise to do something is primarily binding on the parties, and, therefore, limitation of the enforceability of a contractual obligation by the court, should not be accepted lightly.[1462] Furthermore, when considering the situation where the promisor seeks modification or setting aside of the contract on the basis of unforeseen circumstances rendering the performance (subjectively) impossible,[1463] the court needs to establish that the supervening event is not taken into account by the parties at the time of the conclusion of the contract.[1464] Moreover, the right to enforced performance may not be affected by an unforeseen change of circumstances where it is common ground that the seller is accountable for the impediment, or where it follows from the nature of the contract that the seller is responsible for the impediment for performance.[1465] Not surprisingly, the court does not readily accept that enforced performance is exempted on the mere basis that performance became unreasonably financially burdensome due to a change in circumstances, nor that enforced performance results in unreasonable hardship.[1466]

235. The common law system of Singapore is not familiar with a moral standard of good faith which limits the ability to obtain an order for enforced performance where performance has become unreasonably burdensome or expensive, or excessively onerous due to a change of circumstances. More importantly, the contract law is not familiar with a distinction in thresholds and remedial consequences in the aforementioned situations.

1457 Art 6:258(1) DCC; De Jong, Krans and Wissink 2018 (n 194) 133.
1458 Art 6:248(2) DCC; De Jong, Krans and Wissink 2018 (n 194) 31–33.
1459 Art 6:258(1) DCC; Hijma, 'koopprijsvermindering' (n 1399).
1460 *Ibid.*
1461 Arts 6:264, 6:265 DCC.
1462 Dutch Parliamentary History Book 6 (n 207) 967, 974, 979; Schoordijk (n 451) 33–43; Hofmann 1976 (n 84) 192, 208; Stolp (n 536) 246; De Jong, Krans and Wissink 2018 (n 194) 31–33, 133–135.
1463 Art 6:258(1) DCC; De Jong, Krans and Wissink 2018 (n 194) 213.
1464 Art 6:258(1) DCC; Sieburgh, *Asser 6-III* (n 203) 439.
1465 Art 6:258(2) DCC.
1466 *NVB v Helder* Dutch Supreme Court 27 April 1984, ECLI:NL:PHR:1984:AG4797, NJ 1984, 679 para 3.2; *Kriek* (n 1450); *Briljant Schreuders v ABP* Dutch Supreme Court 20 February 1998, ECLI:NL:HR:1998:ZC2587, NJ 1998,493; Dutch Parliamentary History Book 6 (n 207) 136, 969.

The most important exemption to enforced performance (in response to a subsequent imbalance of the equilibrium) follows from the earlier discussed doctrine of frustration which may also be invoked by the non-performing party against a claim for enforced performance if an unforeseen change of circumstances radically changed the purpose of the contract.[1467] For example, a seller may be released from its performance obligations on application of the doctrine of frustration if an unforeseen supervening event causes a delay in performance and enforcement of the contract, if this delay would impose a disproportional burden on the seller (*i.e.* the monetary purpose of the contract is frustrated).[1468] A promisor is, however, not easily released from its obligations by application of the doctrine of frustration where an unforeseeable change of circumstances renders performance merely financial impractical (*e.g.* increase in production costs).[1469] Only if the commercial impracticability goes beyond the normal business risks of contracting parties, can performance be regarded as frustrated, for example, by an astronomical increase in prices.[1470] The threshold in this regard is very high due to the view that the doctrine of frustration does not govern cases of economic hardship. In view of this, it is suggested that the loss must be at least 100%. It is, therefore, important to note that unacceptable hardship due to a radical change in circumstances may release the seller from its performance obligations, even if the requirements for application of the doctrine of frustration are not fulfilled.

As for the doctrine of frustration, the question is not yet answered as to when an increase in price may amount to a sufficient level of commercial impracticability in order to release the promisor from its delivery obligation. This uncertainty raises the question to what extent enforcement of non-monetary obligations is barred in the situation an unforeseen

1467 Phang et al 2012 (n 112) paras 19.040, 19.043. 19.056; Shenoy and Loo 2013 (n 13) para 17.22.

1468 Phang et al 2012 (n 112) paras 19.076, 19.077.

1469 *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] SGCA 1 (2011) 2 SLR 106 [53]; *Oversea-Chinese Banking Corp Ltd v Daewoo Singapore Pte Ltd and another* [2000] SGHC104 (The alleged sharp devaluation of the Korean Won against the US Dollar did not brought about a situation that is fundametally different from that in which the guarantee was given. Nothing in the terms of the guarantee or of the underlying loan showed that the bank and the guarantor never agreed to be bound in the event of such devaluation as alleged or in the event of any fluctuation in the rate of exchange between the stipulated currency (US Dollar) and any other currency); *M P Bilt Pte Ltd v Edy Yumianto* [1999] 2 SLR(R) 655 [14]-[15] (The purchaser pleaded that the contract wasfrustrated by the 'runaway inflation' in Indonesia which was not foreseen by the parties when the contract was entered into. Choo JC held that there was no frustration of the contract, 'the financial capacity of the purchaser is a matter strictly of his ownconcern he cannot walk away from his obligations only because financial difficulties had come upon him'); an astronomical increase in price may justify a discharge of the initial obligation, *e.g., Glahe International Expo* (n 1404) SLR(R) 945 [42]; Phang et al 2012 (n 112) paras 19.068, 19.070; Phang and Goh 2012 (n 318) paras 1375, 1395, 1397, 1398, 1399; in contrast to some American common law jurisdictions, commercial impracticability under Singapore law is not regarded as a frustrating event, see Shenoy and Loo 2013 (n 13) para 17.24.

1470 See the endorsement of the Englisch case *Tsakiroglou & Co Ltd v Noblee Thorl Gmbh* (1960) 2 QB 318 in the Singapore case *Holcim (Singapore)* (n 1469).

change in circumstances makes performance merely onerous. Typically, these cases are fertile ground to discuss whether the court may limit the availability of enforced performance by modification of the terms of the contract. This solution is not available because alteration of the terms of a contract is said to result in uncertainty for the parties, and it is believed to interfere with the freedom of contracting.[1471] Considering these concerns and the absence of contradicting case law in this regard it appears that it is not at the discretion of Singapore courts to limit the availability of enforced performance by means of judicial modification of the contract if a change of circumstances has made the performance of a contract financially unfavourable.

Despite the exclusion of the doctrine of frustration in the aforementioned situations, the contract law of Singapore limits the availability of enforced performance where performance results in unacceptable personal hardship of the promisor.[1472] Be that as it may, financial distress of a promisor due to enforcement of a contract under the agreed terms does not amount to personal hardship, and, therefore, cannot be invoked by the promisor in order to be released from its obligation to perform.[1473] A clear example on this matter is provided in the case *Lim Lay Bee and another v Allgreen Properties Ltd* in which it was considered by the Singapore Court of Appeal that the personal financial hardship that the purchaser incurred due to enforcement of the contract could not be the basis for relief of performance.

Where enforced performance would result in severe hardship of the promisor due to a radical change in circumstances, an award for damages could replace an order for enforced performance in order to provide the necessary relief. For example, in *Tay Joo Sing v Ku Yu Sang* the Singapore Court of Appeal held that in awarding a claim for enforced performance of the conveyance of a half share in a property, the hardship that would be suffered by the other tenant in common resulting from such conveyance had to be taken into account. The court therefore assessed whether damages should be awarded instead of enforced performance.[1474] Hence, severe hardship may result in denial of an action for performance, even where it concerns an obligation to transfer property.[1475] By way of contrast, in *Chua Kwok Fun Kevin and another v Etons Management Consultants Pte Ltd and others* the Singapore High Court was concerned with an action for enforced performance of a settlement agreement entailing the payment of a certain sum and the

1471 Yip Man and Goh Yihan (n 1406) 90.

1472 Phang et al 2012 (n 112), para 23.133; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 206–207; Halsbury's Laws of Singapore (Contract 2016) vol 7 para 80.594; See for cases with personal services *Holiday Inns Inc v Hotel Enterprises Ltd* [1975–1977] SLR 336 (SGHC); *Pub 1997 Pte Ltd v Scorpion* (n 965); *E C Investment Holding Pte Ltd* (n 899).

1473 Hunter 2017 (n 7) 144.

1474 *Tay Joo Sing v Ku Yu Sang* [1994] SGCA 45 [33], [35], (1994) 1 SLR(R) 765.

1475 *Chung Khiaw Bank Ltd* (n 890); Phang and Goh 2012 (n 318) para 1554.

provision of a bank guarantee.[1476] The court awarded the claim for enforced performance of the settlement agreement because on the financial statements it was held that the order would not cause any personal hardship for the non-performing party.[1477] In view of the foregoing, it must be mentioned that the rules on unacceptable hardship works differently than the previously mentioned doctrine of frustration, which, simply put, discharges the non-performing party from its obligations and is, in essence, not concerned with damages. By contrast, the rules on unacceptable hardship requires an assessment as to whether damages in lieu of an award for enforced performance is a more appropriate remedy considering the circumstances of the case. Nonetheless, the promisor shall not be released from its obligations due to hardship when the disturbance of the financial equilibrium of the contract merely derives from financial issues,[1478] such as an increase in the costs of performance. By way of illustration: a manufacturer of home care products cannot avoid a claim for actual performance merely because it has sold its products in a rising market for sustainably sourced palm oil – which is the main ingredient of these products – and, therefore, finds it difficult to obtain this ingredient in the market for a competitive price.[1479] Taking the aforementioned considerations into account, it may be said that under the contract law principles of Singapore, a promisor is not able to escape from its non-monetary obligations when a foreseeable or unforeseeable increase in costs makes performance of a non-monetary obligation, deriving from a commercial sales transaction, more expensive.

Aside from the above mentioned principles, the promisor could also argue that a claim for enforced performance is contrary to the requirements of observance of accepted standards of fair dealing if enforcement would result in an unreasonable (monetary) burden and, therefore, enforcement should not be allowed.[1480] The consideration in the Singapore Court of Appeal Case of *HSBC Institutional Trust Services Ltd v Toshin Development Singapore Pte Ltd* seems to support this approach as the reasoning, in this case, opens the door for acceptance of a general good faith principle for all contracts.[1481] It is advocated that this acknowledgement of a general principle of good faith would make Singapore 'more accessible and commercially attractive to investors'.[1482]

1476 (n 967).

1477 *Ibid* SGHC [9-10].

1478 Halsbury's Laws of Singapore (Contract 2016) vol 7 para 80.594.

1479 Compare the English case *Mountford v Scott* (n 422); Halsbury's Laws of Singapore (Contract 2016) vol 7 para 80.594.

1480 Glen Ting, 'Good Faith in Contractual Agreements in Singapore' (2016) 8(17) Singapore Law Review, Juris Illuminae.

1481 [2012] SGCA 48 [40–42], [45], (2012) 4 SLR 738.

1482 Lee Shen Yang, '*A Look at "Good Faith" in the Common Law*' [unpublished, archived at CJ Koh Law Library] 12.

236. The contract law of China has adopted distinct principles and legal consequences for the scenario that performance has become unreasonably burdensome and expensive, and where the equilibrium of the contract is altered due to a drastic change of circumstances. As for the first situation of hardship, the contract law of China provides the parties to a contract with a right to performance - which may be excluded by the court if the expenses for performances have excessively increased.[1483] This statutory principle is based on the obligation that the parties to a contract shall abide by the principle of good faith in accordance with the nature and purpose of the contract and usage in practice,[1484] which ensures the parties' interest in the thing they bargained for.[1485] It is, however, not clear which standard should be used by the courts to determine that the right to performance cannot be enforced because the costs of performance have excessively increased.[1486] It is submitted that the test should consider the costs and benefits of the promisor (economic efficiency approach),[1487] but it is also held that the assessment must entail a valuation of the costs of performance to be incurred by the promisor versus the benefits of the promisee.[1488] It is also put forward that the costs of performance should be assessed in terms of the benefits of both parties when the contract is properly performed.[1489] In addition, the judges in the Economic Case Trial Division of the Supreme People's Court have stipulated that the costs of enforced performance are also regarded as excessively high if monetary compensation could provide adequate relief to the aggrieved party.[1490]

The statutory principle that enforced performance is not available if performance is unreasonably expensive was applied by the Nanjing Intermediate Court in *Xinyu House Property Development v Feng Yumei*.[1491] In this case, the company Xinyu developed a commercial shopping centre of 60,000 square metres. Approximately 6,000 square metres was partitioned into 150 small retail shops, and one shop was sold to Feng Yumei. After

1483 Art 110 CCL; Zhang 2006 (n 41) 301; Bing Ling 2002 (n 229) para 8.075; Bu 2013 (n 226) 72 para 14; Liming 2016 (n 224) 233.

1484 Art 60 CCL; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 29; Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 399.

1485 Zhang 2006 (n 41) 302.

1486 Yang Zhen Shan, 'On the Necessity of Establishing "Principle of Changed Circumstances" In China' (1990) n 5 Chinese Legal Science 63; Ji Fang, 'Research and Analysis on Exessively High Expenses of Performance in China' (2016) Politics and Law Forum 148.

1487 Zhang 2006 (n 41) 302; Liming 2016 (n 224) 233.

1488 Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 29; Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 399.

1489 Bu 2013 (n 226) 72 para 14; Bing Ling 2002 (n 229) para 8.075.

1490 Li Guogang, *Explanation and Application of the Contract Law* (Xinghua Press, 1999) 438; Zhang 2006 (n 41) 302.

1491 *Jiangsu Nanjing Xinyu House Property Development Limited Company v Feng Yumei* [2006] Nanjing Intermediate Court 6 September (2004) SPC Gazette 2006, issue 6.

a certain period, the entire shopping mall ceased business operations due to excessively high operational costs. To make the shopping centre profitable, it was necessary to redesign the layout of the buildings and, therefore, Xinyu started to repurchase the shops. Feng Yumei refused to cooperate and claimed continuance of performance of the contract. The Nanjing Intermediate Court considered that when the purpose of the contract cannot be realised by enforcement of performance, a claim for actual performance shall not be awarded. The court held that an increase in the costs of performance would make it impossible to achieve the purpose of the contract. This means that when the costs for performance exceed the interest to be gained by both parties through the performance of the contract, the non-performing party may be allowed to avoid actual performance and pay damages instead. In this light, it was adjudicated by the court that performance of the contract would mean that Xinyu was forced to incur excessively high operational costs and that maintaining the small shop would be detrimental to the entire shopping atmosphere. Taking these negative effects into consideration, the claim for continuance of performance was refused, and Xinyu was ordered to reimburse the purchase price of the shop and pay damages.

In addition to the situation that the expenses for performance are excessively high,[1492] enforced performance is also not available where a major unforeseeable (material) change in circumstances has made enforced performance obviously unfair.[1493] Although unfairness may arise from an increase in costs of performance or decrease of the value of the counter-obligation, a gross disparity between the costs and benefits is not demanded.[1494] Nevertheless, the aforementioned exemptions are not easily applied by the court, which accords with the belief that parties conclude a contract for its actual performance and not for the monetary value of their promises.[1495]

Aside from unfairness, it is a requirement that the change in circumstances is inextricably linked with the essential elements of the contract, that it is not be a business risk and that it is not be caused by a *force majeure* which materialised after the formation of the contract by the parties.[1496] In addition, it is held that the major change of circumstances may not be caused by persons or things which fall under the responsibility

1492 Art 110(2) CCL.

1493 Art 26 Judicial Interpretation (I) Contract Law (n 173); Notice on Correctly Applying Judicial Interpretation II Contract Law (n 1425); Bu 2013 (n 226) 58, 60; Bing Ling 2002 (n 229) paras 5.091, 5.093; Chunyan Ding, 'Performance and Breach' in DiMatteo and Chen 2017 (n 19) 318; *E.g.,* a substantial change in state price of aluminium, which results in indisputable injustice or if the state policy on the real estate market is unexpectedly changed; see in this regard *Binhai Entertainment Co Ltd of Haikou City Hainan Province v Hainan Huaxin Realty Management Co Ltd* [2001] SPC 16 May 2001.

1494 Schwenzer, Hachem and Kee 2012 (n 13) para 45.104.

1495 Bing Ling 2002 (n 229) paras 8.011, 8.065.

1496 Notice on Correctly Applying Judicial Interpretation II Contract Law (n 1425); Bing Ling 2002 (n 229) paras 5.089, 5.091, 5.093; Chunyan Ding, 'Performance and Breach' in DiMatteo and Chen 2017 (n 19) 318, 319; Bu 2013 (n 226) 59 paras 26–28.

of the promisee.[1497] In this regard, it is important to mention that in light of the global financial crisis and the increase of legal issues which it has triggered, the Supreme People's Court has stipulated that a distinction between commercial risks and a change of circumstances should be made.[1498] In the view of the Supreme People's Court, commercial risks are changes in supply and demand and price changes which are not abnormal.[1499] In this light, it is held that a change in circumstances should not arise from a risk which derives from the natural operating of the specific market, or from an event which was foreseeable at the moment of conclusion of the contract, or within the reasonable expectations of a normal person.[1500]

Where a claim for enforced performance is brought to court and the promisor argues that enforcement would result in financial hardship due to a change of circumstances after the conclusion of the contract, the courts are obliged to actively direct the parties towards renegotiation of their contract.[1501] In the event the renegotiation fails, the courts are instructed to try to solve the dispute through mediation.[1502] If all measures fail and the court intends to modify the contract or to remove the right to performance by termination of the contract, the court is obliged to obtain approval of the Higher People's Court and the Supreme People's Court.[1503] The aforementioned instructions for the courts are said to protect the right to performance and, in this light, to provide a basis for balancing the interests of the parties in accordance with standards of reasonableness and fairness.[1504] Nonetheless, it should be mentioned that the limitation of the right to performance in case of hardship is merely a judiciary instruction and it is not implemented in the contract law of China. This begs the (unanswered) question to what extent the lower courts are willing to limit the right to performance if the promisor argues that due to a change of circumstances enforcement would result in hardship.[1505]

The considerations above give rise to the question of how the legal concept of *force majeure* relates to situations where hardship occurred due to an unforeseeable drastic

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1497 Bing Ling 2002 (n 229) paras 5.090, 5.092; Bu 2013 (n 226) 59 para 27.

1498 Art 3 Guiding Opinions of the Supreme People's Court on Several Issues concerning the Trial of Cases of Disputes over Civil and Commercial Contracts under the Current Situation, 7 July 2009 (Guiding Opinions); Bu 2013 (n 226) 59 para 29.

1499 Art 3 Guiding Opinions (n 1498).

1500 *Ibid.*

1501 Judicial Interpretation II Contract Law (n 173); Notice on Correctly Applying Judicial Interpretation II Contract Law (n 1425); Art 4 Guiding Opinions (n 1498); Bing Ling 2002 (n 229) paras 5.088, 5.093, 8.014, 8.079; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 31; Bu 2013 (n 226) 59.

1502 Art 4 Guiding Opinions (n 1498).

1503 Notice on Correctly Applying Judicial Interpretation II Contract Law (n 1425); Art 4 Guiding Opinions (n 1498).

1504 Art 4 Guiding Opinions (n 1498); Compare Bing Ling 2002 (n 229) para 5.093; Chunyan Ding, 'Performance and Breach' in DiMatteo and Chen 2017 (n 19) 318.

1505 Zhang 2006 (n 41) 229.

change of circumstances.[1506] The distinction with a situation of hardship was addressed in *Fuping Steel Rolling Co. of Shaanxi Longmen Iron & Steel Co, Ltd v Shaanxi Coke Chemical Co, Ltd.* In this case, it was held by the Shaanxi Higher People's Court that a situation of *force majeure* directly derives from an impossibility to perform due to a change of circumstances, while the doctrine of hardship applies where enforced performance would be severely unfavourable to the promisor.[1507] Despite this clear distinction, the exclusion of a *force majeure* from the application of the hardship doctrine leads to the question of what the impact is on the right to performance if enforcement of performance is rendered obviously unfair because a *force majeure* has made performance excessively onerous.[1508] This situation should be distinguished from cases where performance is objectively impossible due to a *force majeure*.[1509] The judiciary has solved this issue by applying the doctrine of hardship where performance is evidently unfair regardless of the cause of the hardship, that is, a change of circumstances or a *force majeure*.[1510] This shows that a situation of hardship and the legal concept of *force majeure* could coincide. This premise is confirmed by the argument that the doctrine of change of circumstances only applies if the impediment to performance is unavoidable and insurmountable, which also holds true for *force majeure*.[1511] However, in more recent literature a contradicting viewpoint is put forward which suggests that the exclusion of a *force majeure* indicates that the doctrine of a change of circumstances only applies in cases where the impediment for performance could be prevented or overcome.[1512] Given that the courts have applied the doctrine of hardship in both situations, it seems that the issue above is merely theoretical.[1513] The different views on the distinction between the two doctrines have resulted in the rule that application of the doctrine of change of circumstances by the courts is subject to examination of the Higher People's Court, and should be submitted to the Supreme People's Court for examination where necessary.[1514]

1506 Arts 94(1), 117 CCL; Bu 2013 (n 226) 60 para 31, 70 para 3.

1507 *Fuping Steel Rolling Co of Shaanxi Longmen Iron & Steel Co Ltd v Shaanxi Coke Chemical Co Ltd* [2012] Shaanxi Higher People's Court 27 November 2012.

1508 Bing Ling 2002 (n 229) para 8.051; Chunyan Ding, 'Performance and Breach' in DiMatteo and Chen 2017 (n 19) 320.

1509 Arts 94(1), 117 CCL.

1510 Chunyan Ding, 'Performance and Breach' in DiMatteo and Chen 2017 (n 19) 320.

1511 Bing Ling 2002 (n 229) para 5.090; Art 117 CCL stipulates that *force majeure* means any objective circumstances which are unforeseeable, unavoidable and insurmountable.

1512 Chunyan Ding, 'Performance and Breach' in DiMatteo and Chen 2017 (n 19) 319.

1513 *Ibid.*

1514 Notice on Correctly Applying Judicial Interpretation II Contract Law (n 1425); Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 32; Bu 2013 (n 226) 60.

237. *Comparative analysis* – The starting point for this discussion is that the contract law of the Netherlands, Singapore and China act on the universal *pacta sunt servanda* adage, which broadly means that agreements must be kept. However, the three investigated jurisdictions have taken a different approach in protecting this fundamental principle of contract law where performance causes unreasonable efforts and expenses, and where performance becomes more onerous due to a change of circumstances. It appears that the contract law of Singapore has taken the most narrow approach in this regard by following the English common law view on hardship, which does not operate as an exemption to performance, but as a relief in the form of damages in lieu of enforced performance, in exceptional situations. Nonetheless, it seems that Singapore is moving away from the restrictive English liability-based model by allowing a more flexible approach through the application of the requirements of observance of accepted standards of fair dealing. On the basis of this principle, a claim for enforced performance could be denied without directly affecting a potential liability for damages and the existence of the obligation. This adjustment is in line with the approach taken by Dutch and Chinese contract law, as well as the unification instruments.[1515]

That said, the legal systems mentioned above act on entirely different mechanisms for regulating the consequences of an unacceptably onerous performance. This means in effect that performance can be exempted where performance has become unreasonably burdensome or expensive (*i.e.* initial and subsequent imbalance), and where enforced performance has become excessively onerous due to a change of circumstances. In the latter case, the availability of obtaining performance of the initially agreed obligation under the stipulated terms, could also be affected by, for example, an imposed burden to renegotiate the terms, or by judicial modification and termination of the contract. In the latter case, the non-monetary performance obligation ceases to exist. Most unification instruments have regulated their principles for situations where performance has become excessively onerous due to a change in circumstances in a similar way.[1516] Nonetheless, at the domestic and international levels, the thresholds and available judicial instruments to correct an unacceptable change of the equilibrium of the contract vary considerably. As regards the latter point, judicial modification and avoidance of a contract are commonly adopted legal responses affecting the ability to obtain enforced performance of the obligation contemplated at the start of the contract. The contract law of China has also adopted the option of alteration of the contract by the parties as a result of court imposed renegotiation. This additional solution to restore an equilibrium disturbance is also found in the PICC,

1515 Art 79(5) CISG; Art 7.2.2 PICC; Art 9:102(2)(b) PECL; Art III.-3:302 (3)(b) DCFR; Art 7(c) Draft Articles on Non-Performance PACL.

1516 Arts 6.2.3(3), 7.2.2 (b) PICC; Art 6:111, 9:102(2)(b) PECL; Art III.-3:302, art III.1–110 DCFR: art 7(c) or expensive; Arts 7(c), 30(2) Draft PACL, Lee 2016 (n 16) 198, 212.

PECL, DCFR and draft PACL.[1517] The advantage of this practical solution is that parties remain in control, which benefits their relationship more than any judicial interference, although its disadvantages may outweigh the advantage that parties are able to regulate their contractual relationship. This is because it may be assumed that commercial parties generally are inclined to first explore the most economically advantageous route before bringing a claim to court. This route typically entails a process of communication between the parties about acceptable adjustments for each. In cases where this fails, a second round of imposed negotiations will most likely not have a material impact on the dispute, other than a significant and considerable investment in time and recourses. Compared to the above-discussed legal systems, the CISG indirectly regulates its response where performance has become more onerous, and subsequently, the promisor seeks judicial relief. In this situation, it is held that recourse may be had under the PICC and general principles of the CISG to direct the parties to renegotiation.[1518] This appears, however, to be an untenable approach when considering the principle that the exemptions from liability to pay damages due to an unforeseeable change of (*e.g.* economic) circumstances, do not affect the right to obtain enforced performance under the CISG.[1519]

On the issue of different thresholds at the domestic and international levels, the most commonly used method in determining whether enforced performance should not be granted in cases of hardship, is a calculation of the percentage increase in the cost or value of the performance for the promisor, and the decrease in the value of the performance for the aggrieved party.[1520] There is, however, no generally accepted percentage nor any guidelines for its calculation. Whereas in the Netherlands a percentage of 130% is suggested, in China the general notion applies that no gross disparity is required. The contract law of Singapore is also not familiar with predetermined percentages, but it follows that the thresholds for exemptions of liability (in damages and performance) are very high due to the narrow scope of the doctrine of frustration. As for the unification instruments, it is suggested that an increase of between 100% and 200% is required to affect the availability of enforced performance.[1521] Certainly, these viewpoints and the suggestions put forward

1517 Art 6.2.3(1)(2) PICC: the aggrieved party is entitled to request renegotiations; Art 6:111(2) PECL: the parties are bound to enter negotiations; Art III.-1:110 (3)(d) DCFR: the judicial modification and termination is only available if the non-performing party has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation (this is not a duty to renegotiate, see Schwenzer, Hachem and Kee 2012 (n 13) para 45.112; Art 30(2) Draft Articles on Non-Performance PACL: the parties are bound to enter into negotiations with a view of adapting the contract or terminating it.

1518 Art 6.2.3(4) PICC in conjunction with art 9(2) CISG, or on the mere basis of the principle of good faith (art 7(1) CISG), or by construing it as a part of the general principles (art 7(2) CISG); Schwenzer, Hachem and Kee 2012 (n 13) para 45.115; Schwenzer 2016 (n 91) art 79 para 55.

1519 Art 79(5) CISG; Schwenzer 2016 (n 91) para 45.112.

1520 Schwenzer, Hachem and Kee 2012 (n 13) paras 45.101–45.102.

1521 Schwenzer, Hachem and Kee 2012 (n 13) paras 45.106.

in literature are valuable, but broadly accepted guidelines for commercial sales transactions are not available at national or international levels. In light of the above and for the purpose of providing more guidance for those involved in commercial sales transactions, it is recommended that clear and sound financial principles be developed to provide sufficient flexibility for the courts to protect the performance interest of the aggrieved party in view of the necessary protection of the interest of the non-performing party against unjustifiable consequences of a claim for enforced performance. Nonetheless, in light of the example mentioned under paragraph 232, it is also submitted that, in certain commercial sales contracts across civil and common law borders, financial thresholds are not appropriate to deal with an enforcement dispute. At the international level, impediments for performance may go far beyond efforts which are not quantifiable in money. In the provided example, the efforts required to obtain a similar weaving mill within a specific timeframe may result in the imposition of a burden on the manufacturer which is unacceptable in light of the contractual equilibrium. Unfortunately, there are no balanced rules at the international level for situations where performance has become excessively onerous. It is therefore of paramount importance for those involved in international commercial sales transactions to anticipate the situation where the equilibrium of the contract is altered to such an extent that both parties agree to a removal of a claim for enforced performance.

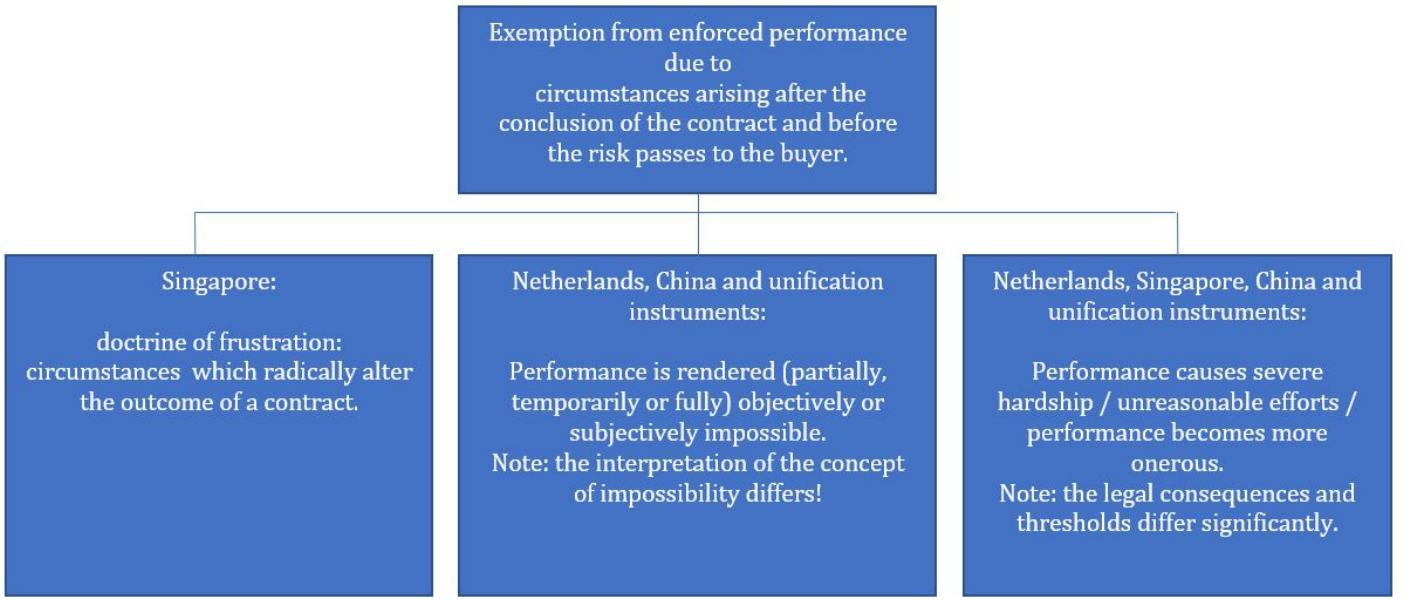
6.2.5 Conclusions

238. The default availability of enforced performance of non-monetary obligations under Dutch and Chinese contract law, as well as the unification instruments, and the primary focus on damages in the common law system of Singapore, results in differing legal concepts for situations where a contracting party requires protection against an order for enforced performance.[1522] This effectively means that the legal concepts for exemption from curing a non-performance is first and foremost an exemption from damages under Singapore contract law. This also holds the explanation that partial or temporary exemption from performance of non-monetary obligations are not familiar concepts under Singapore contract law.

The distinct viewpoints of the three investigated jurisdictions trace back to the underlying legal traditions which may cause significant difficulties for those involved in international commercial sales transactions. Complex issues arise from the different notions of the concept of impossibility, hardship and frustration, although there are situations where their applications coincide. The illustration in Figure 15 below aims to clarify the relationship between the above-mentioned concepts.

1522 See s 4.4 for the disagreement between the subject legal systems.

Figure 15 Exemptions from enforced performance



239. The contract law of the Netherlands, Singapore and China, as well as the unification instruments identified act on the notion that a contractual obligation must be performed even if performance brings about more costs or efforts than contemplated at the start of the contract. Consider, for example, a five-year contract in which a commercial party agrees to ship goods every month from country X to country Y at a fixed price. After one year, fuel prices increase due to a global financial crisis. The seller requests a 5% increase in the initially agreed rate. Generally, the seller is not entitled to raise the agreed price for its performance obligation because it bears the risk of performance becoming more onerous. There are however multiple other less straightforward situations in the realm of commercial sales where the court is forced, or may consider, to exempt the promisor from performance (*e.g.* when a central bank weakens/devalues its own currency and when a country abruptly imposes import tariffs). This section shows that the investigated legal systems allow the court to alter initially allocated contractual responsibilities of the buyer and seller in three situations.

The first exemption to enforced performance concerns a situation where performance is impeded due to an insurmountable factual or legal obstacle. The second exception concerns the situation where performance is unreasonably burdensome or expensive (performance is ruinous for the promisor). For example, a yacht in transit to its buyer is hit by a commercial vessel. Consequently, the yacht sank in very deep water and salvage costs would amount to fifty times its value. The third exemption entails the situation where an exceptional change of circumstances causes a disturbance of the equilibrium of the contract rendering performance excessively onerous. For example, a change of economic circumstances which is of such gravity that the procurement of fabrication of goods would cause the seller to incur unreasonable costs in relation to the contract price.

It appears from the present research that enforced performance may not be available in the above-described three situations, provided that the applicable requirements are fulfilled. For the latter two situations, this means that the costs and benefits of performance must be balanced. At the domestic and international levels, several percentages are suggested to help determine whether or not the ultimate limit of sacrifice has been exceeded. Against this background, efforts to institute uniform guidelines for an economic analysis weighing costs and benefits (leaving aside other uncertain elements) should be encouraged. Nonetheless, based on the research carried out it appears that the key issues do not arise in this regard, but rather when considering the legal impact of the discussed principles on the availability of enforced performance. For example, where performance is rendered unreasonably burdensome or expensive, or performance has become excessively onerous due to a change of circumstances. For both situations, the Netherlands and China, as well as the unification instruments, have taken the approach that the court may refuse a claim for enforced performance. The availability of enforced performance is indirectly affected where performance has merely become more onerousness due to a change of circumstances,

which does not amount to an unreasonably burdensome or expensive performance. In these less severe cases, both the contract law of the Netherlands and China allow judicial modification and avoidance of the contract.

Judicial modification and avoidance are however not available by default under the contract law of China and the vast majority of unification instruments. These legal systems have adopted the prerequisite of renegotiation. Judicially imposed renegotiation of the terms for performance is not a preferable solution because the solution of renegotiations is usually already explored before commercial parties turn to court. That said, the key point here is that under the contract law of the Netherlands and China, as well as the unification instruments, a claim for enforced performance may be fully, partially or temporarily exempted where performance is subjectively impossible or has become more onerous.

In contrast, Singapore contract law is not familiar with the concept of impossibility or hardship due to its English common law foundations, which envisage damages as the preferred remedy to cure a non-performance. That said, when performance has become subjectively impossible or more onerous because of fundamentally changed circumstances (without fault of either party), the non-performing party can be released from performance under the doctrine of frustration. This legal concept contrasts strongly with the aforementioned legal systems in the sense that the only legal response is avoidance. This explains, at least in part, why the contract law of Singapore is not familiar with the concept of a temporary exemption of enforced performance, with a duty to renegotiate or with judicial interference by modification.

Given the foregoing, it follows that the contract law of the Netherlands and China, and the unification instruments, have adopted the most flexible structure, with open-ended principles, which enables the court to seek recourse to the most appropriate means where the severity of the cause renders performance more onerous than anticipated. However, this liberal approach runs counter to the need for legal certainty in international trade. For this, the unitary approach taken by the contract law of Singapore encompasses the advantage that commercial parties are able to determine in advance the enforceability of the obligations when performance has become impossible or more onerous due to a fundamental change of the equilibrium of the contract. Moreover, this solution is only available in a very limited number of cases and thus the approach taken by Singapore encourages commercial parties to take control of their relationship by constructing impossibility and hardship clauses into their contracts. Nonetheless, on an overall assessment, a combination of the approaches taken by the investigated legal systems may have most merit, to wit; an excessively more onerous performance due to a fundamental change of the equilibrium might exempt performance or give rise to judicial alteration of the contract on the demand of either party. That said, considering the universal fundamental principle of *pacta sunt servanda* in light of the necessity of legal certainty in commercial

sales transactions, there should be a significantly high threshold affecting the ability to obtain the very thing parties bargained for.

At a practical level, commercial parties could circumvent the difficulties arising from the divergence between the legal systems by contractual stipulations which best fit the specific circumstances of the agreement. Such contractual stipulations should observe the operative effects and potential mandatory characteristics of the above-discussed principles. In view of this, there are three important points for consideration. Firstly, the clauses dealing with impediments for performance should entail an explanation of the employed concepts. This is necessary because (as observed in this section) the subject legal systems employ a different notion of the concepts which may exempt enforced performance. Secondly, the contractual stipulations should clarify whether the described exemptions from performance are exhaustive or indicative. The reason behind this suggestion is that it clarifies whether a potentially aggrieved party could seek recourse to legal exemption principles if the impediment is not mentioned in the contract. In view of this, the last suggestion concerns the necessity of determining the impact of contractually described impediments on the availability of enforced performance of a non-monetary obligation. That being said, the contractual allocation of the situations exempting the non-performing party from enforced performance should be read in conjunction with the discussion about the differing viewpoints on the admissibility of derogatory agreements.[1523]

6.3 Delayed request for delivery

240. *Preliminary* – The following provides an analysis of a very important constraint which potentially limits the availability of enforced performance of non-monetary obligations under a commercial sales contract, that is, a non-actionable duty of the buyer to require performance within a certain timeframe. This discussion is supplementary to the earlier discussed rules on inspection and notification of any defects discovered (section 5.4.4) and the limitation of a claim for enforced performance (section 6.4). The idea that the buyer is subject to a duty to request performance within a certain time limit, generally arises under hardship considerations because a delayed claim may make it significantly harder for the seller to perform its obligations. The following discusses to what extent the requirement of a timely request for performance of non-monetary obligations (in the realm of commercial sales) is adopted in the three investigated jurisdictions and how the applicable national rules relate to the approach(es) taken by the unification instruments.

1523 Ch 8.

Illustration – Company A, a manufacturer of nutritional products, located in country X, sells to Company B, located in country Y, a new type of vitamin D to be delivered on 19 March at the warehouse of Company B. The manufacturer fails to deliver the vitamins on time (*i.e.* the specified time for performance triggered the delay; a notice is not required), but Company B only requests for delivery of the vitamins six months after the agreed time for delivery. In this situation, the question arises whether the availability of enforced performance of the seller's delivery obligation is affected by the delayed request to deliver the goods, although the formal limitation period for claiming enforced performance has not yet lapsed. It should further be noted that the time of delivery was not of the essence.

241. *Domestic approaches* – Dutch contract law acts on the notion that enforced performance shall not be granted where this is unacceptable according to the requirements of reasonableness and fairness.[1524] This principle is the foundation of the doctrine of forfeiture of rights which could limit a claim for enforced performance where it is established that the aggrieved buyer neglected to pro-actively secure its right by demanding performance without undue delay.[1525] The mere passing of time, however, does not suffice to establish that the aggrieved buyer has waived its rights to enforced performance.[1526] The aforementioned principle is reflected in the rule that the aggrieved promisee may no longer invoke a defect in performance if the latter has not protested to the promisor in respect thereof promptly after it has discovered, or reasonably should have discovered the defect.[1527] The underlying idea is that the aggrieved buyer has acted in such a manner that the seller in all reasonableness cannot be expected to deliver the goods as promised, thus affecting the right of the buyer to claim for delivery of the goods in accordance with the contractual stipulations.[1528] The principle that the right to enforced performance is affected by a delay in requesting performance, however, only applies in cases of a defective delivery in fact (section 5.4.4) and where the seller fails to transfer title free from all special charges and encumbrances.[1529] In circumstances where the seller did not deliver the goods at all, the seller may seek recourse to the standards of reasonableness and fairness where an undue delay in requesting delivery brings about unacceptable hardship for the seller if an order

1524 Art 6:248(2) DCC.

1525 MBM Loos in Schelhaas 2002 (n 19) 356.

1526 *Oostenbroek v Nekami* Dutch Supreme Court 8 December 1989, ECLI:NL:HR:1989:AG6222, NJ 1990, 474; *Van den Bos v Provincial Insurance Company Limited* Dutch Supreme Court 29 September 1995, ECLI:NL:HR:1995:ZC1827, NJ 1996, 89; MBM Loos in Schelhaas 2002 (n 19) 356.

1527 Art 6:89, 7:23(1) DCC.

1528 Arts 6:89, 7:23(1) DCC; MBM Loos in Schelhaas 2002 (n 19) 357; De Jong, Krans and Wissink 2018 (n 194) 213.

1529 Arts 6:89.7:23, 7:17, 7:15 DCC; De Jong, Krans and Wissink 2018 (n 194) 213; *Brocacef v Simons* Dutch Supreme Court 23 March 2007, NJ 2007, 176, ECLI:NL:HR:2007:AZ3531.

for performance is provided. This is only conceivable in exceptional cases, as the thresholds for application of the derogatory effect of the standards of reasonableness and fairness are set very high because it results in a waiver of rights (*i.e.* the right to claim for performance of the seller's delivery obligation).[1530] As for the length of delay, it may be assumed that the guidelines for defective performance apply, that is; the aggrieved buyer has to 'promptly' inform the seller of the non-delivery after it has or should reasonably have discovered that the goods were not delivered.

242. The contract law of Singapore provides a specific solution in the form of the equitable doctrine of laches for the situation where the seller may be prejudiced if, long after the stipulated time for performance, the other party sues for enforced performance. The doctrine of laches must be considered along the lines of the principle that enforced performance is a discretionary and exceptional remedy (section 4.4.3), which allows the courts to deny a claim for enforced performance when an unjustified delay has a detrimental effect on the position of the non-performing party.[1531] The defence of laches limits the availability of equitable relief in the sense that it may be used by the courts to refuse enforced performance of non-monetary obligations (*e.g.* delivery of goods) in case of an undue delay and where this causes prejudice or injustice.[1532] In other words, the doctrine of laches applies where enforced performance would be practically unjust because the undue delay may be regarded as an equivalent to a waiver of the option to enforced performance.[1533] As for the calculation of the length of delay, it is clear that the time starts to run from the moment the aggrieved party knew or ought to have known of the non-performance.[1534] Where the promisor is notified about the failure in performance, the period starts to run from the date of the notice and not from the moment the failure in performance

1530 Art 6:248(2) DCC; De Jong, Krans and Wissink 2018 (n 194) 11–13, 289–295.

1531 Treitel 1998 (n 55) para 43.

1532 *Chng Weng Wah v Goh Bak Heng* [2016] SGCA 9, (2016) 2 SLR 464 [44]; see for the element of unreasonableness (unconscionability) *Re Estate of Tan Kow Quee* [2007] 2 SLR(R) 417 [33]; *Management Corporation Strata Title Plan No 473* (n 326) 1 SLR(R) 418 [33]; *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 [46]; cited in *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 [37]–[38] and *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 [58]); Halsbury's Laws of Singapore (Civil Procedure Law 2016) vol 4, para 50.146; Phang et al 2012 (n 112) para 20.031 *ff.*; Shenoy and Loo 2013 (n 13) para 18.6; Clare Stanley and Michael J Ashdown, 'Laches and Limitation' (2014) 20(9) Trusts and Trustees 958; Note that the equitable jurisdiction to refuse performance on the ground of laches is not affected by S 32 Limitation Act (Cap 163 rev ed 1996).

1533 Report of the Law Reform Committee On the Review of the Limitation Act (Cap 163 rev ed 1996), February 2007, 10.

1534 *Lim Beng Cheng* (n 615) SGHC 282 [116]; *Management Corporation Strata Title Plan No 473* (n 326) SLR(R) 418 [33]; Phang et al 2012 (n 112) para 20.36.

occurred.[1535] The assessment of the length of the period and whether it qualifies as an undue delay varies from case to case.[1536] The same applies to the question of whether the undue delay has caused prejudice or injustice.[1537]

243. In the contract law of China, the availability of enforced performance is subject to the requirement that performance must be demanded within a reasonable time.[1538] Where the aggrieved party fails to act in accordance with this duty, its right to enforced performance is exempted but all other remedies are preserved.[1539] The rationale for this provision is threefold, namely, contracting parties should be prevented from speculating on market prices; undue delay may induce the non-performing party to believe that performance is no longer required; and the economic (efficiency) nature of concluding of a contract requires that the aggrieved party contributes to a timely settlement of a dispute over failure in performance.[1540] For example, a claim for enforced performance was rejected because the claimant had waited several years to bring this claim to court after a wrongful termination.[1541] As for the length of the period, the courts are given the discretionary power to determine the reasonable time given all the circumstances of the particular case, the principle of good faith,[1542] and the rules on limitation (section 6.4).[1543] The latter means in

1535 *Management Corporation Strata Title Plan No 473* (326) 1 SLR(R) 418 [33]; Phang et al 2012 (n 112) para 20.036; Shenoy and Loo 2013 (n 13) para 18.6.

1536 Singapore High Court in *Toh Tiong Huat v PM Gunasaykaran* [1995] 3 SLR(R) 627; In *Tay Joo Sing* (n 1474) SGCA 45 [34] the purchaser of a property brought a claim to court for enforced performance 25 months after the purchaser and the seller entered into the contract of sales. The purchaser made the seller believe that he abandoned the contract and after 25 months he demanded the transfer of the property. Since it was considered that the behaviour of the seller amounted to acquiescence, therefore, remedies of common law were the appropriate remedy instead of specific performance; Halsbury's Laws of Singapore (Contract 2016) vol 7 para 80.588; See for an undue delay of 9 years *British and Malayan Trustees Ltd v Sindo Realty Pte Ltd (in liquidation) and other actions* [1998] SGHC 92 [65], (1998) 1 SLR(R) 903.

1537 *E.g.,* where delay have resulted in a loss of evidence causing several disputes between contracting parties. See *Chng Weng Wah v Goh Bak Heng* (n 1532) SLR 464 [59].

1538 Art 6, 110(3) CCL; Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 398; Bing Ling 2002 (n 229) para 8.076; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 30; Bu 2013 (n 226) 22, para 9.

1539 Ye Changfu 2005 (n 990).

1540 Bing Ling 2002 (n 229) para 8.076; Ye Changfu 2005 (n 990).

1541 *Wen Wufa v Guilin Commerce Bureau* [1991] Guangxi Guilin Xiufeng District Peolple's Court and Guilin Intermediate People's Court (1991) RJDC 1992, 1027; Bing Ling 2002 para 8.076, footnote 31.

1542 Art 110 (3) CCL stipulates that a promisee is not entitled to claim actual performance of a contractual obligation if it does not claim performance within a reasonable time; Arts 135–141 of the GPCL; see art 6 CCL for the obligation to act in good faith; Bing Ling 2002 (n 229) para 8.076.

1543 Art 188 *ff* GPCL; Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 399; Bing Ling 2002 (n 229) para 8.076; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156). 30.

effect that the period starts to run from the time when the aggrieved party knew or ought to have known about the non-performance.[1544]

244. *Comparative analysis* – The three investigated jurisdictions, and the unification instruments recognise the possibility that a non-performing seller or buyer might be prejudiced if, long after the due date of the obligation, the aggrieved party requires performance.[1545] The subject legal systems also each act on the notion that the aggrieved party is expected to claim for enforced performance from such time as it knew or ought to have known of non-performance on the part of the other party. There is, however, a significant divergence between the legal consequences arising from the non-actionable duty of the aggrieved party to request for correct performance within a timeframe which does not unduly harm the interest of the non-performing party. The following focusses on enhancing the understanding of the differing viewpoints, since they are essential for determining the degree the non-performing party's interest is protected against abuse relative to the protection of the performance interest of the other party. In view of this, it is important to bear in mind that only the unification instruments have taken the approach that the buyer is subject to an enforceable obligation to take delivery of the goods.[1546] As previously discussed, the three investigated jurisdictions act on the notion that a failure in taking delivery (or to cooperate) results in a situation of *mora creditoris*.[1547] Hence, the following considerations are most relevant for the seller's delivery obligation, which is actionable in all the subject legal systems – provided that the applicable prerequisites are met.

245. Under Dutch contract law, the buyer is provided with a right to enforced performance of a non-monetary obligation, but it may lose all available remedies to cure the seller's non-performance when the high threshold of an unacceptable delay in requesting performance is fulfilled. The preceding sections reveal that this approach is mirrored under Singapore contract law. That is to say, the latter acts on the notion that enforced performance is only available in specific situations (and even these cases are subject to counter-exceptions), while the consequences of an undue delay of a request for performance by application of the doctrine of laches are significantly less severe. This is because the common law doctrine of laches only affects the availability of specific remedies; the aggrieved buyer may still claim for damages. Although the outcome is the same under

1544 Bing Ling 2002 (n 229) para 8.076.

1545 Art 7.2.2(e) PICC; Art 9:102(3) PECL; Art III.–3:302(4) DCFR; Art 7(e) Draft Articles on Non-Performance PACL; Under the CISG, the rule that the buyer is required to demand performance within a reasonable time is limited to cases where the buyer demands repair or replacement of non-conforming goods.

1546 S 5.3.

1547 *Ibid.*

Chinese contract law and the PICC, PECL, DCFR and the draft PACL, the legal consequence follows from different principles and distinct approaches towards balancing the interest of commercial parties. That is, an unacceptable delay in requesting performance may deprive the buyer of its right to enforced performance, but it does not affect other remedies.[1548] This rule, in effect, protects the seller against hardship deriving from a delayed request for delivery of the goods in accordance with the contractual stipulations.

With regard to the length of delay, the contract law of China, as well as the aforementioned unification instruments, adopt a straightforward starting point, which is supplemented with general guidelines. That is, the aggrieved buyer is required to claim for delivery within a reasonable time.[1549] The length of the reasonable time period depends on the nature of the non-performance, the nature of the goods (*e.g.* durable or perishable goods), the purpose of the rules (*i.e.* protection of the seller against hardship), guarantees as to the absence of defects, trade usages and practices between the parties, and all other circumstances.[1550] For example, the length of the reasonable period to demand performance may depend on the time the aggrieved party needs to determine whether it could obtain replacement goods from another source. Where this can be easily established, the time for requiring performance is shorter than when it takes a significant amount to make the necessary inquiries as to the availability of substitute goods. Furthermore, it may be assumed that for commercial sales contracts, the aggrieved buyer is required to demand delivery after it discovered or should have discovered the non-delivery.[1551]

The aforementioned elements play a key role in determining the impact of the buyer's delay in requiring delivery in the example mentioned under paragraph 240. In this example, the impact of the undue delay on the seller's interest shall be weighed against the legal detriment on the side of the buyer arising from its failure to request delivery. In view of this, the loss of all remedies under Dutch contract law, suggests that the barrier is set high for accepting the defence of the seller that enforced performance of the obligation to deliver the vitamins should not be awarded due to the detrimental effect of the delayed request on its interest. Under Chinese contract law and from the viewpoint of the vast majority of the unification instruments identified, the buyer could also lose its right to obtain delivery of the vitamins, although it is still entitled to claim for damages. It appears that Singapore

1548 The duty to request performance within a reasonable time is limited in the CISG to cases where the buyer claims for cure of fundamental defects by delivery of replacement goods or repair (art 46(2)(3) CISG). It is further important to note that the principle of observance of good faith does not directly apply between parties when their contract is governed by the CISG; Art 7.2.2(e) PICC; Art 9:102(3) PECL; Art III.–3:302(4) DCFR; Art 7(e) Draft Articles on Non-Performance PACL.

1549 Art 7.2.2(e) PICC; Art 9:102(3) PECL; Art III.–3:302(4) DCFR; Art 7(e) Draft Articles on Non-Performance PACL.

1550 Vogenauer 2015 (n 19) art 7.2.2 para 54.

1551 Art 7.2.2(e) PICC; Art 9:102(3) PECL; Art III.–3:302(4) DCFR; Art 7(e) Draft Articles on Non-Performance PACL.

courts should come to the same conclusion, as a delay in requesting delivery may result in a loss of the right to avoid the contract. However, as the aforementioned example concerns the sale of commodity goods, it appears that enforced performance of the seller's delivery obligation is not available under the Singapore sales law. Hence, for determining the actual operative effect of a specific barrier to enforced performance, it is necessary to recognise that legal principles are intimately interconnected and therefore only explicable by reference to the whole.

In view of the foregoing, it is of significant practical relevance to establish express contractual stipulations for requiring performance after the due date, in particular regarding the legal consequences arising from a total failure in performance of this duty. Nonetheless, such contractual provisions may not entirely sidestep the restrictions on the freedom of contract when they aim to interfere with statutory rules on the availability of enforced performance of non-monetary obligations. It is therefore of paramount importance that contractual provisions regulating the situation of a delayed request for performance are assessed in light of the rules on derogatory agreements.[1552]

6.4 Limitation of the action

6.4.1 Introduction

246. This section deals with the question of whether the availability of enforced performance is affected where such a claim is brought to court long after the stipulated time for performance (*e.g.* delivery of the goods). This issue requires an assessment of the rules on limitation periods set out by legislation.[1553] There are five issues discussed in this regard which are contrasted against the rules on limitation periods laid down in the PICC, PECL and DCFR.[1554] The first issue concerns the classification of limitation periods, to wit; procedural or substantive (section 6.4.2). The question of whether a limitation period is

1552 Ch 8.

1553 The expression 'limitation periods' will be used as a synonym for extinction of a claim or a right to enforced performance. The term prescription is also found (usually in a civil law context), but it appears that the latter term focusses on the impact of the effluxion of time on a right to ownership. Moreover, the phrase prescription often refers to substantive rules for claims being time-barred. The phrase limitation period is generally found in common law and appears to focus on the action or claim itself and is usually of procedural nature. See for interesting insights about the aforementioned distinction between precription and limitation: The Jersey Law Commission, 'Consultation Paper Prescription and Limitation' No 1/2008/CP (March 2018).

1554 The two other unification instruments examined in this research (*i.e.* CISG and the draft PACL) do not include limitation periods. The United Nations Conventions on the Limitation Period in the International Sale of Goods has not been adopted by the Netherlands, Singapore and China to date, and is, therefore, excluded from the present comparative undertaking.

of procedural or substantive nature is of significant importance for sales transactions between parties with places of business in different jurisdictions because the rules on limitation periods differ greatly.[1555] If the statutory rules on limitation periods – to be determined in light of the law governing the contract – are of a procedural nature, the question regarding whether a claim for actual performance is barred is governed by the law of the country in which the action for enforced performance is brought *(lex fori)*. In the case where the applicable limitation period is qualified as substantive law, the matter concerning the rules on limitation periods is governed by the choice of law designated in the contract *(lex contractus)*. In general, civil law countries follow the substantive approach by adopting the rules on limitation periods in the contract law principles.[1556] Common law jurisdictions generally tend to qualify the rules on limitation periods as being of procedural nature.[1557] The second issue concerns the starting point of limitation periods, the length of the relative and (if applicable) absolute maximum limitation period under the three subject jurisdictions, and whether these periods are aligned with the modern approach for commercial sales transactions as laid down in the unification instruments (section 6.4.2). The third issue concerns the question of whether contracting parties are allowed to modify a statutory time limit in their contract in the face of party autonomy (section 6.4.3). The fourth issue concerns the possibility of renewal and extension of limitation periods by conduct of contracting parties (section 6.4.4). The last issue discussed here concerns the legal consequences of not requiring performance within the applicable limitation period (section 6.4.5).

6.4.2 The limitation period itself

247. *Preliminary* – This section deals with the limitation regime for enforced performance of a contractual obligation. The focus is on the question of whether the investigated legal systems have adopted a uniform or two-tier system (*i.e.* a relative and absolute limitations period), and whether different rules are laid down for commercial sales contracts. Where this is the case, one must be aware of the danger of the difficulties ensuing from the borderline between commercial contracts subject to the 'standard' limitation periods and the deviating periods for sales contracts. This is particularly relevant for international commercial contracts which, for example, entail elements of sales of goods and lease, or sales of goods and services. Moreover, it is important to bear in mind that where a limitation period regime is focussed on the (legal) nature of the 'right' (*i.e.* obligation to do something, damages or unjustified enrichment), the legal position of the promisor is not always clear.

1555 Schwenzer, Hachem and Kee 2012 (n 13) para 51.01.
1556 Schwenzer, Hachem and Kee 2012 (n 13) para 51.07.
1557 Schwenzer, Hachem and Kee 2012 (n 13) para 51.09.

With this in mind, outlines of the limitation regimes adopted by the three investigated legal systems and to what extent their defined approaches align with international trends are analysed below.

> *Illustration* – Company A, a multinational technology business, located in country X, has sold 100 defibrillators to an international airline, located in country Y. The airline is required to have defibrillators available on its aircrafts as from 2017. The parties agree that the defibrillators have to be delivered on 10 June 2016. However, after two years, the airline has still not received the defibrillators and demands delivery. In this situation, the question arises whether the technology company could be protected against a delayed request for performance.

248. *Domestic approaches* – Dutch contract law does not make a distinction between limitation of a claim for monetary and non-monetary obligations under a sales contract. This means that a claim for payment of the purchase price and delivery of the goods expires after five years.[1558] The limitation period starts to run on the day following the day the promisee is entitled to enforced performance.[1559] If no term has been set for performance, the contractual obligation may be immediately performed as well as demanded, subject to due consideration of the standards of reasonableness and fairness.[1560] In this situation, the limitation period of five years starts to run from the moment the obligation could be performed. If it turns out that the contract is concluded for an indefinite period, the limitation period of five years shall not begin to run until the beginning of the day following the one on which the promisee gives notice of its intention to request the court to order the promisor to perform its contractual obligations.[1561] That said, the limitation period for

1558 Arts 3:307(1), 3:323(3) DCC; The right of action to claim performance of an obligation secured by mortgage shall not be prescribed until expiry of twenty years from the day following the one on which the mortgage has been attached to the obligation.

1559 Art 3:307(1) DCC; Sieburg, *Asser 6-II* (n 532) paras 400, 404; Hartkamp 2011 (n 80) para 195; the right to claim compensatory damages and penalties is covered by art 3:310 paragraph 1 of the DCC, which encompasses a limitation period of five years. This limitation period starts to run from the beginning of the day following the one on which the prejudiced person becomes aware of both the damage or that the penalty become exigible and the identity of the person responsible therefor, and, in any event, on the expiry of twenty years following the event which caused the damages or made the penalty exigible.

1560 Art 3:307(2), 6:38, 6:248(1) DCC; Sieburgh, *Asser 6-I* (n 363) para 240; Dutch Parliamentary History Book 6 (n 207) 170, 171; Dutch Parliamentary History Book 3 (n 204) 162 *ff*; *Visser v Erven Kroon* Dutch Supreme Court 12 November 1999, ECLI:NL:PHR:1999:AA3369, NJ 2000, 67; This principle applies, *i.a.,* to contracts whereby the promisor promises to keep safe and return a thing, which the promisee entrusts or will entrust to him or her (art 7:600 DCC) and contracts whereby one of the parties gives up a thing to another on the condition of its return by the borrower, after the latter has used it (art 7A:1777 DCC).

1561 Art 3:307(1) DCC covers contractual obligations and is in this respect the *lex specialis* of art 3:313 DCC. The latter stipulates that for an obligation to give or to do something, the prescription (in this research

the obligation to provide the source codes of customised hardware and software only starts to run from the moment the purchaser needs the codes due to obsolescence of the purchased user rights (simply put, if developed hardware and software becomes outdated).[1562]

By way of derogation from the general limitation period of five years, Dutch contract law adopts an exception for a defective performance, to wit; a limitation period of two years applies in cases of non-conformity of the goods.[1563] This period starts to run pursuant to the notification about the discovered defects.[1564] After expiry of the two-year period, the buyer may not claim that delivery does not conform to the contract.

In any event, however, the right to enforced performance of a contractual obligation and cure of a defect expires after twenty years.[1565] The final limitation period of twenty years starts to run from the beginning of the day following the one on which performance could be claimed,[1566] if necessary after a notice of termination of the contract by the promisee.[1567] This means that a contractual obligation could become time-barred, even if the promisee was not aware of the existence of its right to claim for enforced performance.[1568] However, the final limitation period does not start to run in the event the promisee is not able to claim enforced performance of the contract due to a situation of *force majeure* or a prohibition imposed by law.[1569] In other words, the promisee needs to be actually capable of requiring enforced performance of the initial obligation.

249. Under Singapore contract law the historically imposed distinction between the common law action for obtaining enforced performance of monetary and non-monetary obligations has resulted in two distinct doctrines which are, to some extent, related. The starting point is the Singapore Limitation Act, which entails the statutory principle that an action founded on a non-monetary obligation emerging from a commercial sales contract cannot be

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referred to a limitation) period starts to run at the beginning of the day following the one on which immediate performance can be claimed.

1562 Sieburg, *Asser 6-II* (n 532) para 404; *Van Genk v De Wild* Dutch Supreme Court 21 June 1996, ECLI:NL:HR:1996:ZC2107, NJ 1997, 327.

1563 Art 7:23(2) DCC.

1564 S 5.4.4.

1565 Art 3:307(2) DCC.

1566 *E.g.,* if the contract entails a term which stipulates that the obligation persists for an indefinite time after a certain period has elapsed.

1567 Art 3:307(2) DCC; *Visser v Erven Kroon* (n 1560).

1568 Hartkamp 2011 (n 80) para 196; It should be noted that the Dutch Supreme Court considered that the non-performing party is not entitled to seek recourse to art 6 EVRM where the aggrieved party claims for enforced performance and the limitation periods have not yet lapsed. Art 6 EVRM brings about the principle that in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law; Dutch Supreme Court 29 June 1990, ECLI:NL:PHR:1990:AD1189, NJ 1991, 337; Sieburg, *Asser 6-II* (n 532) para 359.

1569 Sieburg, *Asser 6-II* (n 532) para 401; Dutch Supreme Court 31 October 2003, ECLI:NL:HR:2003:AL8168, NJ 2006, 112.

brought to court after the expiration of six years, which start to run from the moment the promisor fails to perform its contractual obligations.[1570] This means that in cases of non-conformity, the limitation period generally starts to run once the goods are delivered.[1571] The same approach has been developed by the UN Limitation Convention.[1572] There is no long-stop period for non-monetary obligations arising from a contract. The limitation period of six years also starts to run as long as it can be established that the promisee knew of or could have been aware of the failure in performance but did not exercise reasonable diligence to discover it.[1573] In the case of a continuing obligation to deliver goods, the limitation period starts to run on every day the promisor fails to perform its obligation (the cause of the action) until the last day of that continuing obligation.[1574] There are no guidelines in the Singapore Limitation Act for establishing an alternative starting date for the statutory limitation period in the case a contract does not provide a specific time for performance.

With regard to the relation between the doctrine of laches and the Limitation Act, it should be noted that in *British and Malayan Trustees Ltd v Sindo Realty Pte Ltd* it was argued that the defence of laches did not apply since there are already statutory bars in the Limitation Act (Cap 163, 1996 Ed).[1575] This argument was not accepted by the Singapore High Court on the grounds of the statutory principle that nothing in the Limitation Act shall affect any equitable jurisdiction to deny a specific remedy on the ground of acquiescence, laches or otherwise.[1576] For example, in *Tay Joo Sing v Ku Yu Sang* it was held by the Court of Appeal that a delay of 25 months in bringing an action to court constitutes laches which subsequently led to a denial of an order for enforced performance of a non-monetary obligation.[1577] In a similar vein, the Singapore High Court denied in *Chew Ai Hua Sandra v Woo Kah Wai and another* a claim for enforced performance of the obligation to issue a purchase option for a property due to a delay of 16 months in bringing an action to court via a writ of summons.[1578] The court based its judgement on the view that it is commonplace that an equitable remedy, such as a claim for the performance of a non-monetary obligation, should provide relief to the aggrieved party

1570 Limitation Act (Ch 163, rev ed 1966), s 6(a)(1)(7); Halsbury's Laws of Singapore (Civil Procedure Law 2016) vol 5, para 50.148; the failure in performance is the so-called cause of the action.

1571 Limitation Act (Ch 163, rev ed 1966), s 6(1)(a).

1572 Art 8–10 UN Limitation Convention (4 years).

1573 The guideliness for establishing whether a promisee has exercised reasonable diligence are laid down in *Robert Chua Teck Chew v Goh Eng Wah* [2009] SGCA 40; Halsbury's Law of Singapore (Carriers 2016) vol 3, para 30.352.

1574 *Lim Check Meng v Orchard Credit Pte Ltd* [1997] 3 SLR 795; Halsbury's Law of Singapore (Carriers 2016) vol 3, para 30.352.

1575 *British and Malayan Trustees (* (n 1536) SGHC 92 [64].

1576 *Ibid.*

1577 (n 1474); *British and Malayan Trustees* (n 1536) SGHC 92 [65].

1578 [2013] SGHC 120 [57], (2013) 3 SLR 1088.

(*i.e.* the seller who suffered prejudice due to a lengthy delay in claiming performance) and not the party who abandoned the contract.[1579]

250. The civil law system of China is also familiar with limitation periods for enforced performance. However, recent legal reforms and the interplay between the General Principles and the General Provisions require careful consideration of the applicable rules which shape the limitation regime under Chinese law. Until 1 October 2017, the starting point was a general two year limitation period for enforced performance of contractual obligations. The General Provisions deviates from this principle by adopting a time period of three years.[1580] According to the Supreme People's Court interpretation of the latter,[1581] the limitation period of three years applies where it starts running after 1 October 2017. Where the two year period has not expired on this date, the limitation period of three years applies. As for the commencement of the general limitation period, the two year period commences on the day the promisee knows or ought to know of the infringement of its right.[1582] The limitation period of three years commences on the day the promisee knows or ought to know that its right is infringed and the identity of the promisor.[1583]

Aside from the extension of the general limitation period, the General Provisions also stipulate that a limitation period of four years applies to international commercial sales contracts, calculated from the date on which the aggrieved party knows or ought to have known about the failure in performance of the contract.[1584] This principle is limited by the rule that the courts are not able to award a claim for actual performance if twenty years have elapsed since the failure in performance.[1585]

251. *Comparative analysis* – Taking into consideration the above, three different approaches to the regulation of limitation periods can be distinguished. The first approach may be characterised as a uniform limitation regime, which entails only one general limitation period and a maximum period. This structure is adopted by the PICC, PECL and DCFR, and brings about a general limitation period of three years and a maximum limitation period of ten years for the enforcement of obligations arising from a commercial contract.[1586] The second approach follows a similar structure but has developed an exception for a

1579 *Ibid* SGHC 120 [56], [57].
1580 Art 188 General Provisions 2017 (n 172).
1581 Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Limitation of Action Provided in the General Provisions 2017 (n 172). The aforementioned Judicial Interpretation clarifies the interplay between the GPCL and the General Provisions 2017.
1582 Art 137 GPCL.
1583 Art 188 General Provisions 2017 (n 172).
1584 Art 129 CCL.
1585 Art 137 GPCL; Art 188 General Provisions 2017 (n 172).
1586 Art 10.2(1)(2) PICC; Arts 14:201, 14:307 PECL; Arts III.-7:201, III.-7:307 DCFR.

defective performance. This means in effect that non-monetary obligations under a commercial sales contract is subject to a general limitation period, a specific limitation period in case of non-conformity of the goods and an absolute maximum period. This structure is adopted by Dutch and Chinese contract law, as well as the CISG (the CISG only entails a distinct limitation period for a defective performance).[1587] The contract law of Singapore follows the third approach which may be regarded as a rather simple one because it entails only one limitation period for all contractual obligations. Nonetheless, the availability of enforced performance of non-monetary obligations under a commercial sales contract can also be affected indirectly by the defence of laches and via the general principles on the discretionary power of the courts to deny or allow such a claim. In view of the aforementioned considerations, it appears that in the example mentioned under paragraph 247, the claim of the airline for delivery of the defibrillators is not affected by the discussed limitation periods due to the relatively short period between the moment the delay in performance is triggered and the request for delivery. Nonetheless, in more complicated international commercial sales contracts which entail different elements and with deliveries in different time zones, the variety of approaches at the domestic and international levels may cause significant confusion about the real length of a limitation period.

It must also be mentioned that the limitation periods discussed in this section do not rule out the possibility that enforced performance is not available in cases of any undue delay in requesting performance which causes unnecessary prejudice and injustice (section 6.3). However, difficult issues may emerge where the time allowed for demanding performance is longer than the general or maximum limitation period. This could occur where a limitation period applies, although the time for requesting performance only started to run recently because the promisee could not know or ought to have known of its right to performance at an earlier stage. As for the general limitation periods, the PICC appears to be the only instrument to have clarified this matter by adopting the principle that the reasonable time for giving notice prevails over the applicable limitation period.[1588] In other words, where the reasonable time for requiring performance is longer than the general limitation period, the former prevails. It is, however, said that this principle does not apply to the maximum limitation period.[1589]

1587 Art 39(2) CISG brings about the rule that after the expiry of two years, the aggrieved buyer is not entitled to claim for enforced performance in the form of cure by repair or replacement. Nonetheless, contracting parties may extend or shorten this period by guarantee.

1588 Art 10.1(1) PICC; Vogenauer 2015 (n 19) art 10.1 para 9.

1589 Vogenauer 2015 (n 19) art 10.1 para 9.

6.4.3 Modification by agreement

252. *Preliminary* – In cases where commercial parties to a sales contract feel the need for longer or shorter general and/or maximum limitation periods, the key question arising is whether the applicable law allows this, and if so, to what extent. The approaches taken by legal systems can be divided into three categories, to wit; (i) legal systems which prohibit agreements on limitation periods; (ii) legal systems which allow modification within certain limits, and (iii) legal systems which allow modification without restriction. The regime adopted by legal systems is generally the result of a balancing of the public interest which limitation periods are intended to serve and party autonomy.[1590] The premise here is that the public interest requires protection against a situation of legally unbridled, unknown and indefinite claims. The protection of party autonomy is based on the notion that where the promisor gives up its protection (provided by limitation periods) in the initial contract or by a later agreement, private autonomy should prevail. The discussion below shows that the three investigated legal systems have balanced these elements in entirely different ways, which brings about almost diametrically opposed limitation regimes for enforced performance of a commercial sales contract. Please note that only the fundamental principles surrounding agreements to limitation periods are relevant for the present research, and therefore, the domestic intricacies and the international viewpoints are only briefly discussed.

> *Illustration* – A producer of VR (Virtual Reality) headsets, located in country X, concludes a sales contract with a social media company, located in country Y, for the development, production and sale of 1000 VR headsets, to be delivered on 12 March 2015. The parties also agree that the obligation to deliver the VR headsets for the stipulated price cannot expire before 2025.

253. *Domestic approaches* – There is a significant difference between the three investigated jurisdictions as to the question of whether the statutory limitation periods discussed above can be modified by commercial parties. The disagreement between the legal systems generally follows from two different objectives of the rules on limitation (and prescription), that is, protection of the public interest by preventing costly and long drawn-out lawsuits,

1590 Vogenauer 2015 (n 19) art 10.3 paras 1–4; Christian von Bar, Eric Clive, Hans Schulte-Nölke et al (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Articles and Comments* (prepared by the Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (Acquis Group)) 548–549; Schwenzer, Hachem and Kee 2012 (n 13) para 51.16.

and protection of the interest of the promisor by providing legal certainty.[1591] When considering the impact of the express provisions on limitation periods for non-monetary obligations under a commercial sales contract, Dutch contract law takes the most seller-friendly approach by permitting the parties to modify the statutory rules on limitation provided that a contractually stipulated limitation period does not exceed the statutory limitation periods or is unreasonably onerous to the other party.[1592] The rule that a contractual limitation period may not exceed the applicable statutory limitation period follows from the principle that the promisor is not allowed to waive its rights to raise the defence of limitation before the expiry of this period.[1593] In other words, contracting parties are not allowed to lengthen the limitation period by initial or later agreement (except when this follows from settlement agreements). By contrast, the contract law system of China does not permit contracting parties to reduce or extend the statutory limitation periods by party agreement.[1594] However, if the short or final limitation period has expired, the contracting parties are free to conclude a new contract, which may include enforcement of performance of the unperformed obligations.[1595] The Singapore Limitation Act makes no provisions in relation to whether it is possible for commercial parties to modify the relevant limitation period. As for English law, it is held that the parties are entitled to agree to extend and to shorten the limitation periods provided for under the Limitation Act.[1596] This raises the question of whether the courts of Singapore would also allow extension or reduction of limitation periods by agreement, express or implied.[1597] It seems that Singapore has not yet taken a position on this matter. If the position in English law is followed by Singapore courts (by the application of the English Law Act), an agreement to reduce or extend the limitation period should be possible (without limitation), although where such an agreement is not allowed, an extension can be effective when it is considered as a waiver of rights or promissory estoppel.[1598] In view of this, it must be noted that a system which

1591 D Busch and E Hondius (eds), *Principles of European Contract Law and Dutch Law (Part III). A Commentary II* (Kluwer Law International 2006) 239.

1592 Sieburg, *Asser 6-II* (n 532) para 422; Hartkamp 2011 (n 80) para 196.

1593 Art 3:322(3) DCC; Busch and Hondius (n 1591) 240.

1594 Art 197 General Provisions 2017 (n 172); Art 2 of the Provisions of the Supreme People's Court on Several Issues concerning the Application of Statute of limitations during the Trial of Civil Cases (Judicial Interpretation No. 11 [2008]); Bu 2013 (n 226) 28, para 31. The General Principles does not encompass express provision for agreements to limitation periods.

1595 Bu 2013 (n 226) 29 para 31.

1596 English Law Commission 270, *Limitations of Actions* (2001) paras 2.96, 3.170 <http://www.lawcom.gov.uk/app/uploads/2015/03/lc270_Limitation_of_Actions.pdf> accessed on 14 December 2017.

1597 English Law Commission 270, *Limitations of Actions* (2001) paras 2.96, 3.170 <http://www.lawcom.gov.uk/app/uploads/2015/03/lc270_Limitation_of_Actions.pdf> accessed on 14 December 2017.

1598 A waiver of right is a kind of promisorry estoppel. This common law device brings about that where a seller agrees to extend the limitation period, and thus induces the belief that the buyer preserves a claim for

allows for modification of limitation periods without restrictions may overshoot the mark. This is because a party with a better negotiating position may unfairly prejudice the other party by an excessive reduction or extension of the limitation periods. That having been said, where this issue is addressed by the Singapore courts, they may adopt a different viewpoint if this is required by the circumstances existing in Singapore.[1599]

254. *Comparative analyses* – The starting point for the following comparative analyses is that the applicable statutory limitation periods for claiming enforced performance of non-monetary obligations cannot be extended under Dutch and Chinese contract law. Unfortunately, the position under Singapore law is not clear on the matter. When considering the national perspectives in view of the approaches taken by the PICC, PECL and DCFR, it appears that these unification instruments have adopted a model which strikes a good balance between public interest, legal certainty, protection of performance interest and party autonomy. The essence of this model is that contracting parties are allowed to reduce and to extend the applicable limitation periods within certain limits.[1600] However, it appears that the PICC is too restrictive for commercial sales transactions (in particular where it concerns fast moving and perishable goods) because it does not allow the parties to reduce the maximum limitation period to less than four years, and the general limitation period to less than one year.[1601] To put the limitive scope of the considerations above into context, the contractual extension of the applicable limitation period in the example mentioned under paragraph 252 shall not have the desired effect under Dutch or Chinese law (it appears that the same can be assumed for Singapore law when this is appropriate in view of the circumstances existing in Singapore), nor under the unification instruments identified.

As for the discussed legal systems which disallow extension of the applicable limitation periods, it is important to note that a contractual warranty concerning any hidden defects in the goods also has the effect of lengthening the limitation periods. It is submitted here that such an option is desirable in the realm of commercial sales contracts because it allows the parties to strike a balance of interests that fit the purpose of their agreement.[1602] The

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enforced performance of the seller's delivery obligation, the seller is not entitled to assert the defence of limitation after the expiry of the contractual extended time period; Anson's Law of Contract (n 360) 493; Schwenzer, Hachem and Kee 2012 (n 13) para 51.18.

1599 Statutes of the Republic of Singapore, Application of English Law Act (Cap 7A Rev Ed 1994) s 3.

1600 Art 10.3(2) PICC (the parties may not shorten the general limitation period to less than one year and the maximum limitation period to less than four years; the parties may extend the maximum limitation period to more than fifteen years); Arts 14:601(2), 14:307 PECL (the limitation periods may not be reduced to less than one year or extended to more than ten years); Art III.-7:601(2) DCFR (the period of presription may not, however, be reduced to less than one year or extended to more than thirty years).

1601 The parties are allowed to extend the general limitation period, but it cannot be longer than the maximum period.

1602 Vogenauer 2015 (n 19) art 10.3, para 13; Busch and Hondius (n 1591) 239.

same proposition applies to situations where commercial parties prefer to postpone the due date of a performance obligation in their initial or by a later contract. These legal inroads effectively circumvent the statutory restrictions for agreements to limitation periods without causing any harm on an equal level playing field. That is; for contracts between commercial parties who are competent and acquainted with the intricacies of the envisaged transactions which may require shorter or longer limitation periods. It falls, however, outside the scope of the present research to investigate whether the domestic courts would accept such agreements which in essence intend to shorten or lengthen a statutory limitation period.

6.4.4 Renewal and extension of limitation periods

255. *Preliminary* – As shown in the previous sections, the three investigated jurisdictions and the PICC, PECL and DCFR have taken the approach that enforced performance of a commercial sales contract is only available within certain time limits. These statutory boundaries are, however, not carved in stone. This may be justified due to the role of limitation periods in encouraging those who have claimed to materialise them in order to end a situation of legal uncertainty.[1603] This fundamental policy reason explains that, in special circumstances, limitation periods for enforced performance could be altered by conduct of the contracting parties. The two main situations considered here are: the promisor's acknowledgement (*i.e.* recognising or admitting) of its obligation to performance and commencement of a judicial proceeding. Considering that only the fundamental principles in this regard are relevant for the present research, the domestic intricacies of these situations and the international trend are jointly analysed below.

> *Illustration 1 (acknowledgement)*
> A wine producer is obliged to deliver 400 bottles of wine to B. The obligation to deliver the bottles of wine is due on 30 November 2018. On 28 November 2018, the wine producer delivers 200 bottles and confirms that it will deliver the remaining bottles as soon as it is able to. The wine producer sends a fax to B on 1 March 2019, which states that the remaining bottles of wine shall be ready for shipment on 1 August 2019.

> *Illustration 2 (commencement of judicial proceeding)*
> A is entitled to delivery of five cars by B. The delivery of the cars is due on 15 November 2013, but B fails to deliver the cars. On 1 December 2017, A commences a judicial proceeding to enforce B to deliver the cars. On 19 January 2019, the court dismissed

1603 Schwenzer, Hachem and Kee 2012 (n 13) para 51.03; Art III.–7:302 DCFR, Comment A.

the claim for enforced performance due to a subsequent objective impediment for delivery.

256. *Domestic approaches* – As for the first situation, it is recognised in the legal systems of the Netherlands, Singapore and China that the promisor's acknowledgement of its obligation to perform brings about a renewal of the general limitation period for enforced performance.[1604] As for the impact of the commencement of a judicial proceeding, it is first noted that the legal systems of the Netherlands and China classify limitation periods as substantive law (as earlier mentioned, the term prescription is commonly used in civil law jurisdictions for substantive rules that disallow an action or claim after a certain period of time). This framework of substantive principles brings about the effect of the mere interruption of the limitation periods at the commencement of a judicial procedure.[1605] The reference to interruption implies that a new limitation period starts to run when the judicial proceedings begin. This may have the unwanted consequence that the limitation period expires during the judicial proceeding.

Both legal systems forestalled this situation through different principles, although with a similar result. Under the Dutch legal system, the limitation period is considered as not interrupted in the case a claim is withdrawn or denied by the court, unless, within six months after the decision or termination of the proceeding, a new claim is filed and awarded by the court.[1606] Where a claim for enforced performance is awarded by the court, a limitation period of twenty years starts to run from the beginning of the day following that of the decision.[1607] The recent amendments in China have solved the issue by adopting an approach where the limitation period shall be recalculated from the moment of interruption and the termination of the judicial proceeding.[1608]

The current position under Singapore law is that limitation periods qualify as procedural law, bringing about that the limitation period for enforced performance ceases to run when the judicial proceeding starts.[1609] When a claim for enforced performance is awarded, a new limitation period for an action upon this judgment starts to run.[1610] Nonetheless, in the case a commercial sales contract is governed by foreign law, the law of that other

1604 NL: art 3:318 DCC; SGP: Limitation Act (Cap 163 rev ed 1996), s 26; CHN: art 140 GPCL, art 195 General Provisions 2017 (n 172).
1605 NLD: art 3:316(1) DCC; CHN: art 140 GPCL, art 195 General Provisions 2017 (n 172).
1606 Art 3:316(2) DCC; Sieburg, *Asser 6-II* (n 532) para 425; Hartkamp 2011 (n 80) para 197.
1607 Art 3:324(1) DCC.
1608 Art 195 General Provisions 2017 (n 172).
1609 Report of the Law Reform Committee on Limitation Periods in Private International Law, January 2011 <https://www.sal.org.sg/Portals/0/PDF%20Files/Law%20Reform/2011-01%20-%20Limitation%20Periods%20in%20PIL.pdf> accessed on 29 November 2018.
1610 Limitation Act (Cap 163 rev ed 1996), s 6(1)(c), (3).

country relating to limitation periods applies.[1611] This principle is necessary to prevent Singapore courts applying their own limitation periods (of procedural nature) to the exclusion of foreign limitation periods, and potentially allowing claims for enforced performance although barred elsewhere, but also potentially denying claims for enforced performance although enforceable in other jurisdictions.

257. *Comparative analyses* – The three investigated jurisdictions, as well as the PICC, PECL and DCFR, have adopted the principle that renewal of the general limitation periods for enforced performance is triggered by an acknowledgement of the obligation by the promisor.[1612] At the international level, the synonyms used for renewal are discontinuance, interruption or cessation.[1613] The question 'what constitutes an acknowledgement' should, however, be considered carefully due to the countless forms in which acknowledgement may occur in commercial trade at the national and international levels. Nonetheless, it may be assumed that the fax used in the example in paragraph 255 is sufficient acknowledgement because it shows unambiguously that the seller is aware of its delivery obligation. As a result, a new limitation period starts to run on 1 March 2019. Any further discussion about the required level of sufficient acknowledgement in the legal systems identified, does not bring about fundamental academic issues, something which cannot be said of the alteration of limitation periods by the commencement of a judicial proceeding to obtain an order for enforced performance.

The main reason is the esoteric classification of limitation periods as substantive or procedural matters, although the actual impact of the applicable rules may not differ significantly at closer look.[1614] In this regard, it is noted that the principle under Singapore law that the limitation periods of the law governing a cross-border commercial sales contract apply, brings the law of Singapore into line with the international trend of not necessarily favouring the *lex fori* in the classification of limitation periods.[1615] This, in effect, means that Singapore has simplified the matter for commercial contracts which are subject to the law of another court. In these cases, the law of the other country relating to time limits for enforced performance of a non-monetary and monetary obligation applies (*i.e. lex contractus*).[1616] Moreover, this rule provides the necessary clarity because limitation periods, their impact on party autonomy and legal consequences vary tremendously between the subject legal systems. The aforementioned approach accords with the

1611 Foreign Limitation Periods Act (Cap 111A Rev Ed 2013), s 3(3)(1)(a).
1612 NL: art 3:318 DCC; SGP: Limitation Act (Cap 163 rev ed 1996)s 26; CHN: art 140 GPCL, art 195 General Provisions 2017 (n 172); Art 10.4 PICC; Art 14:401 PECL; Art III.-7:401 DCFR.
1613 Art 10.4 PICC; Art 14:401 PECL; Art III.-7:401 DCFR.
1614 S 6.4.5.
1615 Schwenzer, Hachem and Kee 2012 (n 13) para 51.04 *ff*.
1616 Foreign Limitation Periods Act (Cap 111A Rev Ed 2013), s 3(1)(a)(b).

classification of limitation periods as a substantive matter in the legal systems of the Netherlands and China. As for the latter two, the actual impact of interruption of a limitation period is in line with the approach taken by the unification instruments, to wit; a claim for enforced performance is suspended during the proceedings.[1617] At the end of the judicial proceedings, the actual impact on the limitation period can be determined. As a general rule, the outcome differs between judgements on the merits of the case and judgments that do not relate to the merits of the case. In the latter case, it may be assumed that the initial limitation period revives once the judicial proceedings have come to an end.

To put the considerations above in the context of the second example mentioned under paragraph 255, the claim for delivery of the cars ceases to run from the commencement of the judicial procedure under the Singapore legal system. The Dutch and Chinese legal systems, as well as the unification instruments, have taken the approach that the limitation period is merely suspended by the judicial procedure. In view of the divergence between the approaches discussed above, it is submitted here that on an overall assessment of the theoretical principles, the abstruse classification of limitation periods, the legal consequences arising therefrom and the different terminology used in this regard at domestic and international levels, may cause confusion among contracting parties involved in commercial sales contracts across the borders of the three investigated jurisdictions. To forestall issues arising therefrom, contracting parties to a commercial sales contract across the borders of the investigated legal systems should consider these issues when selecting the law governing the contract with due respect for the legal boundaries discussed in section 6.4.2 and 6.4.3.

6.4.5 The effects of expiration

258. *Preliminary* – Before diving into the effects of the expiration of a limitation period on the enforceability of non-monetary obligations under a commercial sales contract, it is of paramount importance to first briefly reiterate the classification of limitation periods in the subject legal systems. This matters because cultural notions and legal traditions (*i.e.* civil and common law) underlying the three investigated jurisdictions have taken a different approach in this regard, which may cause confusion amongst those involved in commercial trade across civil and common law borders. The key point in that regard is that limitation periods can be classified as a matter of substantive or procedural law. This classification brings about that the matter is governed by the *lex contractus* or *lex fori* respectively, which in turn plays a role in determining the applicable rules on, for example, renewal and

1617 Art 10.5 PICC; Art 14:302 PECL; Art III.-7:302 DCFR.

extension (section 6.4.4) and the legal consequences of the expiry of a limitation period. In jurisdictions where the substantive approach applies, a claim for enforced performance can be extinguished (strong effect). The other option is that the existence of the obligation is not affected, but the promisor is not obliged to perform (weak effect). Legal systems which consider limitation periods as a procedural matter arrive at a similar position as the substantive weak approach, but its focus is on the action or claim.[1618] At the moment the limitation period has expired, the aggrieved party is barred from bringing a claim to court for enforcement of a contractual or statutory right to performance (*i.e.* the right has not been extinguished), provided that the claim for enforced performance is not already barred through the operation of the common law concept of the equitable doctrine of laches (section 6.3).

> *Illustration* – A manufacturer, located in country X, is obliged to deliver 10 customised 3D printers to an engineering company, located in country Y, on 12 March 2012. The manufacturer delivers five 3D printers on 10 March 2012. Concurrently, the manufacturer confirms that it shall deliver the other printers before 1 June 2012. The manufacturer fails to deliver the 3D printers due to production issues. Although the limitation period has expired, the engineering company brings a claim to court for enforced performance of the manufacturer's delivery obligation.

259. *Domestic approaches* – As for Dutch and Chinese contract law, limitation periods are of a substantive nature, which means that the *lex contractus* regulates the time permitted for obtaining an order for enforced performance. Under Dutch and Chinese contract law, these principles bring about that a court is not entitled to reject on its own motion a claim for enforced performance of a contractual obligation on the basis that a limitation period has expired.[1619] In other words, the seller has to raise the defence that the claim of the promisee cannot be allowed due to the expiry of the applicable limitation period.[1620] Until this defence is accepted by the court, the right to claim enforced performance remains available to the aggrieved buyer.[1621] At the international level, the PICC, PECL and DCFR follow the same approach.[1622] The two jurisdictions also agree on the effects of the expiry of the limitation periods, that is, the seller is provided with a right to refuse performance

1618 Vogenauer 2015 (n 19) art 10.9 para 1.

1619 Art 3:322(1) DCC; Hartkamp 2011 (n 80) para 194.

1620 Art 3:322(1) DCC; Hartkamp 2011 (n 80) para 194; Art 193 General Provisions 2017 (n 172); Bu 2013 (n 226) 20 para 2. Previously, the court was obliged to undertake a preliminary assessment of whether a claim for enforced performance should be refused on the grounds of the expiry of a limitation period; See Bu 2013 (n 226) 19–20 paras 1–2.

1621 MWE Koopmann, 'commentaar op artikel 322 Boek 3 BW' para 3 in *Groene Serie Vermogensrecht* (n 530).

1622 Vogenauer 2015 (n 19) art 10.9 para 1; Art 14:501 PECL; Art III.–7:101 DCFR.

because the right to enforced performance is time-barred (weak effect).[1623] Put differently, the performance obligation itself is not affected if the limitation period has expired; it is only the right to claim enforced performance which is not available to the aggrieved buyer.[1624] This means in effect and for example, that a promisor is not entitled to bring a claim to court for unjustified enrichment if it (accidentally) performs the initial contractual obligation and the promisee receives the thing it initially bargained for.[1625] This approach reveals the consistent emphasis on the importance of the bindingness of a contractual promise which prevails in the above mentioned legal systems.

Although the common law system of Singapore qualifies limitation periods as procedural matters for conflict of law purposes, the impact on the existence of a claim for enforced performance is not that different. This is because it only bars a claim for remedial relief (be it enforced performance or damages) under the *lex fori*.[1626] Moreover, the doctrine of laches and the discretionary power of the courts in Singapore to deny enforced performance due to an undue delay is substantive law because it affects the performance obligation itself. With regard to the procedural rules, a Singapore court is not entitled to deny a claim for enforced performance of a (non-) monetary obligation on the basis that a limitation period has expired - unless the promisor has expressly brought this defence to court.[1627] Where a seller successfully argues that the limitation period has expired, only the availability to claim for enforced performance is affected[1628] and the primary obligation to perform the contract itself is not extinguished. As a result, the performance of an expired contractual obligation does not entitle the performing party to demand monetary compensation on the basis of unjust enrichment.

260. *Comparative analyses* – Despite the significant doctrinal differences and the more subtle disparities between the rules on limitation at national and international level, the effect of the expiry of a limitation period on a claim for enforced performance is almost similar. That is, the availability of obtaining enforced performance is only restricted by the limitation periods; the obligation itself still exists. Furthermore, the expiration of the

1623 Schwenzer, Hachem and Kee 2012 (n 13) paras 51.06–51.07; Art 14:501 PECL; Art III.–7:101 DCFR, Comment B (Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Articles and Comments).

1624 Hartkamp 2011 (n 80) para 194.

1625 Hartkamp 2011 (n 80) para 198; Art 192 of the General Rules of the Civil Law of the People's Republic of China 2017; Bu 2013 (n 226) 20 para 3.

1626 Report of the Law Reform Committee on Limitation Periods in Private International Law, January 2011, p. 6 <https://www.sal.org.sg/Portals/0/PDF%20Files/Law%20Reform/2011-01%20-%20Limitation%20Periods%20in%20PIL.pdf> accessed on 29 November 2018.

1627 Limitation Act (Cap 163 rev ed 1996), s 4; Halsbury's Law of Singapore (Commercial Law 2014) vol 5, para 50.146.

1628 Limitation Act (Cap 163 rev ed 1996), s 6(1) stipulates that an action founded on a contract shall not be brought to court after the expiration of six years from the date on which the cause of the action accrued.

limitation period must be asserted by the court on the defence of the promisor. This approach is also followed by the PICC, PECL and DCFR.[1629] This, in effect, means that if the court asserts the expiration of the limitation period on the defence of the manufacturer, the obligation to deliver the customised 3D printers in the example mentioned under paragraph 258 still exists, although enforced performance of the obligation itself is time-barred. An important aspect of this means of regulating the impact of the expiry of a limitation period is that it protects the interest of the seller because the latter may refuse performance after a certain time. On the other hand, the fact that the obligation does not cease to exist also protects the buyer's interest against a counterclaim from a seller who cannot be forced to perform its own obligation. A similar protective effect follows from the rule that the court is only entitled to refuse a claim for enforced performance on the basis of the expiry of a limitation period if the seller has raised this defence. On this matter, too, the three investigated jurisdictions, as well as the PICC, PECL and DCFR,[1630] have adopted the same approach. Considering the observations above, it may be said that the rules on the expiry of a limitation period as adopted by the legal systems strike a good balance between the interests of the parties to a commercial sales contract.

6.4.6 Conclusions

261. In addition to the timeline for requesting performance in a timely manner (following from hardship considerations),[1631] all the subject legal systems have taken the approach that a claim for enforced performance of non-monetary obligations under a commercial sales contract cannot be brought to court after the expiry of a certain period. The principles considered in this section reveal that this rule is the outcome of balancing the public interest, the individual interest of contracting parties, and the general notion of party autonomy. Another important common denominator is that the subject legal systems all agree that the expiration of a limitation period merely acts as a barrier for enforced performance; the contractual right to performance underlying the claim of the aggrieved buyer is not affected. This shows that doctrinal differences (substantive *vs* procedural approach) are not necessarily reflected in the consequences of a legal principle. That said, there is considerable divergence in the ability of contracting parties to contractually alter the limitation periods. Whereas Dutch contract law only permits the parties to reduce a limitation period, Chinese contract law statutory limitation periods cannot be modified by the parties in either way. By contrast, it appears that Singapore contract law will most likely acknowledge an extension and reduction of a limitation period. Interestingly, Dutch

1629 Art 10.9(1) PICC; Art 14:501 PECL; Art III.-7:501(1) DCFR.
1630 Art 10.9(2) PICC; Art 14:501 PECL; Art III.–7:101 DCFR.
1631 S 6.3.

and Singapore contract law use the same concept to justify their approaches. Dutch contract law acts on the notion that extension is not desired because this will amount to a waiver of rights (*i.e.* the right of the seller to assert the defence of limitation). The contract law of Singapore uses the concept of a waiver of right (and promissory estoppel) to legitimise an extension of the limitation period where such a clause cannot be enforced on its own terms.

Despite the diametrically opposed viewpoints described above, it appears that the unification instruments all offer a balanced approach on their own merits, by permitting commercial parties to extend or shorten the limitation period within certain limits. National legislators seeking a similar balanced approach to accommodate and intensify commercial trade within its borders, must be aware that these limits on a reduction or extension by party agreement are inextricably linked with the length of the applicable statutory limitation period. Any undertaking to equalise the availability of enforced performance of a commercial sales contract in this regard, is also complicated when considering the fact that the contract law of Singapore only knows one limitation period for commercial sales contracts, whereas Dutch and Chinese contract law provide for a relative and maximum limitation period, and limitation periods for specific situations (*i.e.* delivery of non-conforming goods and international commercial sales contracts respectively).

That having been said, there is a silver lining when considering the rules on renewal and extension. That is, all the subject legal systems adopt the principle that the acknowledgement of the seller's or buyer's contractual right to performance triggers a renewal of the limitation period. The three investigated jurisdictions, as well as the unification instruments identified, are also aligned (from a practical viewpoint) in cases where a claim for enforced performance is awarded, that is; the promisee is provided with a new limitation period for execution of the judgement. Nonetheless, the actual impact of limitation periods on the availability of enforced performance varies enormously between the investigated legal systems due to numerous subtle differences arising from the rules on limitation, each with their own domestic rationale. To equalise the availability of enforced performance (which ultimately prevents forum shopping), national legislators may draw inspiration from the discussed unification instruments because they have significantly reduced the complexity arising from the domestic approaches. In the meantime, those involved in commercial sales contracts across the borders of the three investigated legal systems, and aiming to bring about a properly balanced set of principles regulating the impact of limitation periods, should be aware that contractual stipulations in this regard may not have the desired effect. This, in effect, means that commercial parties should be especially wary of involving themselves in sales contracts which deviate from limitation periods where this is not allowed under the law governing the contract.

6.5 Duty to mitigate in the form of a precautionary cover transaction

262. *Preliminary* – This section discusses the question of whether a buyer is subject to a duty to obtain substitute goods as a measure to mitigate damages arising from the non-delivery of goods or the delivery of non-conforming goods, where damages would be likely to increase, and the related consequences of the non-fulfilment of the duty to mitigate. This question is particularly relevant when the buyer favours having the goods delivered by the seller as stipulated in the contract and is not interested in avoidance of the contract and subsequently claiming for damages. That said, where an aggrieved buyer wants the court to order a non-performing seller to deliver the goods in accordance with the features set out in the contract, why would the buyer want to take any steps to undertake a precautionary cover purchase to mitigate damages? After all, it may be said that an action for enforced performance is usually brought to court by the buyer when it considers the goods as unique, and where there are no substitute goods available, or it requires delivery of the seller for other reasons. Nonetheless, where the buyer could obtain substitute goods without significant effort or expenses, the question arises as to whether enforced performance of the initial delivery obligation is still available where this would bring about a substantial increase in damages to be paid by the seller (*e.g.* shipment costs, customs duties and flying over of engineers from abroad to cure a defect).[1632] This assessment touches on issues such as the relationship between statutory duties to mitigate damages arising from a non-delivery and non-conforming goods in relation to the availability of obtaining an order for enforced performance, the role of the overarching principle of good faith and the standards of reasonableness and fairness.

> *Illustration* – A commercial food research company in country X purchases microscopes from a manufacturer, located in country Y, for a number of ongoing research projects. Because the delivered microscopes contain too much of highly toxic material (*i.e.* beryllium), the research company demands replacement of the microscopes of the manufacturer. However, the research company could also purchase the microscopes from a local supplier, which would have the effect that the manufacturer only has to cover the costs incurred by the research company and does not have to pay for additional shipping costs and customs duties for the delivery of the replacement microscopes. In this situation, the question arises whether the research company is still entitled to enforced delivery of the microscopes, although the former could mitigate the losses of the manufacturer fairly easily by obtaining the microscopes from another supplier.

1632 Cohen and McKendrick (n 4) 221, 227.

263. *Domestic approaches* – Dutch contract law recognises the duty of an aggrieved buyer to mitigate damages when it is able to do so and when this is reasonable in the circumstances given. This principle, however, does not by default exclude the buyer's right to enforced performance. This is because the aforementioned duty to mitigate loss relates only to damages. Nonetheless, where the aggrieved buyer unreasonably requires enforced performance of a delivery obligation when it could reasonably undertake a precautionary cover transaction, the non-performing seller may seek recourse to the Dutch contract law principle that contracting parties are bound to act in accordance with the requirements of reasonableness and fairness.[1633] This means, in effect, that an aggrieved buyer is obliged to take into account the interest of the non-performing seller when bringing a claim to court for enforced performance of the delivery obligation.[1634] In other words, the buyer could be under a duty to undertake a precautionary cover purchase when this substantially mitigates the damages of the seller in view of the costs arising from the fulfilment of an order for enforced performance of the initial delivery obligation. This premise should be viewed along the lines of the standards of reasonableness and fairness,[1635] as well as in light of the notion that a claim for enforced performance could be considered as an abuse of the right to claim for enforced performance if this would result in an imbalance between the buyer's interest in the exercise of its right and the seller's interest that would be harmed as a consequence of enforced performance of its delivery obligation.[1636] From these considerations, the conclusion may be drawn that it cannot be excluded that a claim for enforced performance of a right to delivery of the goods shall be refused by Dutch courts if such a judgement would unreasonably burden the seller, and the buyer is able to obtain substitute goods from another source, and when forcing the seller to deliver the goods would not be more beneficial to the buyer than obtaining substitute goods.

Under the contract law of Singapore, the principle of mitigation of damages in the form of a precautionary cover purchase as mentioned above is not considered as a stand-alone barrier to enforced performance of the seller's obligation to deliver the goods. This follows from the fundamental rule that enforced performance is only available in exceptional situations (section 4.4.3). The underlying principle is that damages are considered as the most adequate remedy where substitute goods are available at the marketplace. Hence, the question as to whether the buyer is obliged to undertake a precautionary cover purchase is already incorporated in the default assessment as to whether enforced performance is available. In view of the foregoing, it appears that a non-performing seller may be forced to deliver the goods as promised in the contract, if

1633 Arts 6:2(1), 6:248(1) DCC; *Baris v Riezenkamp* (545).
1634 *Multi Vastgoed* (n 568).
1635 Art 6:248(2) DCC.
1636 Art 3:13(2) DCC.

the buyer is not able to obtain substitute goods from another source – because the goods are short in supply, and damages are not adequate to provide the necessary relief. That having been said, it appears from the considerations above that Singapore courts generally shall not grant an order for enforced performance of a delivery obligation where substitute goods are available at the marketplace due to the principle that an order for damages would allow the buyer to obtain the goods itself.

Under the contract law of China, a buyer's failure to mitigate damages in instances of a non-delivery and delivery of non-conforming goods is primarily regarded as a barrier to a claim for damages and not as a limitation to enforced performance of the seller's performance obligations.[1637] However, when considering that the good faith principle aims to prevent social waste,[1638] it does not come as a surprise that it is broadly accepted amongst Chinese legal writers that enforced performance may be refused by Chinese courts where replacement goods are available at the marketplace and a cover transaction mitigates the seller's damages and equally satisfies the aggrieved buyer.[1639] In these instances, the buyer's duty to undertake a cover purchase follows from the previously mentioned overarching statutory good faith principle.[1640] Given the above, it appears that the contract law of China entails the uncodified principle that enforced performance of a delivery obligation is not available where the aggrieved buyer could reasonably obtain substitute goods.

264. *Comparative analysis* – The present section considers whether an aggrieved buyer is subject to a duty to mitigate damages deriving from the non-performance of the seller by obtaining substitute goods on the marketplace; and if so, to what extent a failure in performance of such a duty affects the availability of a claim for enforced performance of the seller's delivery obligation. The discussion in the present section reveals that three points require particular attention. The first issue concerns the uncertainty of whether a buyer is by default subject to a duty to take reasonable measures to mitigate the impact on the seller's interest by obtaining a coverage purchase. The second issue relates to the legally unframed effect for a buyer to obtain substitute goods where they are reasonably available. The third point relates to the theoretical differences between the discussed principles,

1637 Art 114 GPCL; Art, 119(1) CCL; Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 391; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 32.

1638 Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 391.

1639 Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 400; Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 32, 33; Bing Ling 2002 (n 229) para 8.078; Lee 2016 (n 16) 323.

1640 Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 32, 33; Lei Chen, 'Damages and Specific Performance in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 400; Bing Ling 2002 (n 229) para 8.078.

although at a practical level they appear to bring about the same impact on the availability of enforced performance when dealing with a situation where replacement goods are reasonably available in the commercial marketplace.

The first two issues come into play when considering the stance of Dutch and Chinese contract law. It can be seen from the preceding discussion that both jurisdictions are familiar with an uncodified (non-actionable) duty of the buyer to obtain substitute goods where this is required according to the standards of reasonableness and fairness, and the principle of good faith respectively. This effectively means that a claim for enforced performance of a delivery obligation shall not be granted where this would significantly burden the seller, and the aggrieved buyer could reasonably prevent this by obtaining substitute goods – as long as this would provide the aggrieved buyer with the same benefits. The CISG adopts a similar approach by excluding the right to enforced performance where it follows from the principle of observance of good faith in international trade and the buyer could reasonably obtain substitute goods from another source.[1641] In a similar vein, the DCFR limits the availability of enforced performance where a buyer unreasonably insists on delivery of the goods by the seller when the former could easily obtain the goods elsewhere, and when enforcing the seller to deliver the goods would have an unreasonable financial impact on the latter. The control over such abuse under the DCFR is that the right to enforced performance must be exercised in accordance with the principle of good faith and fair dealing.[1642] It may, however, not be assumed that enforced performance is by default excluded where the aggrieved buyer could purchase replacement goods. The prevailing principle under Dutch and Chinese contract law, as well as the CISG and DCFR, is that enforced performance is only limited where substitute goods are available in the marketplace, and the buyer may fairly be required to acquire these goods as a reasonable measure to mitigate the financial impact on the non-performing seller. The applicable assessment standards are reasonableness and fairness, and good faith. It appears, however, that there is tension between the approaches described above, and the regulation of the limitation of enforced performance through a duty to obtain substitute goods under the PICC. The latter entails the notion that if a sales contract for staple goods is not performed, a request for enforced performance from an aggrieved buyer shall not be granted if the non-performing seller proves that the aggrieved buyer may reasonably obtain substitute goods.[1643] The rationale behind this rule is that it causes the buyer not to waste time and effort in forcing the non-performing seller to deliver the goods, even if this would mean that the buyer is obliged to purchase the goods at a higher price and therefore is deprived

1641 Art 77 CISG; Clayton Gillette and Steven D Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2nd edn, Cambridge University Press 2016) 370; Schwenzer 2016 (n 91) art 46 para 14.; Schwenzer, Hachem and Kee 2012 (n 13) para 44.262; Treitel 1998 (n 55) para 72.

1642 Art III.-3:302 DCFR Comment J (n 1590).

1643 Art 7.2.2(c) PICC.

of its right to performance.[1644] In a similar vein, the PECL codified the principle that enforced performance is excluded in the situation where the buyer, without experiencing much difficulty, may obtain the goods from another supplier.[1645] The draft articles on non-performance of the PACL have also adopted a provision which excludes enforced performance where the aggrieved buyer may reasonably obtain substitute goods from another source.[1646] The official commentary reveals, however, that this provision does not impose an actionable obligation on the aggrieved buyer to do so.[1647]

Turning to the last matter, it must first be noted that a discussion about a potential duty of the aggrieved buyer to obtain substitute goods as a reasonable measure to mitigate damages is unnecessary for the contract law of Singapore. This is because the availability of a substitute transaction is absorbed in the assessment of the court to award a claim for enforced performance of the delivery of specific or ascertained good if it thinks fit, and the overarching adequacy of damages test which applies to a claim for enforced performance of a delivery obligation which is not governed by Singapore sales law. This consideration should be viewed in light of the majority view under Dutch and Chinese contract law, as well as the unification instruments, which entails that a claim for enforced performance could be denied where the aggrieved buyer may have reasonably obtained substitute goods from another source. Thus, where Singapore law by default excludes enforced performance where substitute goods are available at the marketplace, Dutch and Chinese contract law, as well as the unification instruments, have taken a less strict approach, in the sense that a claim for enforced performance can be denied if the buyer could reasonably obtain a substitute transaction and the imposition of such a duty is appropriate in view of the circumstances of the case.

The consideration above brings about that the aggrieved buyer in the example mentioned under paragraph 262, is under a non-actionable duty to enter into a substitute transaction for mitigation purposes in the subject legal systems. Nonetheless, it appears that Dutch and Chinese contract law would only impose such a duty if this qualifies as a reasonable measure in view of the circumstances of the case. This is in stark contrast with the theoretical notion of mitigation under Singapore contract law, which lies at the very root of the limited availability of enforced performance of a non-monetary obligation. Interestingly enough, there does not seem to be much difference in the practical implications if the court asserts that the aggrieved buyer can easily obtain the microscopes from another supplier and this transaction would protect the seller's financial interest in the sense that the latter is not exposed to disproportionally high costs.

1644 Vogenauer 2015 (n 19) art 7.2.2 paras 34–41.
1645 Art 9:102(2)(d) PECL.
1646 Art 7(d) Amendment Draft on Non-Performance; Lee 2016 (n 16) 198.
1647 Lee 2016 (n 16) 198.

That having been said, the unregulated potential obligation of the aggrieved buyer to obtain (not to find) substitute goods creates legal uncertainty and inconsistencies between the approaches taken by Dutch and Chinese contract law, and the unification instruments. For instance, it appears that an aggrieved buyer is not by default obliged to obtain substitute goods under Dutch or Chinese law. By contrast, the PICC and the PECL have explicitly excluded enforced performance where the buyer could reasonably obtain a coverage purchase. The term 'reasonably' is, however, not defined, which provides the courts with a significant degree of discretionary power. Hence, the imitating effect of a potential duty of the buyer to take reasonable mitigation measures in the form of obtaining substitute goods remains a contentious issue in the realm of commercial sales contracts. It is therefore of particular importance that contractual stipulations clarify the notion of reasonable obtainable goods and the legal consequences from a failure to obtain a coverage purchase where the seller fails to deliver the goods. Contracting parties however should bear in mind that Singapore courts do not allow contractual stipulations, indirectly coercing a party to bring about a certain state of affairs, if this would interfere with their discretionary power to deny a claim for enforced performance within the boundaries set out by the sales law principles and legal precedent.[1648]

6.6 Supervision on enforcement

265. *Preliminary* – The traditional view in the common law tradition is that where active supervision of the court is required in the form of an indefinite series of subsequent rulings to ensure the execution of its order, a request for enforced performance of a contractual obligation is not available.[1649] These subsequent rulings may amount to quasi-criminal procedure of punishment for contempt, with a potential damage to the commercial reputation of the non-performing party and the danger of heavy and expensive proceedings.

1648 Ch 8.

1649 The modern leading autority is the English case *Co-operative Insurance Society Ltd* (n 909) AC 1 [12–13]. The House of Lords held that 'the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance… The exercise of the discretion as to whether or not to grant specific performance starts from the fact that the covenant has been broken. Both landlord and tenant in this case are large sophisticated commercial organisations and I have no doubt that both were perfectly aware that the remedy for breach of the covenant was likely to be limited to an award of damages. The interests of both were purely financial: there was no element of personal breach of faith… No doubt there was an effect on the businesses of other traders in the Centre, but Argyll had made no promises to them and it is not suggested that CIS warranted to other tenants that Argyll would remain. Their departure, with or without the consent of CIS, was a commercial risk which the tenants were able to deploy in negotiations for the next rent review; Phang et al 2012 (n 112) para 23.143; Treitel 1998 (n 55) 67; Solène Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University Press 2012) 57.

For the purposes of determining as to whether the obligee has performed its obligations, it is necessary that the judicial order can be framed with precision. Jurisdictions based on the civil law tradition generally adhere to the principle that the execution of a court order for enforced performance is to be initiated and arranged by the beneficiary of the court order.[1650] Accordingly, supervision on enforcement is in most civil law jurisdictions a responsibility of the latter. Hence, the legal impediment of constant supervision of the court is generally not a familiar concept in civil law jurisdictions. Nonetheless, globalised trade necessitates looking beyond these traditional approaches and, subsequently, assessing of whether there are elements in the three investigated legal systems which might have a comparable limiting effect on the availability of enforced performance of a commercial sales contract and to what extent the domestic arguments are surmountable.

> *Illustration* – A producer of specific tomato seeds, located in country X, enters into a long-term sales contract with a tomato farming company (hereinafter buyer), located in country Y. The contract entails the obligation of the producer to deliver a specified amount of tomato seeds every month for a period of two years. The producer and the buyer agree on a base price, subject to periodic adjustments based on inflation. Then, after six months, due to an increase in costs of production, the price-adjustment provision is outpaced. Because continued performance of the delivery obligation will result in losses, the producer proposes an adjustment of the price formula. The buyer declines the proposed adjustment, and the producer refuses to deliver the tomato seeds for the remainder of the contract (*i.e.* the producer repudiates the contract). The buyer then seeks a judicial order for enforced performance for the outstanding eighteen months. In this situation, the question arises whether a potential order for enforced performance might be curtailed by the argument that policing its performance by the judiciary brings about too many costs for society.

266. *Domestic approaches* – Dutch contract law is not familiar with the objection of supervision of the court, although it is said that where the circumstances of the case may result in an indefinite series of court rulings, the court could suppress this risk by granting a claim for enforced performance under pain of a judicial penalty (section 7.4).[1651] Under Dutch contract law, the necessity of the common law supervision argument as a bar to enforced performance seems also to be overruled by the enforcement measure of authorising the aggrieved promisee to obtain the performance at the expenses of the defaulting promisor (section 7.3).[1652] Furthermore, the aggrieved buyer does not have to return to court to

1650 Vogenauer 2015 (n 19) 896, para 32.
1651 Mak (n 527) 104.
1652 Treitel 1998 (n 55) para 67; Rowan (n 1649) 57.

obtain payment if the promisor does not comply with the court order because an enforcement officer can step in.[1653] The imposition of a judicial penalty, however, does not guarantee that the obligation shall be performed,[1654] and subsequently, prevents additional proceedings when the promisor does not comply with the court order. This is because subsequent enforcement proceedings may be required where it concerns continuing obligations, the promisor has not enough assets to recover the forfeited judicial penalties, the promisor has brought its assets beyond the reach of the promisee, or the promisor, as a matter of principle, refuses to perform in accord with the court order and is even willing to pay the judicial penalty.[1655] Thus, following the aforementioned practical difficulties, it could be said that the availability of a judicial penalty is not sufficient to militate against the common law bar of constant supervision. Nonetheless, the justification for the constant supervision objection (the risk of an indefinite series of rulings of whether the court order is performed),[1656] is not relevant for the situation under Dutch law when considering the low thresholds for enforced performance by means of an interim relief proceeding and the enforcement measure of authorising the aggrieved party to have the obligation performed at the expense of the non-performing party.[1657]

267. Under the contract law of Singapore, a claim for enforced performance can be refused if it would demand constant supervision of the court via additional court procedures.[1658] In effect, this bar to enforced performance is appropriate where a court ruling is likely to result in a series of subsequent rulings deriving from contempt of court proceedings.[1659] The constant supervision restriction may apply when a contract entails continuous duties, such as a long-term sales contracts.[1660] In such cases where constant superintendence by the court is required, the inextricable financial burden of the judicial system (*i.e.* wasted public resources) and involved parties due to a new series of rulings may be used by the court to refuse an order for enforced performance.[1661] It is said that the argument mentioned above of wasted resources is not of relevance where the court could appoint an officer to supervise performance, or where the promisee may appoint a third party to supervise the

1653 Mak (n 527) 104.
1654 Smits 2008 (n 871) 23.
1655 Smits 2008 (n 871) 24, 25.
1656 See the English law case *Co-operative Insurance Society* (n 909).
1657 S 7.3.
1658 Shenoy and Loo 2013 (n 13) para 18.90; Phang et al 2012 (n 112) para 23.142.
1659 This requirement is inextricably linked with the principle that enforced performance is not available when it is difficult for the court the frame the order with precision; See the English *Co-operative Insurance Society* (n 909); Halsbury's Law of Singapore (Contract 2016) vol 7, para 80.590; Phang and Goh 2012 (n 318) para 1558.
1660 Treitel 1998 (n 55) 67.
1661 Halsbury's Law of Singapore (Contract 2016) vol 7, para 80.590.

performance of the promisor.[1662] In *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* the Singapore Court of Appeal mentioned a practical argument for application of the bar of constant supervision. The claim for enforced performance was refused, *i.a.*, on the basis that it was rendered quite impractical for the court to grant and supervise enforced performance because the buyers were serving sentences in prison.[1663] Aside from this exceptional situation, difficulties in supervision by the court are mainly expected in cases with long-running or complex contractual obligations due to the increased chance of non-compliance with an order for enforced performance.[1664] For instance, the long-running nature of a commercial sales contract to deliver certain commodity goods for an indefinite period increases the chance that the promisor fails to comply with a court order for actual performance. If subsequent supervision would significantly burden the court, it might not be willing to order enforced performance.[1665] In turn, enforcement of short-term and straightforward sales transactions will not involve great difficulties and, therefore, the constant supervision argument shall have less influence in these situations.[1666] In these cases, the adequacy of damages remains the main hurdle. In addition, contractual obligations to achieve a certain result, such as repair and replacement of defective goods, are also less affected because there is a very limited risk of repeated applications for compliance with the initial order for enforced performance.[1667] From a practical point of view, contracting parties could avoid application of the constant supervision argument by precisely stipulating the contractual obligation. The more precise an obligation is described, the less likely it is that disputes will arise over the fulfilment of the obligations. It is also less likely that a court shall refuse to order enforced performance if there has been partial performance so that supervision of delivery of only the remainder is not difficult.

268. It appears that the constant supervision objection is not exercised in Chinese courts for commercial sales contracts. Nonetheless, it is suggested that the availability of enforced performance should be limited under Chinese law if such a court order requires constant supervision of the court or in the case supervision is difficult.[1668] For instance, a sales contract for on-demand delivery of rice in a politically unstable and economically underdeveloped region. In this light, it is unsurprising that it is held that Chinese courts are more willing to award a claim for enforced performance where the actual enforcement

1662 Phang and Goh 2012 (n 318) paras 1561, 1562.
1663 *Lee Chee Wei* 2007 (n 591) SGCA 22 [56].
1664 Phang et al 2012 (n 112), 23.142; See the English case *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116.
1665 O'Sullivan (n 861) para 18.36.
1666 Phang et al 2012 (n 112) para 23.144; See the English case *Co-operative Insurance Society* (n 909) at 12–14.
1667 *Ibid.*
1668 Zhang 2006 (n 41) 302.

can be achieved without great difficulties.[1669] That said, the possibility of limiting the right to performance, if enforcement calls for constant supervision by the court or if supervision is difficult, is rebutted with the argument that the court is entitled to authorise the aggrieved party to obtain the goods at the expense of the seller (section 7.3), and to order the non-performing party to reimburse the cost incurred following from supervision on the execution of the order for enforced performance.[1670]

269. *Comparative analysis* – It appears that the constant supervision argument as a bar to enforced performance of non-monetary obligations is a fundamental principle of Singapore law. Nonetheless, a claim for enforced performance of obligations arising from a commercial sales contract has never fallen foul of the constant supervision bar. As for the legitimacy of this bar to enforced performance, it is argued (from an English law viewpoint) that the reasons for the constant supervision objection are overstated because even parties subject to an order for enforced performance of a continuous obligation generally will comply with judicial instructions.[1671] It is also argued that the availability of enforced performance should not be affected by the constant supervision objection as the court could appoint a court officer to supervise the execution of its order or to authorise the aggrieved party to obtain performance at the expense of the non-performing party. It is assumed here that the principle that the costs of this enforcement measure will be borne by the non-performing party is most likely sufficient to encourage the latter to comply with an order for enforced performance. It is also submitted that the available enforcement measures as mentioned above remove the justification for the constant supervision objection, that is; enforced performance should not be available where the general costs to society following from the continuous supervision of the court outweigh the issues arising from supervising an order for enforced performance. More importantly, parties to a commercial sales contract could limit their exposure to the constant supervision bar by precisely stipulating their contractual obligations. The more precise obligations are, the less likely it is that disputes will arise over whether or not obligations have been performed in accordance with the contractual stipulations.

These considerations should be assessed in the view that the constant supervision bar is not of any relevance in Dutch contract law. This is because the beneficiary of a judicial order for enforced performance is responsible for the actual execution and the expenses

1669 Lei Chen, 'Availablity of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 38.

1670 Liu Tinghua, 'On Grounds for the Application and Limitations of the Specific Performance from the Law and Economics Perspective' (2010) 6 Northern Legal Science 110.

1671 Treitel 1998 (n 55) para 67; Rowan (n 1649) 57 *ff*; See for the position under English law *Beswick* (n 818); *Sky Petroleum Ltd* (n 911); A Burrows, 'Specific Performance at the Crossroads' (1984) 4 Legal Studies 102, 110; Frederick H Lawson and Harvey Teff, *Remedies of English Law* (2nd edn, Butterworths 1980) 224.

incurred are to be paid by the defaulting party. It also appears that in China little attention is paid to the constant supervision argument on the basis of the notion that the financial implications of disobedience against an order for enforced performance suffices to encourage defaulting promisors to perform their obligations as instructed by the court. That having been said, a potential loss of influence of the constant supervision objection in Singapore law and the willingness of Dutch and Chinese courts to award an order for enforced performance are rooted in completely different legal structures and distribution of the responsibilities of securing the enforcement of a judicial order. Nonetheless, it is submitted here that the court adjudicating the case mentioned under paragraph 265 under the law of the three investigated jurisdictions may come to the same conclusion if disobedience of the seller is not expected by the court. This could be the case if such behaviour shall affect the producer's reputation or it would expose the latter to other unacceptable commercial risks, which outweigh the losses incurred by the delivery of tomato seeds under the agreed terms. Nonetheless, in the context of commercial sales contracts, a limited number of situations where enforced performance is envisaged under Singapore contract law (*i.e.* unique and ascertained goods), can fall foul of the constant supervision bar (although it appears that this has never occurred in the Singapore context). It is therefore suggested here that contracting parties involved in commercial sales contract across the borders of the three investigated jurisdictions determine that the execution costs of a potential enforcement order are being borne by the non-performing party. Nonetheless, when dealing with a contract governed by the law of Singapore, contracting parties should be vigilant of the common law principle that the enforceability of performance obligations cannot be protected by contractual stipulations when they affect the discretionary power of the courts to disallow a claim for enforced performance (chapter 8).

In view of the dogmatic differences between the approaches taken by the three investigated jurisdictions, it appears that the PICC provides a very sound middle-ground solution by stipulating that an aggrieved party is not entitled to require enforced performance if enforcement is unreasonably burdensome.[1672] This provision aims to close the gap between the civil and common law views on the responsibility of safeguarding the execution of a court order for enforced performance by providing the court with the discretionary power to take into account that the nature of the obligation to be enforced would unreasonably burden a domestic court supervising the order.[1673] Elements that may be considered, on a case-by-case basis, to assess whether enforced performance is unreasonably burdensome or expensive are obligations arising from complex and long-term commercial sales contracts.[1674] Although this approach resembles the common law tradition,

1672 Art 7.2.2(b) PICC.
1673 Vogenauer 2015 (n 19) 896, para 32.
1674 Vogenauer 2015 (n 19) 896, para 32.

enforced performance of obligations arising from such contracts are not by default denied because the exclusion of enforced performance, if it is unreasonably burdensome or expensive, has to be interpreted taking into account the international character of the PICC.[1675]

6.7 Conclusions

270. All the investigated legal systems impose barriers to enforcement of performance obligations which requires the seller or buyer to bring about a certain state of affairs under a commercial sales contract. However, the method chosen by the subject legal systems varies considerably. This research reveals that this is mainly due to the different ways they have tried to strike a balance between the protection of the parties' performance interest, the protection against abuse of a claim for enforced performance, party autonomy, legal certainty for businesses and to a certain extent public interest. It appears that all these elements are inextricably linked with the legal systems' traditional views on the availability of enforced performance of non-monetary obligations. This means in effect that the findings provided in this chapter are of paramount importance to determine to what extent enforcement of a performance obligation under a commercial sales contract is effectively available to the aggrieved party. To clarify this point: a statutory right to enforced performance is valueless if the thresholds for assuming impossibility, in the sense of not being able to overcome the consequences of an impediment, are set very low. The same is true when an excessively short limitation period applies or where the aggrieved buyer is subject to a duty to find a cover purchase, even in the case of a tight market. Conversely, the viewpoint that enforced performance is only allowed in specific circumstances may have limited impact where case law shows that this notion is interpreted liberally by the adjudicators and counter-exceptions are restricted.

The present chapter has shown that the considerations above are to a certain extent true for the three investigated jurisdictions. To put this in context, Dutch and Chinese contract law have a favourable outlook on enforced performance in the form of a cure by making (a fresh) delivery or repair, although they show a great willingness to accept subjective impossibility and hardship as a barrier to enforced performance. In the realm of commercial sales, the default contract law regime of Singapore only envisages enforced performance of non-monetary obligations in exceptional situations. Nonetheless, the protection of the seller's interest is not unlimited as the traditional understanding of the concept of hardship (*i.e.* increase in costs due to a change in circumstances) generally does not amount to frustration of a contractual obligation and thus does not impair the

1675 Art 1.6(1) PICC; Vogenauer 2015 (n 19) 183, para 5.

availability of enforced performance. The differing principles discussed above may cause controversy between commercial parties from different legal backgrounds. The same holds true when considering the dogmatic basis of the three investigated legal systems and the extent that they accept notions of temporary or partial impediments. While Dutch and Chinese contract law (as well as the unification instruments) preserve the right to enforced performance to the extent that its availability can be temporarily suspended or that a claim is only partially awarded, the contract law of Singapore has taken an all-or-nothing approach. In light of the foregoing, it may appear that the civil law roots of Dutch and Chinese contract law bring about a similar structure of barriers to enforced performance. At a practical level, these differing viewpoints may result in significant interpretation issues. It is therefore suggested that the contractual stipulations describe and explain the scope of the situations arising after conclusion of the contract which exempt enforced performance, whether it concerns a comprehensive or indicative list, and the impact of the contractual stipulations in this regard on the legal response to a claim for enforced performance under the law governing the contract. These clauses should observe at all times the differing viewpoints on the admissibility of derogatory agreements.[1676] In view of this, contracting parties should also take note of the significant differing consequences of a failure to request for delivery on a timely manner. Whereas the buyer is possibly exempted from all available remedies under Dutch contract law when it has not protested to the seller promptly after it has discovered, or should reasonably have discovered a defect,[1677] the buyer is potentially only deprived of the ability to obtain an order for enforced performance under Chinese and Singapore contract law. There is, however, an immense difference between the both jurisdictions when considering the impact on the availability of enforced performance. This is because under Chinese contract law, the buyer is provided with a right to enforced performance which can be exempted if the latter fails to request for enforced performance. This stands in stark contrast with the exceptional nature of enforced performance under Singapore contract law which is further limited if the buyer fails to demand delivery of the goods within a reasonable time after the agreed time for performance. Contracting parties involved in sales contracts which are partially or fully affected (in substance and procedural) by two or more of the investigated legal systems could circumvent difficulties arising from the differing approach by establishing a contractual requirement for demanding performance within a stipulated time frame and for the legal consequences deriving from a failure in performance. As earlier mentioned, such contractual provisions should always be drafted in view of the admissibility of derogatory agreements under the law governing the contract.[1678]

1676 Ch 8.
1677 Arts 6:89(1), 7:23(1) DCC.
1678 Ch 8.

A similar consideration applies to the situation where a delayed request for performance (after the due date) is expected to significantly harm the interest of the non-performing party. Nonetheless, the success of contractual provisions dealing with such a situation depends on the degree contracting parties have familiarised themselves with the underpinnings of the applicable legal principles and the extent to which contractual deviation is allowed. In view of this, it should dawn on contracting parties that the legal consequences of an undue delayed request for performance follows from balancing the performance interest of the aggrieved party and the necessary measures to protect the non-performing party against abuse; understanding the interaction between these elements, however, does not suffice to safeguard contractual provisions dealing with undue delay. For this, the rules on the admissibility of derogatory agreements come into play.[1679] That said, the starting point is that Chinese contract law, as well as the PICC, PECL, DCFR and draft articles of the PACL, require that performance is demanded within a reasonable time after the aggrieved party has or should have discovered the non-performance on loss of the right to enforced performance. This principle aims to protect the non-performing party against hardship. Nonetheless, the aggrieved party's interests are not seriously affected by this limitation to enforced performance because other remedies are still available. Although Singapore contract law strikes the balance differently and relies on the common law doctrine of laches when faced with an undue delayed request for performance, there is reason to believe that the results in practice are similar when comparing the time for making a request and the consequences deriving from a delayed request under Chinese contract law and the aforementioned unification instruments. Interestingly, Dutch contract law regulates the protection of contracting parties in a similar fashion as Chinese contract law and the unification instruments mentioned above, yet the time for requesting performance and the legal consequences arising from a failure to make a request for performance are significantly stricter. Nonetheless, the very high threshold for depriving the buyer from all the available remedies as a response to an undue delayed request for performance provides a sufficient counterbalance at a domestic level. However, for those involved in commercial sales contracts across the borders of the three investigated legal systems, the divergence between the time for requesting performance (*i.e.* reasonable period *v* prompt) and legal consequences when the buyer fails to make a timely request raises the question as to whether the differing approaches should be harmonised under the CISG.

Comparison of the rules on limitation periods and ability of contracting parties to deviate from the applicable principles results in even greater divergence between the three investigated jurisdictions. At one end of the spectrum is the Singapore contract law, in which contracting parties are entitled to interfere with the availability of enforced

1679 *Ibid.*

performance by shortening or lengthening the limitation period. At the other end of the spectrum there is the contract law of China which does not allow interference with the statutory boundaries to enforced performance in this regard. Dutch contract law is somewhere in the middle by not allowing contracting parties to extend the statutory limitation periods. The above approaches are not harmonised at the international level. It is therefore of paramount importance for those involved in commercial sales transactions across the borders of the subject jurisdictions to take into account the legal boundaries of contractual interference with the applicable limitation periods. Moreover, for bringing about a truly balanced set of provisions, the impact of contractual stipulations on limitation periods should be drafted in view of the barrier to enforced performance deriving from the rules on a timely notification of a non-conforming performance and a timely request for performance in the case of a complete non-performance.

That said, there is an important similarity found in the notion that enforced performance is not available in the case where the aggrieved buyer could have mitigated the impact on the seller by taking reasonable measures in the form of a substitute transaction. Nonetheless, there is a significant difference when taking into account that the availability of replacement goods is only considered as a limitation to enforced performance under Dutch and Chinese contract law where this follows from the principle of reasonableness and fairness, and good faith respectively, while it is a part of the default notion of the reluctance to award a claim for enforced performance under the contract law of Singapore. The practical solution lies in the regulation of the notion of reasonably obtainable goods in the contractual stipulations and the legal consequences deriving from a failure of the buyer to obtain these goods where this is required. The operative effect of this route is, however, significantly limited where a contract is governed by Singapore contract law and the court establishes that the buyer is indirectly enforced (by means of contractual stipulations) to bring about a certain state of affairs.

A similar complexity arises from the common law barrier of constant supervision, although it appears that this doctrine is losing its influence in Singapore. Nonetheless, constant supervision may still be imposed by the court as a counter-exemption to the already limited availability of enforced performance of non-monetary obligations arising under a commercial sales contract. This may result in complicated situations in the context of international commercial sales transactions which involve parties from the civil and common law traditions, in particular when it concerns a sales contract across the borders of the three investigated jurisdictions. This is undesirable and, more importantly, it contradicts the objective of the three investigated jurisdictions to bring about a trade-friendly contract law regime. It is, therefore, advocated here that those involved in commercial sales contracts across civil and common law borders, and national legislators, pay more attention to the middle-ground position adopted by the unification instruments, in particular, the CISG and DCFR. It is demonstrated that these legal instruments employ

a balanced structure which recognises the necessity of protection of the performance interest and protection of the interest of the non-performing party against abuse, and they provide sufficient flexibility for the dynamics of international trade. Moreover, they bring about a middle-ground which addresses civil and common law fundamental principles, especially the PICC. Nonetheless, this research also shows that every unification instrument offers a unique framework of interwoven principles, which makes it impossible to employ a cherry-picking approach. Moreover, the way the unification instruments have structured the barriers to enforced performance is not flawless. It is also for this reason that the principles cannot simply be copied or mixed,[1680] without taking account of the details discussed in this section.

1680 *E.g.* the text of the CISG appears to indicate that a claim for enforced performance is available where damages are exempted, although this effect is not intended.