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Singapore and China**
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Citation

Kemp, P. C. M. (2020, January 23). *Enforced performance of commercial sales contracts in the Netherlands, Singapore and China*. Eleven International Publishing, Den Haag. Retrieved from <https://hdl.handle.net/1887/83262>

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

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Issue Date: 2020-01-23

8 DEROGATORY AGREEMENTS

293. *Preliminary* – The findings in the preceding chapters show vivid contrasts between the availability of enforced performance at a practical and theoretical level in the three subject jurisdictions. The different approaches by the legal systems are fundamental to their default responses to a claim for enforced performance of obligations to bring about a certain state of affairs under a commercial sales contract. Suggestions have been made as to how the investigated legal systems could narrow the gap between their approaches in light of solutions offered by the unification instruments. The present-day reality is, however, that the availability of enforced performance of non-monetary obligations owed under a commercial sales contract differs dramatically between the three investigated jurisdictions. This raises the question of whether or not contracting parties to a commercial sales contract are permitted to agree to an enforced performance clause which excludes, restricts or expands the availability of enforced performance beyond the default control mechanism of the law governing the contract. In answering this question, the focus is not on exemption clauses specifically, because such a narrow approach would not provide any guidance in determining the position of Singapore law. Accordingly, this chapter discusses the legal acceptability of clauses (individually negotiated or by means of standard terms), which may frustrate the discretionary power of the courts to assess their appropriateness along the lines of the freedom of contracting and legal restrictions.

Illustration – An importer of beverages, located in country X, and a trading company in country Y conclude an annual sales contract for a specific beer brand. The trading company guarantees that it shall deliver 20–25 40-foot containers of pilsner and lager beer on a monthly basis. The parties also agree that the trading company shall increase the supply of beer prior to other buyers, if the supply capacity of the importer expands. After six months, the importer notifies the trading company that it requires an additional supply of lager beer in the form of 2–5 foot containers every month. The trading company refuses to deliver the requested quantity due to delivery obligations in respect of other buyers. Subsequently, the importer brings a claim to court for the enforcement of the seller's delivery obligation. The trading company argues that the buyer's claim cannot be awarded because the parties agreed to damages, to the exclusion of enforced performance, as a remedy for a failure in delivery of the goods as stipulated in the contract.

294. *Domestic approaches* – The leading principle in Dutch law is that parties to a commercial sales contract are entitled to exclude or reinforce the aggrieved party's right

to enforced performance of an obligation to bring about a certain state of affairs under a commercial sales contract.¹⁷⁷⁵ This includes the right of the parties to a commercial sales contract to impose a financial fine on non-delivery and for non-conforming delivery. Aside from strengthening a contractual right to enforced performance, contractual stipulations may also exclude the buyer's right to claim for a cure by repair and replacement under the statutory regime for a defective performance.¹⁷⁷⁶ Dutch courts may, however, strike down such clauses when they are contrary to the *boni mores* (i.e. standards of good behaviour in the realm of commercial contract law),¹⁷⁷⁷ and when they are the result of duress, fraud or undue influence.¹⁷⁷⁸ Furthermore, a clause in standard terms which excludes or restricts the availability of enforced performance may be nullified when the clause is unreasonably onerous,¹⁷⁷⁹ and if the user of the standard terms has not given the other party a reasonable opportunity to take note of the general terms and conditions.¹⁷⁸⁰ In addition to the limitations set out above, the courts will also not uphold clauses which exclude or restrict enforced performance when they are not in accord with the standards of reasonableness and fairness (threshold for application of the derogatory effect of the standards of reasonableness and fairness are very high).¹⁷⁸¹ It follows from the considerations above that Dutch courts (in exceptional situations) may override the principle that enforced performance is not available where this follows from a juridical act, that is; a derogatory agreement for the exclusion of the right to enforced performance.¹⁷⁸² That having been said, contracting parties are entitled to agree that the aggrieved party may only pursue damages, thereby implicitly renouncing its right to obtain enforced performance. This premise is founded on the freedom of contract and fundamental notion of the bindingness of a contractual promise.

1775 Nispen (n 867) para 12, confirmed in Jongbloed (n 530) para 7; See also TFE Tjong Tjin Tai, 'Garantie, nakoming en schadevergoeding' (2004) 6577 WPNR 363–386; Dutch Parliamentary History Book 3 (n 204) 896; JM Smits in Schelhaas 2002 (n 19) 345.

1776 The principle that commercial parties are entitled to exclude the buyer's right claim for a cure by repair or replacement under the statutory regime for sales contracts also applies where the shares of a business are the subject matter of a sales contract; *Equinix v Rooq et al* District Court Overijssel 7 January 2015, ECLI:NL:RBOVE:2015:363, JOR 2015, 96; Contracting parties should be aware not to merely exclude the sales law provisions, but also general statutory provisions such as art 3:296 DCC for the right to demand performance and art 6:89 DCC which entails a limitation regime for defective performance.

1777 Art 3:40 DCC; JM Smits in Schelhaas 2002 (n 19) 345.

1778 Art 3:44 DCC; Hartkamp 2011 (n 80) paras 87, 218; Sieburgh, *Asser 6-I* (n 363) para 364; Jongbloed (n 530) para 7.

1779 Art 6:233(a) DCC; JM Smits in Schelhaas 2002 (n 19) 345.

1780 Art 6:233(b) DCC; JM Smits in Schelhaas 2002 (n 19) 345.

1781 Art 6:248(2) DCC; Hartkamp 2011 (n 80) para 31; JM Smits in Schelhaas 2002 (n 19) 345; De Jong, Krans and Wissink 2018 (n 194) 11–13.

1782 Art 3:396(1) DCC.

295. It appears that Singapore (case) law has not yet paid attention to the admissibility of clauses which interfere with the availability of enforced performance of an obligation to bring about a certain state of affairs under a commercial sales contract. Determining the position of Singapore law is therefore difficult. Nonetheless, an assessment of cases outside the realm of commercial sales law may provide some helpful guidance to determine, obliquely, the potential judicial response to enforced performance clauses in commercial sales contracts. The starting point is that Singapore courts have taken the approach that contracting parties are bound by the discretionary power of the courts.¹⁷⁸³ This means in effect that the discretionary power of the courts to deny or to allow the exceptional measure of enforced performance in principle cannot be fettered by a contractual clause. The likely reluctance of Singapore courts towards clauses which affect the equitable function of its courts is also reflected in the case *Tay Ah Poon and another v Chionh Hai Guan and another*. It was considered by the Court of Appeal that the liquidated damages clause in question did not exclude a claim for enforced performance, and the defaulting party could still be forced to perform the contract.¹⁷⁸⁴ The case *Govindaraju v Ganasen* also assists in determining how enforced performance clauses in commercial sales contracts might be approached in Singapore. In this case, the Court of Appeal considered that the clause to elect repudiation of the contract in case of failure in performance did not exclude the general (equitable) right of the purchasers to claim for enforced performance of the contract.¹⁷⁸⁵ The notion that the discretionary power of the courts cannot be constrained by derogatory agreements also derives from the case *Pub 1997 Pte Ltd v Scorpion*.¹⁷⁸⁶ It follows from this case that a Singapore court most likely would not enforce a clause stipulating that the seller is not entitled to sell the goods specified in the contract to other parties for the duration of a certain period. This is because enforcement of this negative obligation (*i.e.* injunction) would effectively result in an award for enforced performance of a positive obligation because it would compel the seller to deliver the goods to the initial buyer. This runs counter to the discretionary power of the courts to direct, if it thinks fit, that a contractual obligation to deliver specific or ascertained goods shall be performed specifically. For the sake of clarity; clauses excluding or restricting the availability of enforced performance arising from individual negotiations or standard terms are not governed by the Unfair Contract Terms Act.¹⁷⁸⁷

1783 See the English case *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 422 at 451 in conjunction with *Tay Ah Poon v Chionh Hai Guan* (n 589) [19].

1784 *Tay Ah Poon v Chionh Hai Guan* (n 589) [18]; Dora Neo, 'Specific Remedies and the Performance Interest in Singapore Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 211, 212.

1785 *Govindaraju and another v Ganasen and another* [1994] SGCA 125 [15, 18], (1994) 3 SLR(R) 815.

1786 *Pub 1997 Pte Ltd* (n 965) [21]; Phang et al 2012 (n 112) para 23.174.

1787 SGA, s 55(1) in conjunction with Unfair Contract Term Act (1999), s 6; Chong et al 2016 (n 125) paras 10.3.17–10.3.19.

296. Chinese scholars have made some interesting observations regarding the admissibility of clauses affecting the availability of enforced performance of contractual obligations. The starting point in this regard is the broadly accepted notion that commercial parties are entitled to fashion their agreement to their needs, which brings about that clauses reinforcing and excluding the aggrieved party's statutory right to enforced performance are valid and enforceable.¹⁷⁸⁸ The premise that such clauses are permitted in principle also follows from the statutory provision that a lawfully established contract shall be binding on the parties.¹⁷⁸⁹ However, Chinese courts are reluctant to allow contracting parties to interfere with the statutory control mechanism for enforced performance.¹⁷⁹⁰ In other words, Chinese courts could show some reticence when confronted with clauses in commercial sales contracts regulating the availability of enforced performance, which go beyond, or simply ignore, the statutory limitations. It appears that the assessment made by Chinese courts will be in line with the principle position that the contracting parties shall adhere to the principle of fairness,¹⁷⁹¹ and that private parties are not at liberty to interfere with the discretionary power of courts to award or deny a claim for enforced performance of an obligation under a commercial sales contract.¹⁷⁹² Where a clause in standard terms interferes with the statutory control mechanism for enforced performance, additional barriers apply. That is, the user of the standard terms is obliged to inform about the exclusion or restriction of the availability of enforced performance.¹⁷⁹³ Furthermore, Chinese law invalidates exemption clauses when they follow from fraud, intentional or gross negligence.¹⁷⁹⁴

297. *Comparative analysis* – A significant controversy between the three investigated jurisdictions becomes apparent when considering their approaches towards contractual stipulations which in essence depart from their legal control mechanisms for enforced performance. Where the focal point in the Netherlands, China, as well as the (vast) majority of the unification instruments (*i.e.* PICC, PECL, DCFR)¹⁷⁹⁵ lies on the validity of clauses exempting or restricting enforced performance, the discussion in Singapore centres around the question of whether parties should be permitted to agree on clauses for enforced

1788 Bing Ling 2002 (n 229) para 8.003.

1789 Art 8 CCL.

1790 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 38.

1791 Arts 5, 6 CCL.

1792 Lei Chen, 'Availability of Specific Remedies in Chinese Contract Law' in Chen-Wishart, Loke and Ong 2016 (n 156) 38.

1793 Art 40 CCL; Bing Ling 2002 (n 229) para 4.058.

1794 Arts 52, 53 CCL; Bing Ling 2002 (n 229) para 4.058.

1795 Art 7.2.2 PICC; Art 4:110 PECL (clauses not individually negotiated); Art 8:109 PECL (individually negotiated clauses); Art II.-9:-401 -II.-9:411 DCFR (clauses not individually negotiated).

performance. It may, therefore, appear to be problematic if not impossible to draw any conclusions. Nonetheless, the assessment of the domestic viewpoints in the present section provides (to a certain degree) general guidelines for determining the admissibility of clauses which deviate from the availability of enforced performance under the default systems of the three investigated jurisdictions.

The starting point is that Dutch and Chinese contract law allow clauses which restrict or allow a claim for enforced performance (the latter is less relevant), although in both jurisdictions the effect of this principle is limited. This is due to the fact that contractual stipulations dealing with the availability of enforced performance may be struck out by Dutch and Chinese courts where, for example, the operative effect of the clause is contrary to the principle of good faith, or when it arises from intentional or gross negligence. Furthermore, specific barriers are put in place in Dutch and Chinese law when clauses dealing with enforced performance are not individually negotiated but are a part of standard terms. This is not surprising as commercial parties do not always conclude contracts on an equal footing. Therefore, a certain degree of protection is offered by Dutch and Chinese contract law to eliminate undesirable results which follow from an imbalance of bargaining power between commercial parties. Chinese contract law has adopted another fundamental barrier which appears to be the result of the efforts of Chinese law to narrow the gap with the common law tradition, albeit with a completely different effect. It follows that Chinese courts are likely to be reluctant to allow clauses interfering with the statutory limitations to enforced performance because this would directly affect the discretionary power of the courts to allow or deny enforced performance. It is for the same reason that Singapore courts will most likely show a discernible judicial reluctance to uphold a contractual clause which allows enforced performance beyond the legal control mechanism for the enforcement of positive obligations to bring about a certain state of affairs. Hence, where the hesitation of Chinese courts to allow clauses affecting the default system for enforced performance brings about a significant freedom to protect the performance interest of the parties, the disinclination of Singapore contract law to allow clauses expanding the availability of enforced performance brings about the notion that contracting parties are not entitled to protect their performance interests. This, in effect, means that clauses which indirectly coerce performance of non-monetary obligations to bring about a certain state of affairs shall not be honoured if enforced performance is not envisaged in the case at hand.

To put these considerations into the context of the example mentioned under paragraph 293, it appears that the buyer's claim for the delivery of the beer shall be awarded under Dutch and Chinese law, as there are no indications that one of the previously mentioned limiting elements apply nor that the contractual stipulations for damages would rule out a claim for enforced performance. The outcome under Singapore contract law is probably diametrically opposed considering the notion that the existence of the equitable remedy

of enforced performance of non-monetary obligations cannot depend on the presence of a contractual term expressly providing that the aggrieved party has such a right. Another important principle in this regard is that protection of performance interest is, generally, not allowed when it would directly or indirectly coerce performance of a non-monetary obligation which is not granted protection under Singapore contract law. Hence, those involved in commercial sales contracts across the borders of the subject jurisdictions should give due consideration to the above-described diametrically opposed viewpoints in order to determine the value of any contractual stipulations regulating the availability of enforced performance to, for example, deliver or the taking delivery of goods.

In view of the above, it appears that the ability of contracting parties to protect their performance interest differs significantly between, on one hand, Dutch and Chinese contract law, and on the other hand, Singapore contract law. That said, there is also an important common denominator; that is, the domestic courts will subject clauses dealing with enforced performance to (careful) examination, be it on the basis of general legal principles, specific provisions for standard terms or uncodified doctrinal viewpoints. This premise also applies where the parties have shaped the availability of enforced performance along the lines of the preferred remedy of the law governing the contract.

Unfortunately, the drafters of the CISG have not addressed the legal uncertainty arising from the disagreement between the subject legal systems which in essence represents a fundamental point of divergence between the civil and common law traditions. The CISG takes the approach that clauses deviating from the default regime for enforced performance are subject to domestic law.¹⁷⁹⁶ This raises the question: can commercial parties doing business across civil and common law borders take their lead from the approach taken by the PICC, PECL or DCFR in order to obtain a middle-ground solution which serves the interest of both legal traditions?¹⁷⁹⁷ The answer appears to be in the negative, because these unification instruments have taken the approach that enforced performance is generally available, unless limitations apply. This runs counter to the arguments underlying the unwillingness in the common law tradition to allow clauses providing for enforced performance; that is, inadmissible interference with the discretionary power of the courts. That having been said, it may not be that difficult to sidestep the perceived inadequacies of the investigated legal systems to respect the foundations of the civil and common law without undermining the wishes of the parties to deviate from the legal controlling mechanism to enforced performance. The solution submitted here for the domestic courts is to adjudicate such clauses in international commercial sales contracts in line with the uniform notion of freedom of contract and the principle of reasonableness. It may appear

¹⁷⁹⁶ Schwenger 2016 (n 91) art 46 para 48.

¹⁷⁹⁷ Art 7.1.6 PICC; Art 4:110 PECL (clauses in standard terms); Art 8:106 PECL (individually negotiated terms); Art II.-9:401 ff DCFR.

that this would require Singapore courts to overcome a major doctrinal hurdle, but it is not that controversial when considering the available safeguards to prevent injustice.