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

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9 Conclusions and recommendations

300. *Preliminary remarks* – This chapter is not a repetition of what has already been stated. Instead, it ties up the conclusions provided in the preceding chapters to determine the extent to which the contract law of the Netherlands, Singapore and China balance out the interests of parties to a commercial sales contract in the principles surrounding the enforceability of non-monetary obligations, and how the domestic solutions relate to the approaches taken by the unification instruments. The key focus points are the legal limitations where the default regime entails a right to enforced performance, and counter-exceptions where the default regime only allows enforced performance in specific situations. On that note, the findings in the previous chapters reveal that under the subject legal systems, the principles surrounding the constitution, the actual performance of non-monetary obligations and the substantive rules on enforced performance are intricately interwoven elements of systems that aim to balance different interests (*i.e.* interest of the state, of contracting parties and of market actors). The impact of the discussed principles on the enforceability of contractual rights is, therefore, only explicable with reference to the whole. This means that the larger framework of historical and modern contract law principles is taken into consideration rather than simply focusing on the statutory provisions dealing with the availability of enforced performance of non-monetary contractual obligations arising from a commercial sales contract.

The starting point of this undertaking is that the legal principles encompassing the actual performance of the seller's and buyer's performance obligations and the ability of the parties to enforce those obligations are firmly rooted in cultural notions of the value of the act of promise making, legal traditions and general contract law principles. The differences arising therefrom can be traced back to the way the interests of contracting parties are balanced against each other in view of the weight attached to the concept of party autonomy and the role of public interest. At a practical level, the competing viewpoints are (after countless hours of negotiations) generally accommodated and accomplished in overly lengthy and dense contractual stipulations in order to bring about a contract that parties feel as comfortable as possible in signing. This costly endeavour might not be necessary when commercial parties and those working in an international sales context are provided with more in-depth insights about the actual enforceability of the contractual obligations. In more practical terms, to be forewarned is to be forearmed.

In view of the above, the present conclusion is concerned with three inextricably linked focus points. Firstly, the extent to which the legal systems are able to safeguard the performance interest of parties to a commercial sales contract. Secondly, the extent to which the interest of the non-performing party is protected against unjustifiable

consequences in light of the concept of freedom of contract. And lastly, with what degree of flexibility might courts grant a claim for enforced performance in order to provide the most effective response in consideration of the complexities surrounding international commercial sales contracts. In paragraph 316, these three key elements are evaluated in light of the following comprehensive conclusions of the analyses provided in the preceding chapters.

301. Before diving into the above-mentioned elements, it is reiterated that the efforts of the three investigated jurisdictions to position themselves as legal hubs are not reflected in their traditional view on enforced performance of non-monetary obligations under a commercial sales contract (with the exception of the contract law of China). China has achieved something which is broadly perceived as almost impossible for domestic legal systems. That is, the contract law of China narrows the gap between the civil and common law traditions on a domestic level, by adopting a middle-ground solution which is, *i.a,* inspired by the approach taken by the CISG and PICC. The result, however, is not completely flawless when observing all the relevant provisions affecting the availability of enforced performance. Another interesting point in the context of determining the legal roots of the availability of enforced performance of non-monetary obligations is that the Singapore courts are provided with the discretionary power to adopt appropriate modifications to suit local circumstances. However, the observations in the preceding chapters reveal that, although changes are visible, this has not led to a major shift from the English law position. That said, the Singapore case law discussed shows the increasing willingness of courts to look beyond common law borders. In any case, this does not necessarily mean that Singapore contract law is moving towards a broader notion of the availability of enforced performance, which would enable contracting parties to obtain the very thing they bargained for and not to be forced to settle for monetary relief in the form of damages. As far as the contract law of the Netherlands is concerned, the (French) civil law tradition is strongly embedded in the principles underlying the availability of enforced performance. Alteration, therefore, seems unlikely given that these principles are the very foundation of Dutch contract law.

302. *Recommendations* – The above-described divergence between the three investigated jurisdictions on this matter vividly portrays the unresolved misalignment between the civil and common law traditions. Should there be a desire to narrow the gap between the two major legal families, it might be helpful to move towards an overarching solution at the international level, recognizing that the divergence is deeply entrenched in principles dealing with contractual obligations, from the very moment they are supposed to come into existence until their execution. The suggestion for such a consolidation takes into account the key differences affecting the actual value commercial parties may attach to a

contractual right to be provided with the goods in the quantity and quality as stipulated. The disagreement among the investigated legal systems derives from the thresholds for bringing about enforceable obligations and the limitations imposed for execution,[1798] the goods subject to enforcement measures under the sales law provisions,[1799] the judicial measures available for enforced performance and the admissibility of contractual stipulations that interfere with the default systems for enforced performance.[1800]

The insights gained in this research may provide the judiciary, legislators and commercial parties (doing business across the borders of the three investigated jurisdictions, and in general parties with a civil and common law background) with new perspectives for determining the degree of flexibility by which a claim for enforced performance of non-monetary obligations, under a commercial sales contract, can be granted and given effect in the subject legal systems. The aforementioned undertaking requires balancing the interests of contracting parties in view of the elements identified in this study. Based on this consideration, seven inextricably linked recommendations are formulated below as a model for enhancing the understanding of the need for the adoption of a more holistic approach, that is, evaluation of the larger framework of legal principles surrounding a performance obligation in order to bring about new insights, rather than focusing on the default regime for enforced performance of non-monetary obligations.

303. The first recommendation calls on those involved in drafting international contract law instruments to open the door for legal consolidation of the different ways of structuring the contract and sales law provisions and the distinct interpretation of the basic elements that bring about a commercial sales contract. A one-sided or overly restrictive attitude in this regard could lead to an imbalance in the protection of the performance interests of commercial market actors involved in trading relationships across the borders of the three investigated jurisdictions and, in general, when it concerns commercial sales contracts concluded between parties located in separate civil and common law jurisdictions.

The starting point of the divergence is the distinct structure of a dualistic and unitarian system as adopted by Dutch and Chinese contract law respectively,[1801] and the imposition of an individual act for the sale of goods in Singapore contract law. With the exception of the DCFR, most unification instruments take a uniform approach. As a result, the scope of goods subject to sales law provisions differs significantly in each of the legal systems discussed. The divergence is further aggravated by the disagreement related to the level of

1798 S 3.4.6.
1799 S 3.3.
1800 Chs 7 and 8.
1801 The contract law of the Netherlands consists of a *lex generalis* for obligations and a *lex specialis* for sales contracts; the contract law of China incorporates sales law provisions into the general rules on contracts.

the actual required monetary reciprocity of non-monetary obligations to bring about a certain state of affairs.

If there is a desire to bridge the gap between civil and common law notions of the enforceability of non-monetary obligations, starting with the issues set out above, we must ask first: is it necessary to reform the ambit of a commercial sales contract? In view of findings discussed in preceding chapters, the answer appears to be in the positive when taking into account the fact that contract law principles are merely an instrument to regulate and facilitate transactions in light of the parties' performance interest and protection against unjustified consequences. This is true for all three investigated jurisdictions, as well as for the unification instruments identified. On that account, a progressive attitude towards the applicability and scope of rules concerning the ambit of a commercial sales contract would be beneficial for all the subject legal systems. It is, therefore, suggested here to work towards a comprehensive notion of the concept of a commercial sales contract which employs a restrictive negative definition of the concept of goods and requires a tolerant view among the courts on the rules on formation.[1802] Dutch and Chinese contract law, as well as the CISG and DCFR, already display such an attitude, although there are pronounced differences. By adopting strict rules on contract formation and interpretation of the goods subject to sales law, Singapore contract law is significantly less protective towards the performance interest of the promisee in this regard. Although when considering the guidelines formulated for the protection of the interest of the promisor against abuse, in the following part, Singapore legislators might find sufficient positive guarantees to agree to a solution at the international level, which does not necessarily reflect their English law tradition.

304. That being said, uniform solutions to the issues discussed above are not expected in the foreseeable future. It is therefore important for those involved in international commercial sales contracts to carefully consider the different mechanisms to fill the gap where an offer, and thus the commercial sales contract deriving therefrom, is not sufficiently clear in determining the quantity and quality of the goods to be delivered by the seller and the price owed for the goods, or rules for determining the price.[1803] Any misunderstanding in this regard could have substantial implications if, after a considerable time, it is asserted by the court adjudicating a dispute between the parties that an enforceable sales contract has not come into existence or that the scope of the assumed obligations significantly differ. This research demonstrates that the investigated legal systems deploy different principles and rules for the interpretation of the terms of an offer in order to determine whether an enforceable contract has come into existence.

1802 As for the concept of concept of goods, inspiration may be drawn from the DCFR.
1803 S 3.4.

The practical recommendation to bring about an offer that is sufficient for determining the obligations of the parties should be applied in view of the aforementioned considerations, as well as the necessity of balancing the interests of both parties in contractual stipulations. The latter point is especially important for commercial sales contracts governed by Dutch and Chinese contract law and where inspiration is drawn from the PICC, PECL or DCFR. This is because the courts are allowed to act (on the request of a contracting party) where from the start of the contract there is a gross disparity between the purchase price as assumed by the parties (and asserted by the court) and the quantity and quality of the goods to be delivered by the seller.[1804] The freedom of the contracting parties to prevent issues in this regard is, however, limited under Chinese contract law if adoption of a price commissioned by the government or based on government-issued pricing guidelines is required by law.[1805] The foregoing pragmatic considerations on bringing about a clear offer entailing all details necessary for the final contract, appears to be of less importance under the contract law of Singapore. That is, to constitute enforceable obligations, it is not required that the consideration of the buyer (*i.e.* payment of the purchase price) is adequate in view of the seller's obligation to deliver the stipulated goods.[1806] This brings about the notion that, at one end of the spectrum, Chinese contract law provides for significant freedom of the court to interfere with the seller's and buyer's obligations deriving from the accepted offer in the case of a substantial inconsistency between the monetary value of the assumed obligations, while at the other end, Singapore contract law is not concerned with a monetary disparity between the buyer's and seller's obligations in order to bring about an enforceable contract. Dutch contract law holds an intermediate position between the Chinese and Singapore approaches.

Notwithstanding this divergence between the three subject jurisdictions, each of the legal systems is familiar with a mechanism to interfere with the obligations of the parties assumed in an offer. Careful consideration, therefore, must be given to the terms of an offer and the legal limitations of the undertaking of an offer, which (on acceptance) serves as the basic reference point for the court in establishing whether parties are subject to an enforceable sales contract, together with defining the scope of the obligations arising therefrom. In view of these considerations, it is submitted here that the universal principle of freedom of contracting is not fully protected when the parties have differing viewpoints

1804 NL: art 3:54 DCC; CHN: art 54 CCL; Art 3.2.7 PICC; Art 4:109 PECL; Art II.-7:207 DCFR. The contract law of Singapore is based on English law, which is not familiar with the notion that a gross disparity between the obligations assumed by the parties may give rise to judicial interference by, e.g., declaring a contract void, avoided or adaption of contractual stipulations such as modification of the contract price. See for a detailed discussion about the complexities of the concept of gross disparity Schwenzer, Hachem and Kee 2012 (n 13) Ch 21.

1805 Art 62(2) CCL.

1806 S 3.4.5.

about the meaning of the stipulations and the extent to which they represent the parties' intentions. The view of contract law that emerges from the discussed materials on the formation of contracts is that, in comparison to Dutch and Chinese contract law, the thresholds for judicial interference are significantly higher under Singapore contract law. That is to say, in the contract law of the Netherlands and China, the starting point is a holistic approach for determining the intentions of the parties. This, in effect, means that the courts shall not necessarily give effect to the literal language of the terms of the contract; they may take into account contextual elements to determine the intentions of the parties. Where appropriate, the courts may also have recourse to the standard of reasonableness and fairness and the principle of good faith respectively. In practice, the courts in Singapore may arrive at a similar outcome by invoking implied terms and through the exceptions to the parol evidence rule as accepted under Singapore law, but the effective scope of these measures should not be overestimated in a commercial sales context. That is to say, the terms of a commercial sales contract are generally understood to reflect the intentions of the parties, which are established by determining what a reasonable outside observer (*i.e.* abstract person) would have taken them to be. Nonetheless, it appears that the flexibility offered by Singapore case law, provides sufficient latitude to deal with CISG-contracts which requires that the courts give due consideration to all relevant circumstances in determining the intentions of the parties.

305. In deviation from the key focus of the present work on protection of the buyer's expectation of performance, the second recommendation deals first with protection of the seller's performance interest when the buyer fails to fulfil its obligations. The underlying notion of this undertaking is that a legal principle generally favours either the buyer's or seller's interest. It is seldom possible to protect the buyer's performance interest and the seller's interest in a single legal principle. In Dutch and Chinese contract law, as well as in the five identified unification instruments, the rules on enforced performance of obligations arising from a commercial sales contract and the obligation to put a defect right focus on protection of the buyer's performance interest. Therefore, the second recommendation advocates for more attention in protecting the seller's performance interest in view of two important difficulties arising from a situation of partial payment, and where payment of the purchase price is inextricably linked with the buyer's obligation to take delivery of the goods. A discussion about the different approaches in both scenarios is necessary because it is generally assumed that civil and common law are on the same page when considering the availability of enforced performance of the buyer's obligation to pay the purchase price, that is, the seller is provided with a *legal right* to obtain payment.

This research reveals that the investigated legal systems deploy very different principles when the seller accepts a partial payment and then subsequently claims for the outstanding amount. Although, it appears that the difference lies not so much in the actual outcomes,

the impact of the discussed principles is arguably far more significant when considering the thresholds for application. The underlying reason for the distinct approaches found in the legal systems is rooted in the civil and common law interpretations of the impact of the seller's acceptance of a partial performance by the buyer. The starting point is that the investigated legal systems all act on the notion that the seller is obliged to make full delivery of the goods and the buyer is obliged to make full payment of the agreed purchase price. Unsurprisingly, the seller is entitled to reject payment of a lesser sum than agreed. However, where the seller accepts partial payment that is not provided for in the contract, the assessment of the question as to whether the seller is allowed to sue for the outstanding amount reveals a fundamental divergence between the legal systems. The Dutch and Chinese contract law take the approach that the seller is entitled to claim for the outstanding amount, unless the seller's conduct leads the buyer to reasonably believe that the partial payment has discharged the obligation to pay the outstanding balance. In the Singapore common law system, the seller's acceptance of a lesser sum for the delivered goods results in a modification of the sales contract when consideration for this adjustment is provided. If consideration for the partial payment is not found, the obligation to pay the agreed purchase price still exists. Nonetheless, a claim for the balance can be refused upon the doctrine of promissory estoppel when this follows from the seller's conduct, but the requirements are significantly higher in comparison to the approach taken by Dutch and Chinese contract law. In Singapore law, the buyer is only relieved from its obligation to pay the outstanding purchase price when both parties have acted in reliance on the seller's promise to accept a lesser sum and that in the general circumstances it would be inequitable to permit the seller to go back on its promise. The unification instruments favour the civil law's less strict approach in this regard, which means, in effect, that acceptance of a part payment does not require good consideration (hence, it is not considered as a modification of the contract), but it needs to be established that the seller's conduct has led the buyer to believe that the part payment would release the former from its obligation to pay the outstanding amount. The differences in approaches can be overcome at a practical level by making explicit contractual stipulations regarding a situation of a partial payment in view of the approach taken by the law governing the contract. It is, however, of significant importance that due consideration be given to the later discussed legal boundaries for contractual interference with the default system for enforced performance and the discretionary power of the courts to deviate from contractual modifications.

Where the buyer's obligation to pay the purchase price becomes due on delivery, but the buyer refuses to take delivery, unjustified consequences for the seller may emerge when considering the risk of loss and the incurrence of expenses related to prolonged storage, and where the seller is under a legal duty to preserve the goods. In view of these considerations, and the non-actionable nature of a duty to take delivery under the subject legal systems, and in order to balance the discussed divergence between the civil and

common law views on the potential role of good faith in this regard, it is suggested here to enable the seller (as of right) to claim for enforced performance of the buyer's obligation to pay the purchase price where the latter fails to take delivery on improper grounds. The need for this rule is already recognized since the PECL and DCFR are familiar with a similar principle to protect the seller's performance interest. However, there is currently no universally accepted view on the dogmatic qualification of the buyer's obligations (*i.e.* enforceable obligations or non-actionable duties) and the legal impact of a failure to take delivery. This may result in a disagreement between parties from different legal backgrounds, due to a misunderstanding of the enforceability of the contractual obligations.

In order to manage potential difficulties arising from this situation, a simple solution can be found in a contractual stipulation entailing the express obligation of the buyer to pay the purchase price, regardless of the acceptance or refusal of the goods, unless payment cannot reasonably be required, the contract is void or avoided, or the parties are released from their obligations on the occurrence of certain situations to be determined by the parties. Such a precautionary contractual clause significantly lowers the risk that a seller is forced to sell the goods on the market and subsequently has to sue for monetary relief where the buyer fails to take delivery. Hence, with the proposed solution, it can be reasonably expected that the buyer shall take delivery (unless one of the stipulated exceptions apply), meaning that the seller is directly entitled to payment of the purchase price.

306. The third recommendation focusses on the primary notion of the availability of enforced performance of non-monetary obligations in the realm of the sale of goods and the practical implications of divergence. The most obvious example of a non-monetary obligation arising from a commercial sales contract is the delivery of goods in accordance with the contractual stipulations. The difficulties in safeguarding the performance interests of the buyer in this regard are rooted in the favourable civil law view on enforced performance of non-monetary obligations, which is diametrically opposed to the common law reluctance to award enforced performance, instead favouring the award of damages.

These conceptually distinct notions of the enforceability of non-monetary obligations are also found in the three subject jurisdictions. Whereas the dogmatic underpinnings of Dutch contract law allow for enforced performance of contractual obligations (regardless of their nature and occurrence of a failure in performance), Singapore contract law does not envisage enforced performance of non-monetary obligations in the realm of commercial sales, with the exception of specific situations (*e.g.* the delivery of specific and ascertained goods, and when substitute goods are (practically) unobtainable), which are further subject to counter-exceptions. The position of Chinese contract law is somewhat unclear because the statutory principles suggest that a right to enforced performance of a non-monetary obligation is available on a failure in performance. Nonetheless, from a purely theoretical

point of view, it can be argued that such a claim does not depend on the occurrence of a non-performance. That having been said, the prevailing legal opinion under Dutch and Chinese contract law is that an award for enforced performance only enables the buyer to give effect to the judicial enforcement order as soon as there is an actual non-performance. This notion fully aligns with the approach taken by the unification instruments, but stands in stark contrast to the approach taken by Singapore contract law, which allows only for enforced performance of commercial sales contracts in very limited situations.

When considering the desired scope of the availability of enforced performance, the importance of the buyer's performance interest in the realm of commercial sales transactions should not be underestimated, due to the potential presence of ancillary performance obligations of the seller, such as the handing over of safety certificates, declarations of origin and the continuous availability of spare parts. Under Dutch and Chinese contract law, as well as the PICC, PECL and DCFR, enforced performance of ancillary obligations is possible on the basis of the standards of reasonableness and fairness, and the good faith principle. This legal escape route is not available in the common law system of Singapore due to a different view on the imposition of good faith in commercial sales contracts.

Based on an overall assessment of the observations provided above, it is submitted here that a universally acceptable solution for the protection of the buyer's performance interest can be best found in the formulation of the buyer's right to performance as a remedial instrument for the seller's delivery obligation, and the intricately interwoven ancillary obligations and duties. This basic understanding of the concept of enforced performance shall not cause major concerns when taking into account the fourth recommendation, which aims to provide sufficient countervailing power to substantially constrain unjustifiable consequences and also to prevent abuse of a right to enforced performance.

A more practical solution to overcome the consequences of the divergence can be found in contractual stipulations that give due consideration to the fact that the concept of delivery encompasses various obligations under the investigated legal systems, such as physical or constructive delivery of the goods and even deemed delivery. Particular attention should also be given to the differing viewpoints on the legal (and thus practical) consequences of a failure to deliver the goods at an agreed time. Depending on the law governing the contract, delivery of the goods can be inextricably linked with the transfer of risk of the seller to the buyer and potentially with the transfer of title. In view of the immense differences in this regard at national and international levels, Incoterms® might be helpful in circumventing and overcoming potential difficulties. This suggestion is also of particular relevance for commercial sales contracts involving carriage of goods in combination with the agreement that the purchase price becomes due during transit. For those involved in such contracts it is of significant practical importance to take note of the full scope of the concept of delivery under the law governing the contract, in particular when the dispatch

of the goods brings about legal delivery, including the passing of risk.[1807] Determining the time of the legal delivery of the goods is also important for safeguarding the availability of a cure for non-conformity. This is because under the three investigated jurisdictions, as well as the CISG and DCFR, the time at which conformity of the goods must be determined is inextricably linked with the time the goods are considered as delivered to the buyer (delivery of the goods does not necessarily coincide with the transfer of property in the goods).

307. The objective of the fourth recommendation is to concentrate on bringing about sufficient counterweight to the right to enforced performance versus protecting the non-performing party against unjustifiable consequences (*i.e.* to mitigate the effects of unfettered rights). The suggested counterbalance consists of five elements which are necessary to generate contractual stipulations that sufficiently satisfy the differences in approaches towards appropriate means to protect the interests of contracting parties under the contract law of the subject jurisdictions. This undertaking could be helpful in consolidating the fundamental differences between the civil and common law traditions (at the international level) by taking into account the approaches developed in the three jurisdictions.

308. In view of the above, the first counterweight entails the imposition of an express requirement of a request for enforced performance within a reasonable time from the moment the buyer ought to be aware of the non-delivery. This restriction on the availability of enforced performance is laid down in Chinese contract law and is broadly adopted at the international level, with the exception of the CISG, which is only familiar with examination and notification requirements for non-conforming performance. Under Dutch and Singapore contract law, a failure to demand performance within a specific timeframe is also penalized with legal consequence(s) for the party that fails to make the request in due time, but the timeframe and scope of the legal detriment differ significantly. Although a uniform set of principles would do justice to the civil and common law understanding of the necessity to protect a seller against stale claims, any form of harmonization in this regard requires an assessment of the impact of the legal system as a whole, in order to offset an imbalance in the protection of the interests of contracting parties. In particular, attention should be paid to the differing provisions in the subject legal systems for examination of the goods and notification of the seller about any non-conformities therein. The same consideration applies when bringing about a practical solution in the present situation, where the most important sales law instrument does not follow the approach taken by the PICC, PECL, DCFR and draft PACL. It is therefore

1807 S 5.3.

suggested here that those involved in commercial sales contracts across the borders of the three subject jurisdictions seek recourse to contractual provisions to specify the legal consequences of a delayed request for performance and the applicable period imposed by the law governing the contract. This must be done with an awareness of the legal framework of time limits for examination and notification of a non-conforming performance, and the admissibility of contractual interference with the rules on the availability of enforced performance of a non-monetary obligations arising from an agreement between commercial parties.

309. The above considerations are inextricably linked with the second counterweight, which entails the notion that enforced performance is not available if the aggrieved buyer is able to mitigate the impact on the seller by acquiring (*i.e.* not a duty to find) substitute goods, provided that the goods are readily available in the marketplace. A uniform approach in this regard is necessary when taking into account the legal uncertainty deriving from the significantly different value attached to the availability of replacement goods in view of the enforceability of the seller's delivery obligation at the national and international levels. The practical impact of the divergence between the subject legal systems cannot be overestimated in the context of international commercial sales transactions. This is because the ability of the buyer to obtain substitute goods in the marketplace in the case of a complete non-delivery plays a role in the Dutch and Chinese contract law standards of reasonableness and fairness, and good faith respectively. This stands in stark contrast to the notion that the availability of a substitute transaction is essential to the default rules on enforced performance under Singapore contract law. It appears that the PICC and PECL bring about a reasonable middle ground solution, although difficulties in practice could be expected due to the arbitrary threshold of reasonably obtainable goods. The usefulness of contractual stipulations in this regard is limited where a commercial sales transaction involves the contract law of Singapore. This is because the latter does not allow the parties to (in)directly coerce the buyer into performing a non-monetary obligation that cannot be enforced under the default system.

310. The third counterweight, in the form of hardship as an exemption from enforced performance, is related to the restrictive impact of the doctrine of frustration and a radical change in circumstances employed by Singapore contract law, in view of the concepts of subjective impossibility and hardship adopted by Dutch and Chinese contract law as well as by the unification instruments. Although the limited impact of the common law doctrine of frustration is not surprising, given the way that the availability of enforced performance is structured under Singapore law, the constantly changing elements affecting international commercial sales contracts may require a more flexible and transaction context specific approach. Considering that the importance of the limiting effect of a situation of hardship

is broadly recognised by the unification instruments, as well as by Dutch and Chinese contract law, major obstacles for the acceptance of a broader notion of the concept of hardship are not expected. In particular, when taking into account the earlier discussed situation of a delayed request for performance that may also be barred when enforced performance brings about unacceptable hardship for the seller.

311. The fourth counterweight entails the discretionary power of the court to temporarily or partially deny a claim for enforced performance. The necessity of the imposition of this limitation to the right to enforced performance is also rooted in the argument that adjudicators should be provided with sufficient flexibility to deal with the present day dynamics of international commercial trade. It is, therefore, of little surprise that partial and temporary exemptions from enforced performance are well-known judicial measures at the international level. The advantages of these solutions for certain impediments are also recognised in Dutch and Chinese contract law. However, the all-or-nothing approach of the applicable common law principles in this regard brings about the premise that Singapore courts do not have the same flexibility. From a practical perspective, commercial parties could seek recourse to contractual stipulations to overcome potential difficulties arising from the discussed differences. In order to avoid interpretation issues, the contractual solution should entail (at the very minimum) an extensive description and explanation of the meaning of the impediments triggering exemption from enforced performance, qualification of the listed impediments (whether it is a comprehensive list, or the described impediments are merely indicative) and to what extent the contractual stipulations affect the legal principles regulating the availability of enforced performance under the law governing the contract.

312. The fifth counterweight aims to reduce clear and subtle differences between the ways the three subject jurisdictions have structured the rules on limitation. In this regard the discussed divergence also relates to legal traditions and cultural interpretation of the impact of concluding a contract, and to the extent contractual stipulations may result in a waiver of rights deriving from the agreement and the applicable legal principles. Taking this, and the need to balance the interests of contracting parties in view of the universal concept of party autonomy and legal certainty into account, it is suggested here to allow a reduction and extension of a general limitation period with a floor and cap based on a maximum limitation period. Essential to this attempt to bring about a universally acceptable structure is to allow for renewal of the limitation periods for enforced performance by an acknowledgement of the obligation by the promisor, to allow for suspension of the limitation periods during proceedings (when it relates to the merits of the case) and to acknowledge that on the expiry of a limitation period only the right to claim for enforced performance is removed; the obligation itself should not be affected. However, a harmonised

set of principles is not anticipated in the foreseeable future due to the legal and cultural underpinnings of the discussed limitation periods. It is therefore suggested here that contracting parties agree to a balanced scheme of contractual stipulations entailing the regulation of the limitation of enforced performance in view of the discussed legal boundaries, as well as the rules on the applicable time limits for requesting performance and to cure a non-conforming performance. This undertaking however requires particular scrutiny as an erroneous interpretation of the statutory principles governing the contract may have an immense impact on the availability of enforced performance.

313. The fifth recommendation aims to balance the generous approach of Dutch and Chinese contract law, and the unification instruments, towards the availability of enforced performance in the form of repair and replacement to cure a delivery of an *aliud* (*i.e.* goods different in nature) or *peius* (*i.e.* defective goods) against the reluctance of Singapore contract law to recognise these specific forms of enforced performance in the realm of commercial sales contracts. The disagreement between the subject legal systems is inextricably linked to the extent to which they adopt civil and common law traditional views on enforced performance of non-monetary obligations.

At the international level, it is broadly recognised that a seller to a commercial sales contract can be forced to make a fresh delivery or repair where the seller delivers goods that do not possess the features agreed in the contract. Importantly, the limitations on enforced performance in the form of cure by repair and replacement also apply in cases of a shortfall in goods under the (most important unification instruments in the field of commercial sales contracts) CISG and DCFR, and also under the draft PACL. Considering this significant level of consensus, it is proposed here to strive for a solution that provides the courts with the flexibility to grant a claim for enforced performance to cure a seller's failure to deliver the goods in conformity with the contractual stipulations when the court establishes that this brings about the most appropriate and effective response in view of the buyer's performance interest and protection of the seller's interest against hardship.

The recognition of the availability of enforced performance in the form of repair and replacement should not be limited to unique or difficult to obtain goods. This is because an action for repair and replacement could also be the most appropriate response in the case of non-conforming delivery of commodity goods if, for example, the initial seller observes specific standards in its manufacturing process which are not yet followed by competitors. In view of the foregoing, the buyer should be entitled to express and to substantiate its preference, although the court should not be bound to this choice where the failure in performance is fundamental to the contract. In the latter situation, the distorting effects of enforced performance on the seller's interest could potentially justify a judicial deviation of the freedom of contract. This seller-friendly approach should be

balanced with a requirement of giving notice of the non-performance within a reasonable time.

On one hand, the solution suggested above satisfies the civil law strict interpretation of the bindingness of a contractual promise, entitling the aggrieved buyer to claim for enforced performance in the form of cure by repair and replacement. On the other hand, this attempt to narrow the gap between the two major legal traditions reflects the common law concept of a fundamental breach and the buyer-friendly requirement of a reasonable period of time in which to give notice. More importantly, the aforementioned elements are of significant importance in providing the courts sufficient latitude to deal with the complexity of commercial sales transactions across the borders of the subject jurisdictions, and in general when a contract is concluded between parties with respective civil and common law backgrounds. In this situation, contracting parties could expressly stipulate that the buyer is provided with a right to claim for enforced performance in the form of cure by repair and replacement. Although such a provision reflects the civil law tradition, it is accepted under the Singapore regime for consumer sales. In this context, another important aspect is that the consumer sales law, in certain circumstances, allows for the qualification of a business purchasing goods as a consumer. Significantly, the aforementioned considerations may cause a Singapore court to deviate from the traditional narrow interpretation of enforced performance (in the realm of commercial sales) when it concerns a non-conforming unique item and the buyer does not have the financial resources to obtain a similar product in the marketplace.[1808]

314. The sixth recommendation aims to regulate the rules which enable an aggrieved buyer to give effect to a judicial order for enforced performance in the context of commercial sales contracts. This suggestion entails a set of three inextricably linked principles. The starting point is the recognition of the ability of the buyer to obtain the goods from the seller with support of a public enforcement officer whereby the costs of enforcement shall be borne by the non-performing party. In view of the general reluctance against direct execution (with the exception of the Netherlands), the second (subsequent) principle entails the notion that the aggrieved party is only allowed to execution once the court provided the latter with judicial leave for giving effect to its order. The third principle is necessary for dealing with situations where the court establishes that obtaining the goods directly from the seller is not possible or requires more than reasonable efforts. In these cases the buyer should be allowed to obtain the goods from another source at the expense

1808 See the US case *Stephan's Machine & Tool* (n 1223). In this case it was considered that a degree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

of the seller. When this is not possible or appropriate, the aggrieved buyer should be allowed to compel the seller to deliver the goods by means of a financial sanction (*astreinte pénale*).

For the aforementioned suggested principles to be laid down in an international contract law instrument, however, requires a significantly liberal attitude by Singapore courts when a contract is governed by this instrument, in particular when considering the way Singapore contract law regulates enforced performance of a non-monetary obligation. A less obvious but important element for complex commercial sales transactions is the common law constant supervision argument, which is rooted in the principle that the court is responsible for safeguarding the correct execution of its order for enforced performance. The element of sufficiently precise terms and the penal consequences of non-compliance with an order for enforced performance plays an important role in the application of the constant supervision bar. To overcome this barrier, it is suggested here that allocation of the responsibility of enforcement to the party provided with an order for enforced performance (with the support of an enforcement officer that is subject to government regulation), and the costs of enforcement to the non-performing party, affect the relevance of the counter-exception of constant supervision.

At a practical level, it is of significant importance that those involved in commercial sales contracts across the borders of the subject legal systems take into consideration the fact that Singapore contract law does not allow the parties to circumvent the rules on enforced performance of non-monetary obligations. In view of this, contractual stipulations affecting the underlying principles of the constant supervision argument and the allocation of the responsibility of enforcement may not have the desired effect when the court asserts that they indirectly coerce performance.

315. The objective of the seventh recommendation is to balance the protection of the buyer's and seller's interests by contractual modification of the default rules dealing with availability of enforced performance of non-monetary obligations. The complexity of this matter traces back to the limitations on the freedom of contract; that is, contractual (substantive) unfairness under Dutch contract law,[1809] the protection of the principle of good faith and the state's interest under Chinese contract law, and protection of the discretionary power of the courts under Singapore contract law.

In view of the above, the seventh recommendation encompasses a general permission of clauses affecting the availability of the right to claim for enforced performance to cure a non-delivery or non-conforming delivery. This may concern a positive clause which provides the buyer with the freedom to choose between the various forms of enforced performance in the case the seller fails to provide the goods in accordance with the terms

1809 Substantive unfairness can be remedied (in exceptional situations) by application of the derogatory effect of the standards of reasonableness and fairness.

of the contract. The parties could also entirely exclude the buyer's right to enforced performance. A key element of the suggested approach is that the courts are provided with the discretionary power to strike out a clause affecting the availability of enforced performance when it establishes that it brings about a contractual (substantive) unfairness with insurmountable consequences, which could not have been foreseen by the aggrieved party at the time of conclusion of the contract.

To achieve a pragmatic solution that does not require intervention in existing legal principles is much more difficult. This is due to the fact that Singapore contract law does not honour contractual protection of the performance interest of the party to a commercial sales contract if enforced performance of the subject matter is not available under the default system. Consequently, for those involved in commercial sales contracts across the borders of the subject jurisdictions, and in general for parties with a civil and common law background, it is of immense importance to give due consideration to the limited effect of contractual protection of the interest of the parties in actual performance of the assumed obligations when this is not envisaged by the law governing the contract.

316. *On balance* – In the realm of commercial sales contracts, the level of protection of the buyer's performance interest varies significantly. At one end of the spectrum, a directly enforceable right for non-delivery and non-conforming delivery is provided by Dutch and Chinese contract law, as well as by the identified unification instruments. At the other end, enforced performance of an obligation to bring about a certain state of affairs under a commercial sales contract is a severely restrictive exception to the primary right to damages under Singapore contract law. This distinction, however, is less clear cut when considering the discussion in the preceding chapters about the various options to protect the parties' performance interest (*e.g.* specific performance, (interlocutory) mandatory injunctions, contractual penalties and liquidated damages), the different situations of non-performance and the bars to enforcement of obligations arising from a commercial sales contract.

It appears that Dutch and Chinese contract law, in line with the unification instruments, provide the buyer with a significant level of protection of its expectations of the seller's performance obligations. This, in effect, means that the aggrieved buyer is provided with a statutory right to enforced performance of the seller's obligation to deliver the goods in accordance with the contractual stipulations. Where the seller fails to fulfil this obligation, the aggrieved buyer may claim for delivery in the case of non-delivery, and has a right to demand a fresh delivery and to put a defect right in the case of a non-conforming delivery. This liberal approach towards the concept of enforced performance stands in stark contrast with the default response to a failure in performance of non-monetary obligations under Singapore contract law; that is, damages. Only when it concerns the delivery of specific and ascertained goods, when substitute goods are only obtainable with great difficulty, and the court thinks it fit in view of the adequacy of damages bar, can enforced performance

of the seller's delivery obligation be granted in the absence of counter-exceptions. Important exceptions to this already limited availability of enforced performance are the bar of constant supervision, vagueness, lack of mutuality, and unfairness following a lack of monetary consideration or adequate consideration, the clean-hands doctrine and potential hardship for the seller following the enforced performance. The degree of protection of the buyer's performance interest is further limited under Singapore contract law due to the nature of the judicial measures to give actual effect to an order for enforced performance (*i.e.* contempt of court procedure which may result in monetary fines imposed by the court and even an order for imprisonment of the non-performing party) which are considered draconian measures. This research reveals that Dutch and Chinese contract law, as well as the unification instruments identified, also impose limitations on the right to enforced performance under, at first glance, similar principles. For example, legitimate interest as a bar against abuse, undeterminable substance, substantive unfairness, subjective impossibility of performance resulting in an unacceptable change of the equilibrium and a duty to mitigate losses by obtaining substitute goods. However, the actual impact of these legal limitations on the availability of enforced performance is significantly less severe. This reiterates that the buyer is provided with a much greater degree of protection for its expectation of performance under the aforementioned legal systems than under Singapore contract law which favours damages over enforced performance.

There is also a significant variation in the admissibility of contractual stipulations (indirectly) regulating the availability of enforced performance where enforcement of the subject matter is not envisaged by the law governing the contract. It is here where the concept of freedom of contract brings about fundamental differences between the three investigated jurisdictions. Whereas Dutch and Chinese contract law, and the unification instruments identified, appear to honour freedom of contract within general legal boundaries (*e.g.* reasonable and fairness, and good faith considerations), Singapore contract law follows the common law approach by not honouring contractual clauses regulating the protection of the buyer's expectation of performance if this would (indirectly) coerce performance of non-monetary obligations that are not enforceable under the default system. Nonetheless, the above-described limiting factors are merely considerations in the exercise of the court's discretion to award a claim for enforced performance. In other words, the vast majority of the discussed limiting factors are not necessarily a bar to enforced performance. This suggests that the flexibility of the Singapore courts to grant an order for enforced performance does not differ that much from the flexibility provided to the courts under Dutch and Chinese contract law, and the approach taken by the unification instruments. Nonetheless, the restrictive concept of enforced performance and the number of different bars to enforced performance suggest that the buyer's contractual right to delivery of commodities, does not play a meaningful role under Singapore contract law when substitute goods are available at the marketplace. Hence, the balance of approach is

clearly in favour of the seller's interest where it otherwise would be forced to performance under Dutch and Chinese contract law, as well as under the unification instruments. There is, however, an important argument in favour of the restricted common law view on the concept of enforced performance, which may counterbalance the overwhelming representation of the civil law approach at the international level. That is, for situations where a non-performance follows from a change of mind, enforced performance should not be readily available because it may unduly interfere with the party's freedom.[1810] The same freedom also underlies the ability to enter into a contract in the first place.[1811] This reasoning is rooted in the well-known common law principle that commercial parties bargain for monetary considerations and not to obtain the actual subject matter, and the inextricably linked efficient breach theory.[1812]

Nonetheless, for those currently working in the realm of international commercial sales transactions it is of paramount importance to bear in mind that the discussed legal systems, in favouring protection of the interest of the aggrieved party in performance, are not on the same page when considering the impact of the principles protecting the non-performing party against abuse and unjustifiable consequences of enforcement of its performance obligations. That said, the diametrically opposed doctrinal viewpoints on the availability of enforced performance could (theoretically) converge when considering the discretionary power of Singapore courts to decree enforced performance, the overarching principle of reasonableness and fairness under Dutch contract law, the principle of good faith under Chinese contract law, and similar standards under the unification instruments identified. Ergo, the flexibility of the courts to deal with a claim for enforced performance varies according to the circumstances of the case. It is, therefore, quite impossible to define standard rules for the degree of protection of the buyer's performance interest and protection of the seller's interest against unacceptable consequences of enforced performance. Notwithstanding the above observations, the civil and common law traditions still have a significant impact on the question as to whether performance obligations under a commercial sales contract can be ordered by the court when considering the divergence in the notion of the scope of enforced performance and the limitations on the freedom of contract to protect a buyer's performance in any of the subject legal systems.

317. *On a final note* – This comparative work does not advocate that the three subject legal systems should adopt a uniform response to a claim for enforced performance of non-monetary obligations arising from a commercial sales contract, because domestic rules surrounding the concept of enforced performance are intricately interwoven with

1810 Chen-Wishart 2017 (n 26); Virgo and Worthington 2018 (n 29) 98–126.
1811 *Ibid.*
1812 *Ibid.*

general contract law principles which are developed in a national context. As a result, it is submitted here that to embrace legal solutions available at the international level (in order to equalise and overcome the most fundamental divergence between civil and common law traditional views on enforced performance) would disrupt the legal structure of the subject jurisdictions when the impact on other provisions and rules are not taken into account. It is, therefore, of paramount importance that the concept of enforced performance be treated holistically, in order to find common ground and overcome fundamental differences, and to obtain new insights and find new ways to deal with allegedly insurmountable disagreements between the two major legal traditions. In this regard, it is not appropriate to focus merely on the primary principles that allow or disallow enforcement of the buyer's and seller's performance obligations under a commercial sales contract. Considering the ambitions of the Netherlands, Singapore and China,[1813] legislators in the three jurisdictions may draw inspiration from the findings of the present work to move towards a form of convergence that does not distort the balance between protection of the parties performance interest, the necessity of protection against abuse and the notion of freedom of contracting as a barrier to contractual (substantive) unfairness. It will be particularly interesting to see if and how the draft PACL develops further in view of the ambition to harmonize the contract law of various jurisdictions in Asia, which are founded on Dutch, French and German based civil law, to legal systems which are rooted in centuries-long legal traditions, from jurisdictions with a common law background.

1813 Ch 1.