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10 SUMMARY

Introduction – When commercial parties conclude a contract for the sale of goods, their main objective is to exchange the subject goods for the agreed purchase price. The civil law and common law traditions have adopted the notion that these contractual promises are binding and each has put in place specific instruments to protect the interests of both parties. However, while the civil law tradition protects the interest in actual performance of the assumed obligations with a right to enforced performance, the common law tradition perceives the availability of enforced performance as a rarity. This research explores the Dutch, Singapore and Chinese viewpoints on this issue by analysing the extent to which respective contract law principles balance out the interests of parties to a commercial sales contract in their principles surrounding the enforceability of performance obligations, and also how domestic solutions correlate to the approaches taken by the identified unification instruments.¹⁸¹⁴ The main focus of this undertaking is to address the fundamental differences in approach to safeguarding the buyer's performance interest in obtaining the very thing it bargained for, and the seller's interests in protection against unjustifiable consequences of awarding a claim for enforced performance. The most striking findings are considered below. Consulting the main text of this thesis is recommended for more in-depth insights and practical suggestions on how the differing legal approaches can be dealt with.

Historical and contemporary fundamentals of sales law – In chapter 2, which explores the historical and contemporary fundamentals of sales law, the starting point is that the approaches taken by the subject jurisdictions are rooted in the two major legal traditions. The foundations of the contract law of the Netherlands and China can be traced back respectively to the French and German civil law legal families. Singapore contract law is, in essence, a codification of English common law, although its principles are subject to revision by Singapore courts where this is appropriate in the light of domestic circumstances. However, the assessment of the actual availability of enforced performance in the three jurisdictions goes beyond a basic understanding of the disagreement between the civil and common law traditions and domestic interpretations. This is because the actual availability of enforced performance and the extent to which the interests of contracting parties are protected are only explicable by reference to the whole. This also

¹⁸¹⁴ I.e. UN Convention on the International Sale of Goods (CISG) and international Principles (UNIDROIT Principles of International Commercial Contracts (PICC), Principles of European Contract Law (PECL), Draft Common Frame of Reference (DCFR) and Draft Principles of Asian Contract Law (Draft PACL).

means that attention should be paid to the role of the unification instruments. On that note, it seems that the subject jurisdictions have overcome significant barriers for commercial businesses involved in cross-border trade by becoming signatories to the CISG. That instrument, however, entails a significant exception to the rules on enforced performance. This effectively means that the CISG is not of any help when seeking to bridge the yawning gap between the traditional civil and common law notions on the enforceability of non-monetary obligations. This applies in particular where a sales contract is governed by the contract law of the Netherlands, Singapore or China, as these legal frameworks have strong roots in the two major legal traditions.

Ambit of a commercial sales contract – Chapter 3 shows that the impact of the different approaches adopted by the three jurisdictions can already be seen at the outset of a commercial sales contract. This means in effect that Dutch and Chinese contract law allow for a broad interpretation of goods subject to a sales contract, in combination with a liberal attitude towards the rules on contract formation. Nonetheless, there are significant differences in the power of the courts to limit the impact of the obligations assumed in an offer. That said, the shared civil law roots of the contract law of the Netherlands and China display an open attitude towards the promises that are provided with legal protection. The starting point under Singapore contract law is quite different as the rules on contract formation are significantly stricter for assuming a binding contractual obligation. Moreover, it utilises a narrower definition of goods which may be subject to a sales contract. This finding is of paramount importance because it affects the (already limited) availability of enforced performance under sales and contract law principles. More importantly, it reveals that an assessment of the availability of enforced performance traces back to the very ambit of a commercial sales contract.

General availability of enforced performance – Chapter 4 provides a comparative discussion of the underlying principles of a claim for enforced performance of non-monetary obligations. Dutch contract law perceives a claim for enforced performance as a direct consequence of the bindingness of a contractual obligation. Although this civil law viewpoint also underlies the contract law of China, the thresholds for obtaining an order for enforced performance differ. This is because the civil and common law tradition, as well as international principles are used as sources for drafting the Chinese law of remedies. Consequently, Chinese contract law only allows for enforced performance in the case a party does not perform its obligations, but the availability of enforced performance is justified by the promise of the defaulting party to perform the contract as agreed. The default contract law system of Singapore does not envisage enforced performance of non-monetary obligations under a commercial sales contract, unless damages are inadequate (restrictive interpretation). In view of these diametrically opposed starting points, chapter

4 also considers the extent to which the highly contested behavioural standard of good faith provides guidance in determining the degree of performance owed by parties to a commercial sales contract and if it may be used to assume ancillary (non-monetary) obligations.

Specific failures to bring about a certain state of affairs – Chapter 5 concentrates on the availability of enforced performance in the case the seller fails to deliver the goods, the buyer fails to take delivery or when the seller fails to deliver the goods in accordance with the agreed quantity and quality. The starting principle in the Netherlands and China is that a claim for enforced performance of the seller's delivery obligation is available to the buyer. In Singapore, the normal remedy for a failure to perform is an action for damages. The protection of the performance interest in the contract by the enforcement instruments of 'specific performance' and '(interlocutory) mandatory injunctions' are only exceptionally available. That is, when the seller fails to deliver specific or ascertained goods, or when the seller fails to deliver generic goods which are scarce and substitute goods are practically unobtainable. However, even in such cases, the seller shall only be ordered to perform its delivery obligation where the courts find it appropriate to order enforced performance. 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 restrictive availability of enforced performance obviously runs counter to the default availability of enforced performance under Dutch and Chinese contract law. This effectively means that while the rules for enforced performance of the seller's delivery obligation are primarily focussed on protection of the buyer's performance interest in the contract law of the Netherlands and China, the protection of the seller's interest is prioritised in the contract law of Singapore.

The disagreement between the investigated legal systems on the question of whether enforced performance is or should be available also brings about legal uncertainty when considering the possibility of ancillary performance obligations of the contracting parties. In particular, when the buyer refuses to provide the necessary cooperation for delivery of the goods but its obligation to pay the purchase price only becomes due on delivery. Although the three investigated jurisdictions agree that the buyer is merely subject to a non-actionable duty to take delivery (or to cooperate), Dutch and Chinese contract law provide the traditional civil law escape route for assuming the enforceability of such duties, in the form of the principle of reasonableness and fairness, and good faith respectively. Therefore, this study advances the view that these open-ended legal principles provide a crucial balancing instrument under both Dutch and Chinese contract law, based on their favourable approaches towards the protection of the buyer's performance interest in the

case of non-delivery. In the Singapore context, the court left open the possibility that a duty of good faith could be implied in fact,¹⁸¹⁵ but this is far from a ringing endorsement of the doctrine of good faith as a source to imply an enforceable obligation of the buyer to provide the necessary cooperation for delivery which is not expressly agreed upon by the parties.

Dutch and Chinese contract law entail the principle that where the seller fails to comply with its obligation to deliver goods conforming with the features agreed in the contract, the aggrieved buyer is provided with a right to enforced performance in the form of making a fresh delivery or the repair of defective goods. This stands in stark contrast with the contract law of Singapore, which is not familiar with such measures to coerce performance. It may not be assumed, however, that Dutch and Chinese contract law ignore the interests of the seller. In contrast, the availability of enforced performance by making a fresh delivery and repair of defective goods is counterbalanced by seller-friendly notification requirements. The unification instruments are also familiar with a right to repair and replacement, but by adopting buyer-friendly notification requirements they balance the interests differently. Another important difference in this regard follows from an additional barrier for requiring enforced performance in the form of cure by replacement. Whereas Dutch and Chinese contract law, as well as the vast majority of the investigated unification instruments, allow this claim in severe cases of non-conformity, the CISG requires a fundamental failure in performance. The latter reveals that the CISG has not turned a blind eye to the common law tradition.

Barriers to the availability of enforced performance – Chapter 6 shows that, aside from the diametrically opposed views on the availability of enforced performance, there is an important common core, that is, the recognition of the importance of the imposition of legal measures to protect the parties against unjustifiable consequences. However, the impact of the method chosen by the investigated legal systems varies considerably. This research reveals that this is mainly due to the different ways the three legal systems aim to strike a balance between the performance interest of the aggrieved party, protection of the interest of the non-performing party against abuse, party autonomy, legal certainty for businesses and, to a certain extent, public interest. Putting this in the context of limitations on enforcement, Dutch and Chinese contract law have a favourable outlook on enforced performance, although they show a great willingness to accept subjective impossibility and hardship as barriers to enforced performance. Meanwhile, the default contract law regime of Singapore does not envisage enforced performance of non-monetary obligations to bring about a certain state of affairs, but the traditional understanding of the concept of

1815 The 'business efficacy' and the 'officious bystander' test are used for ascertaining whether or not a term should be implied in fact.

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 availability of enforced performance. A similar disagreement becomes apparent when considering the dogmatic basis of the investigated legal systems and the extent to which they accept notions of temporary or partial impediments. Whereas 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 takes an all-or-nothing approach.

The focus of Dutch contract law on performance of a contract is also reflected in the notion that a delay in request for delivery does not affect the right to enforced performance. Surprisingly, however, Dutch contract law has taken the approach that the buyer could be exempted from all available remedies when it has not protested to the seller promptly after it has discovered, or should reasonably have discovered a defect in the goods. This contrasts with the approach taken by Singapore and China, which adopt the principle that a delayed request for delivery only deprives the buyer of the ability to obtain an order for enforced performance. There is, however, an immense difference between the consequences of the latter approach. This is because under Chinese contract law, the buyer is provided with a right to enforced performance, which can be exempted if the buyer fails to make a request for enforced performance. This stands in stark contrast with the exceptional nature of enforced performance under Singapore contract law, which is subject to counter-exceptions such as a delayed request for delivery. Comparison of the rules on limitation periods and the ability of contracting parties to deviate from the applicable principles results in even greater divergence between the three investigated jurisdictions.

That said, there is an important similarity found in the notion that enforced performance is not available where the aggrieved buyer could have mitigated the impact on the seller by taking reasonable measures in the form of a substitute transaction. A significant difference, however, emerges when taking into account that the availability of replacement goods is only considered a limitation to enforced performance under Dutch and Chinese contract law, where this follows from the principle of reasonableness and fairness, and of good faith respectively. The response of Singapore contract law is the complete opposite, as the availability of replacement goods underlies the reluctance to award a claim for enforced performance of non-monetary obligations. The common law barrier of constant supervision (and the penal consequences deriving from non-compliance with a court order to performance) further emphasises the negative attitude towards enforced performance, although this legal concept appears to have a limited impact in the realm of commercial sales contracts. In sum, where Dutch and Chinese contract law have adopted a set of limiting factors to balance the statutory right to enforced performance, Singapore contract law only allows for enforced performance in specific situations and where no counter-exceptions apply. Consequently, the promisee's performance interest is endowed

with more protection under the contract law of the Netherlands and China than in the common law system of Singapore. More importantly, it follows from chapter 6 that the unification instruments identified do not provide for middle-ground solutions to overcome the differences between the approaches taken by the subject jurisdictions.

Judicial enforcement measures – The notion that one can only fully understand the impact of the disagreement between the ways the interests of contracting parties are protected by looking at a legal framework in its entirety becomes even more apparent when considering the intricacies of the available judicial enforcement instruments in chapter 7. Dutch contract law places the strongest emphasis on protection of the performance interest of the parties by hardly imposing any barriers to give effect to an order for enforced performance. However, it is questionable whether this progressive approach strikes the correct balance when it concerns commercial sales contracts involving perishable commodity goods that are easily obtainable in the marketplace. Nonetheless, the reverse can be said from the thresholds for compelling the promisor to perform under Singapore and Chinese law. Considering the lack of clarity on this matter under the CISG, contractual stipulations can be particularly helpful in sidestepping the discussed differences, by regulating situations where the seller fails to deliver the goods or delivers non-conforming goods, and the buyer's desire is to obtain substitute goods at the expense of the seller without unwinding the contract. Another argument for including a contractual enforcement regime in commercial sales contracts across the borders of the three investigated jurisdictions involves the disagreement between the legal systems on the ability of the judiciary to impose monetary fines to encourage performance. Whereas Dutch and Chinese contract law (as well as the PICC) have taken the approach that the courts are entitled to impose financial sanctions, the legal system of Singapore is unfamiliar with such a legal device. Nonetheless, a similar repressive effect may follow from the possibility of contempt of court proceedings. This is, however, a very indirect method compared to the Dutch and Chinese approach. Moreover, the reluctance of the courts to order enforced performance when this might result in contempt of court proceedings (and a potential fine to be paid to the state for disobeying an order for enforced performance) reflects the common law notion that monetary fines have an undesirable impact on the freedom of contract. This notion also underlies the rule against contractual penalties to compel the parties' to do exactly what they promised. A properly drafted liquidated damages clauses may also compel the parties' to do exactly what they promised, but the impact is less significant than contractual (compensatory) penalty clauses as allowed under Dutch and Chinese contract law.

Derogatory agreements – Chapter 8 reveals that contractual clauses may not be particularly helpful for those seeking a middle-ground solution, when taking into account the common law principle that contracting parties to a commercial sales contract are not entitled to

circumvent the limited availability of enforced performance by means of clauses which indirectly coerce performance. This approach is strikingly different from the liberal view of Dutch and Chinese contract law on clauses which allow for enforced performance. The impact of agreed enforced performance, however, can be limited due to the fact that such contractual stipulations may be struck out by Dutch and Chinese courts where the clause is contrary to the principles of reasonableness and fairness, and of good faith respectively, or when it follows from intentional or gross negligence. Chinese contract law has adopted another fundamental barrier, which appears to be the result of the efforts of China to narrow the gap with its civil law roots and the common law tradition. 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 that allows enforced performance beyond the legal control mechanism for the enforcement of non-monetary obligations to bring about a certain state of affairs. The impact of both approaches is, however, completely different due to their diametrically opposed starting points (*i.e.* a legal right under Chinese contract law versus an exceptional remedy under Singapore contract law). The drafters of the CISG have not addressed the legal uncertainty arising from the disagreement between the subject legal systems. By contrast, where a commercial sales contract is subject to the CISG, clauses deviating from the default regime for enforced performance are subject to domestic law. This raises the question of whether commercial parties doing business across civil and common law borders can draw inspiration from the approach taken by the PICC, PECL or DCFR, to overcome the disagreement between the two legal traditions. 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.

On a final note – In this research, it has been advanced that in determining the differing factors affecting the enforceability of non-monetary obligations under a commercial sales contract, the applicable legal framework should be assessed holistically. This is because the courts legitimately weigh factors ranging from the scope of the sales law principles, the substantive and administrative barriers to enforcement and the appropriateness of judicial and contractual measures to coerce and encourage performance. The key to overcoming the divergence between the approaches of the Dutch, Singapore and Chinese contract law lies in the middle-ground position adopted by the unification instruments. It is demonstrated that these legal instruments employ a balanced structure that recognises the necessity of protecting the performance interest of the aggrieved party and the interest

of the non-performing party in protection against abuse, while they also provide sufficient flexibility to deal with the dynamics of international trade. However, this research also reveals that every unification instrument identified offers a unique framework of interwoven principles, which makes it impossible to employ a cherry-picking approach. It is, therefore, that the solutions provided by the unification instruments cannot simply be copied or mixed to overcome the disagreements between the subject jurisdictions without taking account of the details discussed in this research.