# THE REMEDY OF REQUIRING PERFORMANCE UNDER THE CISG AND THE RELEVANCE OF DOMESTIC RULES

Jianming Shen, S.J.D.

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# THE REMEDY OF REQUIRING PERFORMANCE UNDER THE CISG AND THE RELEVANCE OF DOMESTIC RULES*

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## I. INTRODUCTION

A contract for the transnational sale of goods has been validly concluded. The buyer expects prompt delivery of the goods in conformity with the contract. The seller expects the buyer to accept delivery of the goods and to make timely payment for them. Then something happens before or during either party's performance: the seller or the buyer defaults by failing either to perform, to perform on time, to otherwise complete performance, or to perform in conformity with the contract. The defaulting party assumably is in breach of the contract. What remedies are available to the non-defaulting party? How can he realize his expectation which could have occurred had the contract been properly performed?

When a breach of contract occurs, the injured party's primary concern may not be simply monetary damages but instead actual performance of the breaching party's specific obligations. In such a case, does the non-breaching party have a legal right to require specific performance by the defaulting party? The answer depends on the governing law and the specific situations surrounding the breach of contract. Some legal systems favor the use of specific performance as a preferred form of relief, while others are designed to discourage the resort to such form of relief. Regardless of the extent to which a performance remedy is allowed or favored, there are inevitably some conditions that must be met before the right to specific performance can be enforced.

The primary purpose of rendering remedies for contractual breaches under many legal systems is to place the non-breaching party in as good a position as he would have been had the contract been fully performed.[1] However, the

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1. Whether this is so under some legal systems, such as that of China, may remain an open question. In the Chinese legal tradition, remedies other than specific performance have been aimed at placing the injured party in as *good* a position as if no contract had been entered into. *See infra* notes 163-78 and accompanying text. The main purpose of available remedial measures under Chinese law also seems to

preferred form of remedies under each legal system varies. In order to put the aggrieved party in the same situation as if the contract had been performed, common law attempts to reach this goal by awarding damages for actual loss suffered plus loss of its expected profits, which include both the "losses caused and gains prevented by the [defaulting party's] breach, in excess of savings made possible."[2] Civil law systems, to the contrary, attempt to protect the contracting parties' interest to the fullest by emphasizing enforcement of their right to specific performance.[3]

Chinese law often emphasizes the ensurance of performance and addresses remedial issues in terms of the *liabilities* and *obligations* of the party in breach rather than straight-forwardly in terms of the remedies and rights of the non-breaching party.[4] The overall remedial system (or, to be more accurate, the *liability* system) under Chinese law is designed to ensure proper performance of contractual obligations and to discourage any attempt to depart from these obligations.[5] Not surprisingly, therefore, the remedy of specific performance, and the device of the so-called *wêiyue jin* ("breach of contract penalty" or liquidated damages), play a major role in the realization of that goal.[6] In this aspect, Chinese contract law essentially falls within the civil law category.

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG or the Convention),[7] which entered into force on January 1,

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guarantee performance and to "punish" breaches. *See infra* notes 117-44 and accompanying text.

2. JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 591 (3d ed. 1987) (quoting RESTATEMENT CONTRACTS §329 (1981)).

3. *See, e.g.,* CODE CIVIL [C. CIV.] art. 1184 (Fr.).

4. The pertinent sections and/or articles of the Economic Contracts Law, The Common Rules of Civil Law and the Foreign Economic Contracts Law relating to remedies for breach of contract are commonly under the heading "Liabilities" or "Liability" (*zérèn*) instead of "Remedies" (*jiùjì bànfâ* or *bûjiù cuòshi*). *See* Economic Contract Law of the People's Republic of China, *adopted* Dec. 13, 1981 by the 4th Sess. of the 5th National People's Congress, *effective* July 1, 1982 (amended 1993) [hereinafter ECL], *translated in* 1 CHINA LAWS FOR FOREIGN BUSINESS Ch. IV (arts. 32-47) (Liabilities for Breach of Economic Contracts) [hereinafter CHINA L. FOR FOREIGN BUS.]; Mínfâ Tongzé [The Common Rules of Civil Law of the People's Republic of China] *adopted* Apr. 12, 1986 by the 4th Sess. of the 6th National People's Congress, *effective* Jan. 1, 1987 [hereinafter COMMON RULES CIV. L.] *translated in* 2 LAWS OF THE PEOPLE'S REPUBLIC OF CHINA Ch. VI (arts. 106-34) (Civil Liability), Sec. II (arts. 111-16) (Civil Liability for Breach of Contract (1987)); The Law of the People's Republic of China on Economic Contracts Involving Foreign Interest (Foreign Economic Contracts Law), *adopted* Mar. 21, 1985 at the 10th Sess. of the Standing Committee of the 6th National People's Congress, *effective* July 1, 1985 [hereinafter FECL], *translated in* 1 China L. FOR FOREIGN BUS. Ch. III (arts. 16-25) (Performance of Contract and Liabilities for Breach of Contract).

5. *See infra,* text accompanying note 117.

6. *See infra,* text accompanying note 117.

7. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf.97/18 Annex I (1980) [hereinafter CISG], *reprinted in* U.N.

1988 and has forty-five Contracting States Parties as of October 1996, provides a comprehensive remedial system, and contains detailed provisions on the buyer's remedies and those of the seller for various circumstances of contractual breach. One of these remedies is the right of the aggrieved party to require performance under Article 46 or 62. Under the Convention, the buyer or the seller as a general rule has a broad right to demand specific performance by the other party.[8] On this point, the Convention, subject to certain restrictions, adopts a position similar to that of civil law which routinely allows specific performance.

On the other hand, the Convention gives domestic courts broad discretion in granting or refusing to grant requests for specific performance if they would not be otherwise required to do so under their domestic law. Article 28 of the Convention provides that "[if a] party is entitled to require performance of any obligation by the other party" under the relevant provisions of the Convention, "a court is not bound to enter a judgment for specific performance unless the court

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CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS, U.N. Doc. A/Conf./97/19, U.N. Sales No. E.81.IV.3 at 178-99, (1981) [hereinafter O.R.]; JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 766-78 (1989) [hereinafter DOC. HIST.].

Article 99(1) of the CISG provides that the Convention becomes effective "on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession." China was the tenth Signatory State to deposit the instrument of ratification of the Convention, which occurred in December 1986 as stated above. This made the Convention effective on January 1, 1988.

As of October 1, 1996, there are 45 Signatory States of the Convention. Up-to-date information on the status of the Sales Convention may be obtained by contacting the U.N. Treaty Section:

Office of Legal Affairs
Treaty Section, Rm. 3200
United Nations Plaza
New York, N.Y. 10017
(212) 963-5047

For a general treatment and commentary on the U.N. Sales Convention, see JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (2d ed. 1991) [hereinafter HONNOLD (2d ed.)]; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1st ed. 1982) [hereinafter HONNOLD (1st ed.)]; *see also* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA CONVENTION (C. Bianca & M. Bonnell eds., 1987) [hereinafter COMMENTARY]; INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (N. Gaston & H. Smith eds., 1984) [hereinafter INTERNATIONAL SALES]; ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1987); P. SCHLECHTRIEM, UNIFORM SALES LAW: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1986).

8. CISG, *supra* note 7, arts. 46 & 62.

would do so under its own law in respect of similar contracts . . . ."[9] This is considered to be a "compromise solution to the divergent common law and civil law perceptions of the proper role of specific performance in some contracts," a solution that "ensures that common law courts will not have to abandon their traditional position."[10] The compromise created under Article 28 would bring domestic law into play even if the underlying sales transaction is governed entirely by the Convention. This makes it necessary for transnational merchants and practitioners to possess some familiarity with not only the Convention provisions relating to the remedy of specific performance, but also relevant domestic provisions and practices respecting such relief.

The Convention becomes automatically applicable to a sales contract between parties from two different countries that are both Contracting States of the Convention.[11] This is true even if the contract requires delivery, taking delivery or making payment in a third country that is not a Contract State, unless the parties have expressly excluded the application of the Convention in accordance with Article 6. An international sales contract is also governed by the Convention if the domestic law of a Contracting State becomes the applicable law through the operation of private international law rules, unless that State has declared that it will not be bound by Article 1(1)(b).[12] Furthermore, the CISG may apply by virtue of a choice-of-law clause regardless of the nationality or place of business of the parties.[13] Thus, a dispute arising out of a sales contract governed by the Convention does not have to be submitted to the court of a

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9. *Id.* art. 28.

10. Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, *in* INTERNATIONAL SALES, *supra* note 7, at 9-1, 9-9, 9-10.

11. CISG, *supra* note 7, art. 1(1)(a).

12. *Id.* art. 1(1)(b). This typically occurs where the State in which one of the parties to an international sales contract has its place of business is not a party to the contract, but its rules of private international law direct its court to apply the substantive law of a Contracting State in which the other party has its place of business. It is nonetheless possible for the Convention to govern by virtue of Article 1(1)(b) even if none of the parties to a contract is from a Contracting State. For example, a contract between Seller in State A and Buyer in State B requires the performance of the parties' obligations to take place in State C. States A and B are not Contracting Parties to the Convention; State C is. The applicable private international law rules of State A or B, or both, may lead to the application of the law of State C, in which case the applicable substantive law becomes or includes the CISG unless it is explicitly excluded by the parties.

13. *Id.* Whether a choice-of-law clause that chooses the law of a Contracting State invokes the automatic application of the Convention is not clear. Article 1(1)(b) merely concerns the effect of conflict of laws rules in the absence of a choice-of-law clause; it does not address the effect of such a clause when the law of a Contracting State is selected. To avoid ambiguity, it is advisable to make it clear in a choice of law clause whether the parties intend to apply the Convention rules or the domestic law rules of a Contracting State not including the Convention.

Contracting State of the Convention. In a contract of sale between an English buyer and a German seller, for example, with Germany[14] being a Contracting Party to the Convention while the United Kingdom is not, if the conflict of laws rules lead to the application of German law, then the contract would be governed by the Convention. Should the German seller fail to deliver, the English buyer is not required to apply for an order compelling specific performance only in a German court. He may well choose an English court. The English court would then apply the Convention to first determine whether the buyer is entitled to require specific performance under Article 46 of the Convention. The court will then determine whether, under Article 28, it must order specific performance by referring to the domestic rules of the United Kingdom on the remedy of performance, and not those of Germany even if substantive German law, including the CISG, would otherwise govern.

The relevance of domestic rules in the performance remedy is significant both in cases where the Convention does not govern and in those where the Convention does govern.[15] For the sake of convenience of discussion, Chinese law is chosen as an illustrative example. This Article therefore examines the performance remedy under the Convention, under some representative common law and civil law systems, and in particular under Chinese law and practice. The discussion focuses on the authoritative and restrictive Convention rules governing specific performance and their implications for the enforcement of rights under international sales contracts, particularly in the context of China-related sales transactions. Special attention is given to Article 28 of the Convention, which is

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14. *See* Franco Ferrari, *Recent Development: CISG, Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing,* 15 J.L. & Com. 1, 126 n.296 (1995); Steven J. Stein, *Sales Contracts and the Impact of the U.N. Convention on the International Sales of Goods on U.S. Businesses* 592 PLI/COMM 259, 310 n.9 (1991). Germany made no reservation to Article 1(1)(b) except for a statement which has no practical meaning. The statement reads:

> Germany holds the view that Parties to the Convention that have made a declaration under [A]rticle 95 of the Convention are not considered Contracting States within the meaning of subparagraph (1)(b) of [A]rticle 1 of the Convention. Accordingly, there is no obligation to apply . . . this provision when the rules of private international law lead to the application of the law of a Party that has made a declaration to the effect that it will not be bound by subparagraph (1)(b) of [A]rticle 1 . . . .

Ferrari, *supra.*

15. Needless to say, where the Convention does not govern, either because of the parties' choice or otherwise, the applicable domestic rules, including those on specific performance, would be the governing rules. Where the Convention does govern, domestic rules on specific performance would nevertheless continue to have a role to play because of the effect of Article 28 of the Convention. CISG, *supra* note 7, art. 28.

the very article that may invoke references to domestic rules on the performance remedy even though the contract is otherwise governed by the Convention.

The Convention modifies or replaces Chinese law only when the contract is between parties having their place of business in different countries which are both Contracting States of the Convention.[16] Where the rules of private international law require the application of Chinese law, the Convention will not be considered a part of Chinese law because China declared itself to be not bound by Article 1(1)(b).[17] Thus, there will be more applications of Chinese law without the CISG in Sino-foreign transactions. Where a contract for the international sale of goods is governed by Chinese law but not by the CISG, the discussion on Chinese law and practice regarding the remedy of specific performance will be of more immediate and practical importance. In any sales transaction governed by the Convention, and when the dispute is before the domestic court of any State, given the effect of Article 28, the availability of and limitations on the remedy of specific performance are subject not only to the Convention provisions but also to the domestic rules of the *forum* State.[18] In other words, if a party to a CISG contract requests, for example, a Chinese court to enter a judgment for specific performance, Chinese domestic law will remain relevant despite the fact that the Convention preempts Chinese law. Therefore, the discussion in this Article on illustrative Chinese law and practice will be as extensive as on the Convention rules, and will include Chinese statutes and regulations that govern contracts among Chinese domestic parties as well as those applicable only to Sino-foreign transactions.

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16. *Id.* art. 1(1)(a).

17. *Id.* art. 1(1)(b). On December 11, 1986, when it deposited its instrument of approval (ratification) with the United Nations, China made the following declaration: "The People's Republic of China does not consider itself to be bound by subparagraph (b) of paragraph (1) of [A]rticle 1 [of the Convention]." *See* 1987 ZHONGGUÓ FÂLÜ NIÁNJIÀN [Chinese Annual of Law] 540 (1987) [hereinafter 1987 FÂLÜ NIÁNJIÀN]; 5 CHINA LAW AND PRACTICE 25, 49 (May 1987) [hereinafter CHINA L. & PRAC.]; *see also* U.N. Doc. ST/LEG/SER.E/10, X.10 at 365; HONNOLD (2d ed.), *supra* note 7 at 693-94. The former Czechoslovakia and the United States have also made similar declarations as to Article 1(1)(b). *Id.*

18. CISG, *supra* note 7, art. 28.

## II. SPECIFIC PERFORMANCE UNDER THE CONVENTION

### A. The Rights to Specific Performance

#### 1. Broad Rights under Articles 46 and 62

Although Article 28 of the Convention obligates a court to grant specific performance *only if* it would do so under the domestic law of the country in which it sits with a similar contract under similar circumstances, the Convention makes specific performance more readily available than the domestic law of some countries.[19] On the buyer's general rights to specific performance, Article 46(1) of the U.N. Convention states: "The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement." With respect to the seller's specific relief, Article 62 of the Convention similarly provides: "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement."[20]

Paragraph (1) of Article 46 and Article 62 respectively grant the buyer and the seller the choice of either the right to specific performance or the right to other remedies such as damages, or a combination of the two, as long as they are not "inconsistent with" the request for specific performance. The breadth of a buyer's rights to specific performance under Article 46 includes his entitlement to: (1) delivery of the goods; (2) delivery of conforming goods, delivery of substitute goods in case of "fundamental breach," or repair of nonconforming goods if not "unreasonable"; (3) delivery of the goods before or at the specified time or at a specified place if time or place is an important factor to the buyer's expectation from the contract; (4) prompt delivery of proper bills of lading and other documentation; and (5) the performance by the seller of his other obligations under the contract and/or the Convention.[21]

Similarly, the seller's broad rights to specific performance under Article 62 entitle him to require the buyer to: (1) take delivery of the goods; (2) pay the price of the goods; and/or (3) fulfill his other obligations under the contract and/or the Convention, such as the obligation under Article 86(1) to preserve the goods which he intends to reject after being received.[22]

The provisions of Article 46 and 62 indicate that the Convention considers specific performance to be a routinely available, and perhaps even preferable, remedy. Unlike the common law and the domestic law of some countries, the Convention's regime of the remedy of specific performance is so broadly defined

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19. *See, e.g.*, British Sale of Goods Act, 1979, § 52; U.C.C. § 2-716 (1995).
20. CISG, supra note 7, arts. 46(1) & 62.
21. *Id.* art. 46.
22. *Id.* art. 62.

that it does not require many of the prerequisites seen in some domestic law.[23] The Convention does not require that it be impossible to calculate damages or to assess other types of remedies. It does not require that the goods be irreplaceable or non-resalable, that is, that a buyer cannot reasonably purchase substitute goods (*i.e.*, the unavailability of cover purchase) or that a seller cannot reasonably resell the unwanted goods (*i.e.*, the unavailability of resale).[24] Nor does the Convention require that the performance remedy be contingent upon the existence of a continuing possibility to perform the contract by the breaching party. As long as he is not exempted from liability under Article 79, the party in breach still has a potential duty (especially upon the aggrieved party's request) to perform his contractual obligations.[25] The Convention does not even require that the non-breaching party take such reasonable steps as necessary to mitigate any loss due to the other party's breach before he can claim specific performance, and/or that his entitlement to the performance remedy be reduced if he has failed to mitigate damages.[26] Also, under Articles 46 and 62 of the Convention, the subject matter of the contract (the goods) does not have to be unique, specific, identifiable and/or exceptional before specific relief can be sought. Nor does a contract of sale have to be one that does not call for the personal performance by the party in breach. Further, no distinction is made under Articles 46 and 62 between different types of breaches, *e.g*, non-performance, delay in performance, incomplete performance and performance not in conformity with the terms of the contract. Thus, subject to Article 46(2), (3), and other restrictive provisions and conditions, specific performance is made available in the case of almost any type of breach, entitling the aggrieved party to require the breaching party to perform all or any of his obligations due under the contract and/or the Convention.[27]

2. "Legislative History"—Support for Broad Rights

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23. *See infra* part III.

24. *See infra* text accompanying notes 33-43.

25. CISG, *supra* note 7, art. 79 (force majeure provision).

26. Article 77 of the CISG on the duty of mitigation is contained in the section on damages, and therefore applies to the remedy of damages only. CISG, *supra* note 7, art. 77.

At the 1980 Vienna Diplomatic Conference, a proposal was made to amend draft Article 71 of the 1980 draft text that corresponds to Article 77 of the Convention, so that the breaching party may claim a reduction in any form of remedies (presumably including specific performance) if the aggrieved party fails to reasonably mitigate its losses due to the former's breach. That attempt was rejected, and draft Article 71 (*i.e.*, Article 77 of the Convention) was left unchanged and now remains in the section that deals solely with damages. *See First Committee Deliberations* 30th mtg., ¶¶ 55-78 U.N. Doc. A/CONF.97/C.1/SR.30 (1980) *reprinted in* O.R., *supra* note 7, at 396-98; DOC. HIST., *supra* note 7, at 617-19; *see also Commentary Prepared by the U.N. Secretariat on the 1978 Draft Convention on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF.97/5, art. 73, para. 3 [hereinafter *U.N. Secretariat's Commentary*] *reprinted in* O.R., *supra* note 7, at 61; DOC. HIST., *supra* note 7, at 451.

27. *See infra* part II.C.1.

A number of points concerning the "legislative history" of Articles 46 and 62 support the view that the Convention guarantees a wide range of rights to specific performance as a remedy routinely available to the aggrieved party, and that such rights under these articles are much less restrictive than remedies under some other legal systems.

At the Vienna Conference, the U.S. delegation introduced a proposal to place a "reasonable time" restriction on the buyer's right to require performance[28] in order to avoid a situation where the buyer "would be put in a position to speculate at the seller's expense on a rising market."[29] Contrary to the U.S. position, delegates from Norway, Sweden and a few other countries held that, in the case of non-delivery or delayed delivery, the buyer was entitled to wait for delivery even if the market was going up, and should not lose his right to specific performance.[30] The U.S. proposal was subsequently rejected by the First Committee.[31] There was also a similar proposal to restrict the seller's right to require payment of the price with regard to time,[32] but that proposal was never discussed in the First Committee or the Conference. These facts indicate that a party's remedy of specific performance is in essence intended to be free from any time restriction, and this remedy is available as long as any part of the other party's obligations have not been fulfilled.

The Convention does not contain a provision comparable to Article 25 of the Uniform Law on the International Sale of Goods (ULIS), which provided that the buyer could not require performance "if it [was] in conformity with usage and reasonably possible for the buyer to purchase [substitute] goods" from other sources (cover purchase).[33] It is of interest to note that during the drafting stage

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28. O.R., *supra* note 7, at 112; DOC. HIST., *supra* note 7, at 684. The proposed addition to draft Article 42 read as follows: "2 *bis* The buyer loses the right to require performance unless he requests and institutes legal action for it within a reasonable time and before changes in market or other conditions make the exercise of the right unfair or oppressive." O.R., *supra* note 7, at 112.

29. O.R., *supra* note 7, at 334; DOC. HIST., *supra* note 7, at 555.

30. O.R., *supra* note 7, at 334-35; DOC. HIST., *supra* note 7, at 555-56.

31. O.R., *supra* note 7, at 113, 335, DOC. HIST., *supra* note 7, at 556, 685.

32. *See* Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and other Final Clauses Prepared by the Secretary General, U.N. GAOR, at 18, art. 58, ¶ 2, U.N. Doc. A/Conf.97/9 (1980) [hereinafter Pre-Conference Proposals], *reprinted in* O.R., *supra* note 7, at 79; DOC. HIST., *supra* note 7, at 400.

33. Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 Annex, art. 25 (1964) [hereinafter ULIS], Article 25 of the ULIS states:

> The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract

of the CISG, the wording from Article 25 of the ULIS initially appeared in a number of proposed draft articles that eventually became Article 46 of the CISG,[34] but were deleted from later drafts. The Committee of the Whole I of the United Nations Commission of International Trade Law (UNCITRAL), when preparing the 1977 draft Sales Convention, considered a proposal that attempted to re-insert the restrictive language of Article 25 of the ULIS requiring the non-attainability of cover. In support of that proposal, "it was stated that if the buyer could easily purchase substitute goods it would be unreasonable to compel the seller to supply such goods when this may involve him in great expense."[35] On the other hand, it was pointed out, *inter alia*, that if that proposal were to be accepted, the rights of the buyer to require performance would be unjustifiably restricted; that it would be inequitable to force the innocent buyer "to go to the trouble of obtaining replacement goods"; and that there would be the danger of the seller abusing that proposed provision in order to avoid his obligations under the contract.[36] Based on these arguments, the Committee rejected the "cover purchase" proposal.[37]

Prior to and during the Vienna Diplomatic Conference, it was again proposed that a paragraph be added to draft Article 42 (corresponding to Article 46 of the Convention) to read that "[t]he buyer may not require performance by the seller if the buyer can purchase substitute goods without substantial additional expense or inconvenience."[38] The majority in the First Committee of the Conference

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relates. In this case the contract shall be *ipso facto* avoided as from the time when such purchase should be effected.

*Id.*

34. *E.g.*, draft Article 42(2) (Alternative A) of the Working Group stated: "The buyer shall not, however, be entitled to require performance of the contract by the seller if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates."

Another proposed text, draft Article 42 (Alternative B), read: "The buyer may require the seller to perform the contract *unless it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates"* (emphasis added).

A subsequent tentative draft Article 42(2) used identical language as Alternative A of draft Article 42 above. *See Report of the Secretary-General: Obligations of the Seller* (1972), *reprinted in* [1972] 4 Y.B. 36, U.N. Doc. A/CN.9/WG.2/WP.16, at 53, 59; DOC. HIST. *supra* note 7, at 130, 136.

35. *Report of the Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods*, U.N. GAOR 32 Supp. (No. 17) Annex 1, para. 239, U.N. Doc. A/32/17 (1977) [hereinafter *Report on the 1977 Sales Draft*] *reprinted in* [1977] 8 Y.B. 25, 42, U.N. Doc. A/CN.9/SER.A/1977; DOC. HIST., *supra* note 7, at 335.

36. *Report on the 1977 Sales Draft, supra* note 35, para. 240.

37. *Id.* at para. 241.

38. Pre-Conference Proposals, *supra* note 32, art. 42 ¶ 3; O.R., *supra* note 7, at 78; DOC. HIST., *supra* note 7, at 399; Consideration by the First Committee of the draft Convention on Contracts for the International Sale of Goods [hereinafter

opposed this proposal and it was therefore rejected.[39] They argued, *inter alia*, that the proposal would encourage the seller to evade its contractual obligations on the pretext that the buyer would have the option of securing cover purchase elsewhere, and that, even if the buyer could secure replacement goods from other sources, he should remain entitled to enforce the contract and to expect that the seller honor its promise.[40]

Furthermore, the Convention does not contain a provision comparable to Article 61(2) of the ULIS, which provides that the seller was not entitled to require payment "if it [was] in conformity with usage and reasonably possible for the seller to resell the goods" (resale).[41] It may be noted that, prior to the Diplomatic Conference, a similar proposal was made in respect to draft Article 58 (corresponding to Article 62 of the CISG) to the effect that the seller should not have the right to require payment if the buyer had not taken delivery of the goods and the seller could resell the goods without unreasonable or substantial additional expense or inconvenience.[42] This proposal was apparently withdrawn. The fact that UNCITRAL and the Diplomatic Conference did not retain the ULIS Article 61(2) approach could suggest the intentional omission of the requirement of "resale in reasonable circumstances" from the Convention. According to the U.N. Secretariat's Commentary:

> Article [62 of the Convention] differs from the law of some countries in which the seller's remedies in respect of the price are restricted. In those countries, even though the buyer may have a substantive obligation to pay under the contract, the general principle is that the seller must make a reasonable effort to resell the goods to a third party and recover as damages any difference between the contract price and the price he received in the substitute transaction. . . .

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Consideration by First Committee]; O.R., *supra* note 7, at 111; DOC. HIST., *supra* note 7, at 683.

39. Consideration by First Committee, *supra* note 38; O.R., *supra* note 7, at 111, 113; DOC. HIST., *supra* note 7, at 683, 685.

40. First Committee Deliberations, 18th mtg., paras. 45-72 U.N. Doc. A/CONF.97/C.1/SR.18 (1980); O.R., *supra* note 7, at 330-32; DOC. HIST., *supra* note 7, at 551-53.

41. ULIS, *supra* note 33, art. 61(2). Article 61(2) of the ULIS reads as follows:

> (2) The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be *ipso facto* avoided as from the time when such resale should be effected.

*Id.*

42. Pre-Conference Proposals, *supra* note 32, art. 58, ¶ 1; O.R., *supra* note 7, at 79; DOC. HIST., *supra* note 7, at 400.

> However, under Article [62], when the buyer has a substantive obligation to pay the price . . . , the seller has available a remedy to require him to pay it.[43]

Indeed, the "legislative history" of Articles 46 and 62, as is observed, indicates at a minimum the following reasons to justify the broad rights to specific performance recognized and established in the Convention:

> First, several delegates expressed the belief that a party to a contract is entitled to full performance by virtue of the agreement itself, and that the law should not force a nonbreaching party to accept anything less. Second, buyers of goods from other countries often are unable to obtain alternative sources of supply in the quantities and with the qualities needed. Finally, if an aggrieved party's primary remedy is damages, then litigation frequently will be required to fix the extent of liability, resulting in cost and delay.[44]

Under the Convention a party's entitlement to require specific performance is more a matter of right, and the application for such relief may not be denied by a court without more. The U.N. Secretariat's Commentary on the 1978 Draft Convention, commenting on draft Article 26 (now Article 28 of the Convention), states:

> It should be noted that [A]rticles 42 [corresponding to CISG Article 46] and 58 [corresponding to CISG Article 62], where not limited by this Article, have the effect of changing the remedy of obtaining an order by a court that a party perform the contract from a limited remedy, which in many circumstances is available only at the discretion of the court, to a remedy available at the discretion of the other party.[45]

The U.N. Secretariat's comments on Articles 42 and 58 of the Draft (now Articles 46 and 62 of the Convention) also support the inference that when one party exercises its rights to specific performance, it has the effect of mandating a court to guarantee that right by compelling the other party to render the requested performance.[46]

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43. *U.N. Secretariat's Commentary*, *supra* note 26, art. 58, paras. 3 & 4; O.R., *supra* note 7, at 48; DOC. HIST., *supra* note 7, at 438.

44. Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 614-15 nn.41-43 (1988).

45. *U.N. Secretariat's Commentary*, *supra* note 26, at 77 art. 26, para. 4; O.R., *supra* note 7, at 27; DOC. HIST., *supra* note 7, at 417.

46. *U.N. Secretariat's Commentary*, *supra* note 26. The commentary by the U.N. Secretariat on what is now Article 46 of the Convention states:

## B. Broad Discretion of Courts under Article 28

### 1. The Effects of Article 28

It is one question whether an aggrieved party is entitled to specific performance under the Convention, and it may be quite another whether it can obtain a court order to compel specific performance. Some legal systems mandate the court to enforce the performance of contractual obligations, others do not. Article 28 of the Convention is designed to cope with the latter question and stands as an explicit limitation on the right to compel performance. The whole Article reads:

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court *would* do so under its own law in respect of similar contracts of sale not governed by this Convention.[47]

It follows from the above provision that, in certain circumstances, the enforceability of the right to specific performance under the Convention depends on the exercise of discretion by the domestic court in light of the court's domestic procedural rules. As was indicated before, this limitation on the right to specific performance is the result of a compromise between two legal systems—some in which the court would grant a request for specific performance for similar sales transactions not governed by the Convention, and others under which the court would not be required to do so.[48]

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> The style in which [A]rticle 42 in particular and Section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the requested relief. However, these two different styles of legislative drafting are intended to achieve the same result. Therefore, when [A]rticle 42(1) provides that 'the buyer may require performance by the seller,' it anticipates that, if the seller does not perform, *a court will order such performance and will enforce that order* by the means available to it under its procedural law.

*Id.* arts. 42 para. 8 & 58 para. 5; O.R., *supra* note 7, at 38 & 48; DOC. HIST., *supra* note 7, at 428 & 438 (emphasis added).

47. CISG, *supra* note 7, art. 28 (emphasis added).

48. *Cf.* E. Allan Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 249-51 (1979); Kastely, *supra* note 44, at 612.

Technically, a distinction may be made between the right to request (apply for) specific performance and the right to specific performance. A difference must also be made between the above two situations and the non-availability of a performance remedy at all. Where an aggrieved party under domestic law is entitled to a performance remedy as a matter of right, the court is always bound to grant its application for such remedy so long as it meets the required conditions. Where the court has discretion as to whether to approve an application for performance, the injured party merely possesses the right to *apply* for such relief, not the right to the relief itself. Where the domestic law disallows the remedy of specific performance, the innocent party enjoys neither the right to such remedy nor the right to apply for it. Accordingly, a domestic court when presented with an application for specific performance pursuant to CISG provisions, might well be faced with three different types of situations:

*Scenario A*: The law of State A requires the award of specific performance concerning a non-CISG yet comparable domestic contract. Therefore, the court in State A, under its own domestic law, would be bound to grant the performance remedy against a similar sales contract *not* governed by the Convention.

*Scenario B:* The law of State B forbids the use of specific performance as a remedial measure under a particular circumstance. When such circumstance arises, the court in State B, under its own domestic law, not only would not be bound to, but also would in fact be unable to grant a demand for specific performance in respect to a similar sales contract *not* governed by the Convention.

*Scenario C:* The law of State C neither requires nor prohibits the award of specific performance. The court of State C would then, under its own domestic law, not be bound to grant an application for the performance remedy in respect of a similar sales contract *not* governed by the Convention, but it may or may not so grant at its own discretion.

Before the Convention enters into play, and for a sales contract (say, a domestic sales contract) not governed by the Convention, only in *Scenario C* would the court have the choice to either allow or disallow specific performance at its own discretion; while in either *Scenarios A* and *B*, the court would have no choice—in *Scenario A* it would be bound to grant such relief, while in *Scenario B* it would be bound not to do so.

When the court is expected to decide, in accordance with Article 28 of the CISG, on an application for specific performance of obligations under a contract that *is in fact governed* by the Convention, the court's discretionary and mandatory power may or may not be affected. Under the Convention, the result in *Scenario A* would be the same as under the domestic rules of State A, *i.e.*, the court would still be bound to enter an order for specific performance. Wherever the domestic law requires the granting of specific performance in respect to a similar transaction not subject to the Convention, Article 28 makes it clear that the injured party's rights to demand performance under the Convention will be strictly enforced, and the court shall have no discretion in this regard. Thus, *Scenario A* does not present any problem through the operation of Article 28. In *Scenario B*, however, a different result in the power (and decision) of the court may take place under Article 28. In *Scenario C*, whether there is a change in the

result depends upon how the word "*would*" in Article 28 is interpreted. The solutions to *Scenarios B* and *C* under the Convention are thus not that simple and therefore deserve one's special attention.

2. The Court's Discretion When Domestically Bound Not to Grant

In *Scenario B*, in which the court *could not* grant the remedy of specific performance under the domestic law of State B, a change might occur in the result when the contract is governed by the Convention, because the court under Article 28 would no longer be bound to refrain from ordering specific performance. In other words, if the contract is subject to the Convention, the court is neither bound to enter, nor precluded from entering, a judgment granting the performance relief; instead, the decision is now at the court's own discretion. The following hypothetical example illustrates this:

*HYPOTHETICAL EXAMPLE 1*: Shanxi Cereals, Oils & Foodstuffs Import and Export Corp. (FoodImpex), a specialized FTC in Taiyuan, China, and Asian-Food Trading Inc. (Asian-Food), a New York company (through its representative office in Beijing), entered into a sales contract under which Asian-Food agreed to purchase 100,000 boxes (10 bottles per case, 500g per bottle) of Shanxi Fine Vinegar from FoodImpex. FoodImpex was to complete delivery in October. To ensure conforming and timely delivery of the specified type of vinegar, FoodImpex had independently contracted with Gaopíng County FTB (Gaopíng FTB), a local foreign trade bureau and a major supplier of Shanxi Fine Vinegar, for the supply of 50,000 boxes of such vinegar for the purpose of performing part of FoodImpex's sales contract with Asian-Food, and procured the remaining 50,000 boxes of vinegar from other producers and suppliers. By the end of October, however, FoodImpex was able to deliver only 50,000 boxes of the vinegar due to Gaopíng FTB's failure to supply these products to FoodImpex. Gaopíng FTB's decision to break its supply contract with FoodImpex was based on a recommendation made by the Provincial Department of Foreign Trade and Economic Cooperation (DOFTEC) for switching the sales of all Shanxi Fine Vinegar that Gaopíng FTB could arrange for export to a fourth party in Hong Kong who had offered a price substantially higher than that of FoodImpex and even ultimately that of Asian-Food. Part of DOFTEC's functions was to ensure that the targets of the State's foreign trade plan assigned to the province be fulfilled. DOFTEC, superior to both FoodImpex and Gaopíng FTB, tried to convince FoodImpex that the breach would be worth it even after deduction of damages and "breach of contract penalties" which FoodImpex would probably have to pay for incomplete performance. Asian-Food, however, sued FoodImpex in a Chinese court and demanded specific performance within three additional months plus other remedies allowable under the U.N. Sales Convention. Meanwhile, Gaopíng FTB had sold out all the products in its stock and contracted with the fourth party for continuous supply of the Fine Vinegar produced in the future. Neither was it likely for FoodImpex to procure the vinegar from other

suppliers in time because of their limited production capacity and the long duration required for production. It thus became impossible for FoodImpex to complete the fulfillment of its obligations under the sales contract with Asian-Food.

Under Chinese law, the existence of inability or impossibility to perform would require a Chinese court *not* to order specific performance, leaving the court without discretionary power.[49] When the Convention does govern the principal contract between Asian-Food and FoodImpex, the result may well differ from that under Chinese domestic rules: without Article 28, the court would be bound to grant the performance remedy (unless the remedy is restricted by Article 46 itself); with Article 28, the court is neither bound to enter, nor bound *not* to enter, a judgment granting Asian-Food the relief of specific performance. Assume that Asian-Food has not resorted to a remedy that is inconsistent with that of performance, and that its entitlement to specific performance is not subject to the restrictions in Article 46(2) and (3). Before applying Article 28 of the Convention, Asian-Food "may require performance" by FoodImpex of its obligations under the contract pursuant to Article 46(1) of the Convention.[50] The court would then be bound, at least theoretically, to grant Asian-Food such relief. This is because its entitlement to specific performance operates as a matter of right under Article 45(1) which states that "[i]f the seller fails to perform any of his obligations under the contract . . . , the buyer may . . . exercise the rights provided in Articles 46 to 52."[51]

The Convention does not address the issue, as the domestic law of some countries does, whether specific performance is still available to the aggrieved party in case of inability or impossibility not caused by an excusable failure to perform. According to Article 79(2), if a party's failure to perform the whole or part of his contractual obligations is due to the failure of a third party "whom he has engaged to perform the whole or a part of the contract," he may be relieved of his liability only if (a) he himself under Paragraph (1) of Article 79 can prove that his inability "was due to an impediment beyond his control" which he could not reasonably be expected to have anticipated at the time the contract was concluded; and (b) the third party would also satisfy the exemption requirement if Paragraph (1) of Article 79 "were applied to him."[52] Neither Gaoping FTB, the third party, nor FoodImpex itself seemed to have based its failure on an uncontrollable and unavoidable "impediment" as mentioned in Article 79(1).[53] Accordingly, neither

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49. *See infra* part III.B.5.

50. CISG, *supra* note 7, art. 46(1).

51. *Id.* art. 45(1)(a).

52. *Id.* art. 79. For more discussions of Article 79, see HONNOLD (1st ed.), *supra* note 7, at 426-43; HONNOLD (2d ed.), *supra* note 7 at 529-52; Jianming Shen, *«Liánhé Guó Guójì Huòwù Xiaoshòu Hétong Gongyue» xià de Miânzé Wèntí* [Exemption Issues under the United Nations Convention on Contracts for the International Sale of Goods] CH. Y.B. INT'L L. 259 (1989).

53. CISG, *supra* note 7, art. 79(1).

of them may be exempted from liability under the Convention. It thus follows that unless it "has resorted to a remedy which is inconsistent with" the requirement for specific relief, Asian-Food under the present Convention may still exercise its right under Article 46(1) to require FoodImpex to continue performance even if it has become practically impossible for FoodImpex to do so. In other words, without Article 28, the court is more bound than not to grant such relief to Asian-Food.

Because of the effects of Article 28, however, the court would not be bound to grant the performance relief. Rather, it has the option to either grant or not grant that remedy. The decision is left entirely to the court's discretion—it may well choose to order FoodImpex to complete delivery no matter what, or it may relieve FoodImpex of unperformed contractual obligations without prejudice to any of Asian-Food's other remedies. To allow the discretion to compel a party to do what has become impossible appears to be legal nonsense, but no other inference seems feasible from the current wordings of the Convention. Of course, the focal point here is not specific performance in the particular case of inability or impossibility. It is the availability of discretion to the court in the case of an application for specific performance made under the Convention, where such relief is not available under the domestic law of that court for a similar contract not governed by the Convention. Professor Honnold is correct in pointing out that "[t]he phrase 'is not bound' indicates that a court that would not 'require' performance under its own law is free either to 'require' performance or to apply other remedies provided by the Convention."[54]

### 3. Power of the Courts When Having Discretion Domestically

When a court, as indicated in *Scenario C*, retains the freedom to either allow or disallow the remedy of requiring performance under its own domestic substantive law, will it continue to have that discretion under the Convention or will the discretion become a legal duty to order such performance? Does the reference to "unless the court *would do so* under its own law . . ." cover *Scenario C* where the court *could* (but would not be legally required to) enter a judgment for specific performance under its domestic law respecting a similar contract not subject to the Convention?

It is interesting to note that previous draft texts of Article 28 used the word "could" instead of "would."[55] This fact suggests that a court would still be bound

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54. HONNOLD (2d ed.), *supra* note 7, at 273.

55. *See, e.g., Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session* (Jan. 27-Feb. 7, 1975), U.N. Doc. A/CN.9/100, para. 52, draft art. 16, *reprinted in* 6 Y.B. UNCITRAL 49, at 54 (1976) ("a court shall not be bound to enter a judgment providing for specific performance unless this could be required by the court under its own law . . ."); *Report on the 1977 Sales Draft, supra* note 35, para. 136, draft art. 12 ("unless the court could do so under its own law . . .");

to enforce the rights under the Convention to require performance when the court under its own domestic law was authorized either to grant or not to grant a request for specific performance respecting a similar non-CISG sales contract.[56] At the Vienna Diplomatic Conference, delegates from the United States and the United Kingdom proposed to replace the word "could" with "would,"[57] stating that draft Article 26 as it was worded would "reduce . . . protection . . . [of] those States whose courts did not readily grant the remedy of specific performance," and that courts which had jurisdiction to grant specific performance (*i.e.*, which *could* do so) under domestic law, but in fact rarely exercised it, "might arguably be compelled to do so under the Convention."[58] As a result, the First Committee changed the word "could" to "would."[59]

Despite this change, Article 28 remains less than satisfactory and its meaning less than clear, since the word "would" may still be subject to different translations and interpretations. For example, the following Chinese version of Article 28 would create more confusion and uncertainty:

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1978 UNCITRAL Draft, A/CONF.97/5, draft art. 26, *reprinted in* O.R., *supra* note 7, at 7; DOC. HIST., *supra* note 7, at 384 (substantially similar to the 1977 Sales Draft, art. 12).

56. *See, e.g.*, *U.N. Secretariat's Commentary*, *supra* note 26, art. 26, para. 3; O.R., *supra* note 7, at 27; DOC. HIST., *supra* note 7, at 417 (stating that "Article 26 limits [the] application [of draft Articles 42 or 58] only if a court could not under any circumstances order . . . specific performance").

57. Pre-Conference Proposals, *supra* note 32, art. 26; O.R., *supra* note 7, at 76; DOC. HIST., *supra* note 7, at 397; Consideration by First Committee, *supra* note 38, art. 26; O.R., *supra* note 7, at 100; DOC. HIST., *supra* note 7, at 672.

58. *First Committee Deliberations*, *supra* note 40, 13th mtg. paras. 41-44; O.R., *supra* note 7, at 304-05; DOC. HIST., *supra* note 7, at 525-26.

59. *First Committee Deliberations*, *supra* note 40, 13th mtg. para. 52; O.R., *supra* note 7, at 305; DOC. HIST., *supra* note 7, at 526.

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如果按照本公约的规定，一方当事人有权要求另一方当事人履行某一义务，法院没有义务做出判决，要求具体履行此一义务，除非法院依照本身的法律对不属本公约范围的类似销售合同愿意这样做。[60]

The underlined part of the above passage, especially the italicized term *yuànyì*, when properly translated, means "unless the court . . . *would be willing* to do so." This language would inevitably invite the construction that the decisive element would not be whether the domestic law would require the court to enforce specific performance in similar non-CISG transactions, but whether the court would have the discretion or willingness to do so *or not*. This construction, however, may be contrary to what the "legislative history" of Article 28 appears to indicate. Had the English version of Article 28 made it clearer that a court was not bound to grant a request for specific performance pursuant to the Convention unless that court *would be required to do so* under its own domestic law for non-CISG sales contracts, the Chinese version would not have used the term *yuànyì* (to be willing).

Nevertheless, the "legislative history" could reasonably lead one to the conclusion that the words "would do so" in Article 28 were intended to mean "would be required to do so." Consequently, the only situation in which Article 28 of the Convention does not limit the rights under Articles 46 and 62 is where the aggrieved party under the court's domestic law is entitled to the performance remedy as a matter of right. This is because the court in that circumstance would be bound to grant an application for ordering specific performance on non-CISG sales contracts similar to contracts governed by the Convention. It follows that a party's right to require performance under Article 46 or 62 of the Convention will be affected by Article 28 of the Convention where: 1) under the court's domestic law the discretion whether to approve a request for specific performance is left entirely to the court for similar sales contracts not governed by the Convention; or 2) the domestic law does not authorize the court to enter a judgment for specific performance at all. In these two situations, a court presented with a petition to compel specific performance pursuant to the Convention provisions is not bound to enforce the right to require performance under the Convention, although nothing in Article 28 prohibits the court from entering a judgment for specific performance.

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60. CISG, *supra* note 7, art. 28 (Chinese); O.R., *supra* note 7, at 223; DOC. HIST., *supra* note 7, at 813 (emphasis added).

## C. Other Limitations on the Remedy of Requiring Performance

### 1. Limitations on the Buyer's Right to Replacement or Repair

In the case of delivery of non-conforming goods, paragraphs (2) and (3) of Article 46 limit the buyer's right to seek specific performance by placing the buyer's requirement for delivery of substitute goods under the "fundamental breach" test, and his requirement for remedy of the nonconformity by repair under the "reasonableness" test:

> (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under [A]rticle 39 or within a reasonable time thereafter.
>
> (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under [A]rticle 39 or within a reasonable time thereafter.[61]

Under Article 46(2), if the nonconformity of the goods delivered does not deprive the aggrieved buyer of its basic expectation from the contract and does not constitute a *fundamental* breach as defined in Article 25 of the Convention,[62] the buyer will then be entitled only to repair, reduction in price, and/or damages, and he will not be entitled to the remedy of requiring delivery of substitute goods. Under paragraph (3) of Article 46, the buyer's entitlement to require the seller to cure the nonconformity by means of repair may be exercised *only* if it is not "*unreasonable*" to do so under the circumstances.[63] Thus, for non-conformity, the performance remedy is limited to certain situations in which substantial performance has not been rendered by the seller or the cost of repair does not exceed the reasonable expectations of the parties under the contract. By these provisions, the Convention protects against an unreasonable decree of specific performance.

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61. CISG, *supra* note 7, art. 46(2) & (3).

62. *Id.* art. 25. Under Article 25 of the Convention, a "fundamental breach" occurs "if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." *Id.*

63. *Cf.* Common Rules Civ. L., *supra* note 4, art. 134(6).

2. Prohibition of Inconsistent Remedies

A party's right to specific performance under the Convention is further limited by the following language that appears in both Article 46(1) and Article 62: if "the buyer has resorted to a remedy which is inconsistent with" the requirement for specific performance, he loses the right to demand that the seller deliver specific goods, deliver conforming goods, deliver goods within an additional period of time he has fixed, or perform other obligations under the contract and the Convention.[64] Similarly, a seller may not require acceptance of delivery, specific payment of the price, or performance by the buyer of other obligations under the contract and the Convention if he has employed another remedy or remedies "inconsistent with" specific performance.[65]

The avoidance of a contract pursuant to Articles 26, 49(1), 51(2), 64(1), 72, or 73 of the Convention is such a remedy that it is inconsistent with the remedy of specific performance. [66] For example, where the buyer declares that he or she considers the seller's failure to deliver the goods a "fundamental breach" and therefore declares that the contract be avoided, he no longer possesses the right to demand specific performance.[67] The remedy of specific relief and the remedy to avoid a contract are always incompatible concurrently—it must be one or the other. Effective avoidance of the contract not only eliminates the practical need for, and the legal (or contractual) basis of, continuing performance, but also deprives the aggrieved party of its entitlement to specific performance which it would have otherwise enjoyed. Article 81(1) of the Convention specifically states that avoidance of a contract "releases both parties from their obligations under it, subject [only] to any damages which may be due."[68] This clearly indicates that all performance obligations, and the corresponding rights to request and receive such performance, cease to exist once the contract is avoided.

In addition, other situations involving remedies or measures precluding or inconsistent with specific performance include proportional reduction of contract price by the buyer for nonconforming goods, and the election to accept early delivery of the contracted goods or to accept excessive delivery. Once the buyer has agreed to accept non-conforming goods and has requested or received a price deduction to offset the lack of conformity, he or she no longer has the option to require the seller to remedy the defectiveness by delivering substitute goods or by repair.[69] If the buyer accepts the goods that arrive ahead of schedule, he or she loses the right to reject or return the early delivery and to demand that delivery be made on time.[70] In case of partial delivery or partial nonconformity of delivery,

64. CISG, *supra* note 7, art. 46(1).
65. *Id.* art. 62.
66. *Id.* arts. 26, 49(1), 51(2), 64(1), 72 & 73.
67. *Id.* art. 81(1)
68. *Id.*
69. CISG, *supra* note 7, art. 50.
70. *Id.* art. 52(1).

the buyer may not reject the whole delivery and require the seller to completely re-deliver the goods; instead, he or she may only demand delivery "of the part which is missing or which does not conform" or demand repair of the nonconforming part.[71] If the buyer has accepted a price reduction for the shortage or the partial lack of conformity, he or she even loses the right to demand performance in respect of the missing part or non-conforming part.[72] Similarly, the buyer is precluded from demanding the redelivery of the goods simply on the grounds that the quantity of the delivered goods "is greater than that provided for in the contract."[73] Instead, the buyer may only reject that portion of the shipment that is in excess of the required quantity if he or she chooses to do so, but not the entire shipment.[74] Furthermore, Article 48 of the Convention provides that "[i]f the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to *any remedy which is inconsistent with performance* by the seller."[75] It follows that if the buyer has rejected the seller's proposal to remedy its breach by delivering the goods within a specified period of time, then the buyer may not proceed to compel the seller to perform by delivering the goods at least within that period of time, unless the circumstances change.

3. Implied Restrictions on Specific Performance

Beside Article 28 subjecting a court's duty to compel performance to domestic rules, Articles 46(1) and 62 prohibiting concurrent application of inconsistent remedies, and Article 46(2) and (3) limiting the buyer's rights to substitute goods or to repair, there are certain implied or indirect limitations on a party's right to require specific performance under the Convention. Article 7 subjects the exercise of the right to specific performance to the general "good faith" obligation.[76] Articles 85 through 88 impose upon the parties general duties of preservation and disposal of the goods.[77] Failure to comply with these provisions may affect or limit the injured party's full entitlement to specific

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71. *Id.* art. 51(1).

72. *Id.* According to Article 51(1), Article 50 of the Convention (price-reduction in case of nonconformity) applies to partial lack of nonconforming *vis-à-vis* the part which does not conform. *Id.* arts. 50 & 51(1). However, the Convention makes no provision as to whether the shortage in quantity may be resolved by way of price reduction as well. The author suggests that Article 50 be made applicable by analogy to the case of insufficient delivery as well.

73. *Id.* art. 52(2).

74. CISG, *supra* note 7, art. 52(2).

75. *Id.* art. 48(2) (emphasis added).

76. *Id.* art. 7.

77. *Id.* arts. 85-88.

performance.[78] Finally, under Article 82(1) of the Convention, a buyer's right to demand substitute delivery in place of nonconforming goods is further limited by the provision that "[t]he buyer loses the right to . . . require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them."[79]

## III. SPECIFIC PERFORMANCE UNDER DOMESTIC LAW

### A. General Comparative Observations

Comparative studies indicate that the remedy of specific performance is recognized under many legal systems, although the degree of legal restrictions on this right varies from country to country, especially between civil law systems and common law systems.[80] Generally, in the civil law world, the basic premise is that specific performance is not only easily available to a non-breaching party, but also considered the primary remedial measure for breach of contract.[81] In the common law world however, specific performance as a remedy is subject to stricter conditions and is more often a matter of discretion by the court[82] which usually compels specific performance "only when damages do not provide an adequate remedy."[83]

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78. *Id.*

79. CISG, *supra* note 7, art. 82(1).

80. *See, e.g.*, HONNOLD (2d ed.), *supra* note 7, at 274-77.

81. *See, e.g.*, BÜRGERLICHES GESETZBUCH [BGB] art. 241 (F.R.G.) (creditor entitled to claim performance from debtor); C. CIV., art. 1184 (Fr.) (aggrieved party entitled to seek an order compelling performance); C. CIV. art. 1124 (Spain) (aggrieved party entitled to request specific performance of the contract); MICHAEL H. WHINCUP, CONTRACT LAW AND PRACTICE 253 (1990). Similarly, in Danish law, "the basic remedy . . . for breach of contract . . . is an order for fulfillment of the contract," except in the case of a contract of employment. Also, in The Netherlands, "an order for specific performance is not considered as exceptional" as in common law; rather, it is "seen as the most common remedy." *Id.* at 254.

82. *See, e.g.*, British Sale of Goods Act, 1979, § 52; U.C.C. § 2-716.

83. HONNOLD (2d ed.), *supra* note 7, at 272.

1. Common Law Approaches

According to common law theory, monetary damages are the common and primary remedy for breach of contract.[84] Specific performance is a secondary remedy, and will be compelled only when an award of compensatory damages does not give adequate protection to the aggrieved party claiming injuries.[85] The Uniform Commercial Code (U.C.C.) authorizes American courts to order specific performance whenever commercial needs make it necessary to do so, such as in the case of impracticability of resale or the uniqueness of the goods.[86] A seller's action under U.C.C. Section 2-709 for specific payment of the price is "limited to those cases where resale of the goods is impracticable" except where the goods have been accepted by the buyer or have been destroyed after the buyer has assumed the risk of loss.[87] Under U.C.C. Section 2-716, which "is intended to give the buyer rights to the goods comparable to the seller's rights to the price,"[88] specific performance of a seller's obligations under a contract is available if the goods involved therein are "unique or in other proper circumstances."[89] The test of uniqueness "must be made in terms of the total situation which characterizes the contract," and "other proper circumstances" are said to include

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84. *See* G.H. Treitel, *Remedies for Breach of Contract, in* 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 16 § 9 (1976).

85. *Id.*; J.P. BENJAMIN'S SALE OF GOODS § 1447 (2d ed. 1981).

86. K. YORK, ET. AL., REMEDIES 815 (1985).

87. U.C.C. § 2-709, cmt. 2 (1995). The text of § 2-709 of the U.C.C. reads in its relevant part as follows:

> 2-709. Action for the Price [by Seller].
> (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
> (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
> (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

*Id.*

88. *Id.* §2-716, cmt. 4.

89. *Id.* § 2-716 (Buyer's Right to Specific Performance or Replevin), stating in part:

> (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
> (2) The decree 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 . . . .

*Id.*

such situations as the "inability to cover."[90] These circumstances may also include situations where pecuniary damages or other remedies at law cannot provide adequate compensation.[91]

In comparison, the British Sale of Goods Act of 1979 is more restrictive in authorizing English courts to issue a decree upon a defendant to fulfill his contractual obligations. Section 52 of the Act provides:

> (1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages . . . .[92]

Under that Act, a plaintiff cannot seek specific performance as of right; rather, "the remedy rests entirely within the discretion of the court and will not be granted in respect of [goods] of no special importance, where damages would be an adequate remedy."[93] The circumstances in which such a judgment or decree will be made "will have to be exceptional—*e.g.*, to compel a buyer to take goods made to his personal requirements and without general market value."[94] In another exceptional case, an English court granted a petroleum buyer an order for specific performance because it was the only way to avoid exceptional hardship to him in a severe petroleum shortage when the defendant seller had been relieved from performing its contractual obligations.[95] Only in rare cases do English

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90. *Id.* cmt. 2.

91. *See, e.g.*, Madariaga v. Morris, 639 S.W.2d 709 (Tex. Ct. App. 1982) (specific performance may be decreed where plaintiff would not be adequately compensated for his loss by an award of money damages); Stephan's Mach. & Tool, Inc. v. D & H Mach. Consultants, Inc., 417 N.E.2d 579 (Ohio 1979) (where buyer had suffered irreparable harm from an innately defective and substantially inoperable machine since its arrival and had no adequate remedy at law, he was entitled to specific performance requiring delivery of a "unique" new machine); Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975) (stating that it is axiomatic that specific performance will not be ordered when the party claiming breach of contract has an adequate remedy at law; this is especially true when the contract involves personal property as distinguished from realty); Sedmak v. Charlie's Chevrolet, Inc., 622 S.W.2d 694 (Mo. Ct. App. 1981) (specific performance of contract for the sale of automobile allowed where buyers had no adequate remedy at law because they could not go upon open market and purchase automobile of kind at issue with same mileage, condition, *etc.*).

92. British Sale of Goods Act, 1979, §§ 49(1) & 52(1) (permitting action by the unpaid seller for the price).

93. P.S. ATIYAH, THE SALE OF GOODS 552-53 (8th ed. 1990).

94. WHINCUP, *supra* note 71, at 251.

95. Sky Petroleum v. VIP Petroleum, [1974] 1 All E.R. 954; *see also* Perry v. British Railways, [1980] 2 All E.R. 579. *Cf.* Beswick v. Beswick, [1967] 2 All E.R. 1197 (granting decree compelling specific performance of a contract for periodic

courts exercise this discretion. Contracts for the sale of ships and aircraft are usually considered specifically enforceable in other common law jurisdictions, such as the United States, because of the uniqueness of such goods,[96] but this is not necessarily the case in an English court. In a case involving the sale of a ship, an English court held that the buyer was not even *prima facie* entitled to a decree of specific delivery of the ship.[97] The mere inconvenience caused to him, and the possibility of his remote loss, were not enough to justify the buyer's entitlement to such a judgment.[98] He had to prove that the specific ship was of peculiar importance to him in that its design was especially suited to his needs, or the like.[99]

2. Civil Law Approaches

In the civil law world, although the degree of limitations varies from country to country, the basic premise is different from that of common law in that specific performance is not only more easily available to an aggrieved party, but also is considered the primary remedial measure for breach of contract.[100] Under Danish law, "the basic remedy . . . for breach of contract . . . is an order for fulfillment of the contract," except in the case of a contract of employment.[101] In The Netherlands, "an order for specific performance is not considered as exceptional" as in common law; rather, it is "seen as the most common remedy."[102] The German Civil Code relies primarily on specific performance. It is made routinely available in Germany[103] except in cases where the cost of specific performance would be too disproportionate, and in cases where the breaching party has ignored or has not complied by the deadline with the other party's *Nachfrist* notice.[104] The *Nachfrist* is a notice demanding performance within a specified reasonable period of time. In such case no further request for specific performance may be made after the expiration of such *Nachfrist*, although

payments due to the difficulty of suing for damages for each non-payment); Behnke v. Bede Shipping Co. Ltd., [1927] 1 K.B. 649 (granting decree of specific performance where a chattel was of peculiar importance and of practically unique value to the plaintiff).

96. *See* WHINCUP, *supra* note 81, at 251.

97. CN Marine Inc. v. Stena Line, [1982] 2 Lloyd's Rep. 336.

98. *Id.*

99. *Id.*

100. *See, e.g.*, Farnsworth, *supra* note 48.

101. WHINCUP, *supra* note 81, at 253.

102. *Id.* at 254.

103. *See, e.g.*, BGB, art. 241 (creditor entitled to claim performance from debtor).

104. The German concept of *Nachfrist*, a notice that gives the defaulting party a choice either to perform within a grace period or to face avoidance of the contract, is explained well in § 290 of Professor Honnold's book comparing the "notice-avoidance" approach of Articles 47 and 49(1)(b) of the Convention and Article 326 of the German Civil Code. *See* HONNOLD (2d ed.), *supra* note 7, at 371.

the aggrieved party can still seek monetary damages (*Schadenersatz*).[105] Under the basic rules of the Spanish Civil Code relating to remedies for breach of contract, the aggrieved party has the right to request either specific performance of the contract or its termination, and is entitled to damages and interest in both cases.[106] The only limitation on the right to specific performance is that if an aggrieved party seeks to have a liquidated damages clause enforced, he cannot seek to continue to have the contract performed at the same time.[107] The French Civil Code similarly provides that the innocent party to a broken contract may either seek to have the breaching party compelled to fulfill his contractual obligations or to have the contract rescinded and damages paid.[108] A court's order of specific performance (*execution en nature*) may be supplemented by an award of damages.[109] Such an order is enforced together with a daily monetary penalty (*astreinte*) payable to the aggrieved party for each day of non-performance. In the alternative, the court may authorize performance by a third party "at the risk and expense of the defendant."[110] The only exceptional situation is one involving obligations requiring personal performance (*obligation de faire*) by the defaulting party.[111] Louisiana, which has not adopted Article 2 of the Uniform Commercial Code, is the only state in the United States that adheres to the civil law tradition. Its Civil Code provides that where the obligor fails "to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument," "the court shall

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105. *See* 1 E.J. COHN, MANUAL OF GERMAN LAW 105 (2d ed. 1968); NORBERT HORN, ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 109-11 (1982) (noting circumstances in which the relief is unavailable under German law); G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 48, 52-53 (1988); John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 529-30 (1959) (pointing out that under the German Civil Code specific performance is normally granted to an aggrieved party although such relief is not available if performance would involve "disproportionate cost"); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1155 (1983). *Cf.* HONNOLD (2d ed.), *supra* note 7, at 276 n.15 (citing Hellner, *The Draft of a New Swedish Sale of Goods Act*, 22 SCAN. STUD. 55, 66 (1978)) ("buyer may not require specific performance that would impose sacrifices which are disproportionate to the buyer's interest in obtaining performance").

106. C. CIV. art. 1124 (Spain).

107. *Id.* art. 1153.

108. C. CIV. art. 1184 (Fr.). Procedurally, "specific performance injunction" is also available under Article 1425-1 and 1425-5 of the *Neuveau code de procedure civilée*.

109. C. CIV. art. 1142 (Fr.) (any unfulfilled obligation entitles the victim to compensation).

110. WHINCUP, *supra* note 81, at 254. Germany has a similar procedure under which a court may authorize a third party, at the expense of the defendant, to perform a certain act if it does not need to be performed by the defendant himself. *See* HONNOLD (2d ed.), *supra* note 7, at 269 n.3.

111. WHINCHUP, *supra* note 81, at 254; *see also* BARRY NICHOLAS, FRENCH LAW OF CONTRACT 213 (1982); TREITEL, *supra* note 105, at 56-57.

grant specific performance . . . if the obligee so demands," with the sole limitation that the court can deny a request for specific performance if such relief "is impracticable."[112]

Nevertheless, the difference between the civil law and the common law systems in this regard should not be overstated. This is especially true considering that in international commercial transactions, for practical reasons, parties in both civil law and common law worlds "are more interested in efficiency than in legal theory," and often will not resort to the remedy of requiring performance to avoid wasting their time and money in protracted and expensive international litigation.[113] Moreover, domestic rules on specific performance in many legal systems, on the one hand, are "less rigid than the 'require performance' rule of the Convention."[114] Such domestic rules, furthermore, "differ widely even among civil law jurisdictions."[115] Consequently, "the flexibility permitted under Article 28 is not confined to [common law jurisdictions or to] the procedural approach of one legal system."[116] The non-breaching party to a sales contract under the U.N. Convention is not always entitled to specific performance as of right, depending on where the forum is and what the law of the particular forum State provides.

## B. Chinese Law and Practice

### 1. Statutory Emphasis on Performance

#### a. The ECL and The Common Rules

As a general rule in Chinese law, the tradition has been to compel the parties to perform their contractual obligations, making the right to specific performance often the primary remedy for breach of contract. Specific performance is even considered a fundamental principle of Chinese contract law.[117] Compensatory damages are merely of secondary significance. Under the Economic Contracts Law (ECL)[118] and The Common Rules of Civil Law (often referred to as the Civil Code),[119] the defaulting party must continue its performance if the injured party so demands. Article 35 of the ECL, in upholding this principle, states that

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112. LA. CIV. CODE ANN. art. 1986 (West 1984).
113. HONNOLD (2d ed.), *supra* note 7, at 276-77.
114. *Id.* at 278 (*citing* TREITEL, *supra* note 105, at 47).
115. Ziegel, *supra* note 10, at 9-11 (citing Treitel, *supra* note 84, § 12).
116. HONNOLD (2d ed.), *supra* note 7, at 277, 360-61.
117. XU JIE, «JINGJÌ HÉTONG FÂ» JIBÊN YUÁNLÌ [BASIC PRINCIPLES OF THE ECONOMIC CONTRACTS LAW] 129 (1985).
118. ECL, *supra* note 4.
119. Common Rules Civ. L., *supra* note 4.

"[w]hen one of the concerned parties breaches an Economic Contract, . . . *[i]f the other party demands continuous fulfillment of the Contract, the responsible party shall continue to perform the Contract.*"[120] The ECL is further delineated by a number of implementation regulations, including the Industrial Sales Contracts Regulations and the Agricultural Sales Contracts Regulations.[121] The Common Rules of Civil Law also provide that remedies for breach of contract include "the right to demand fulfillment" of the broken obligation. "If a party fails to fulfill its contractual obligations or violates the terms of a contract while fulfilling the obligations, *the other party shall have the right to demand fulfillment* . . . ."[122] The Common Rules of Civil Law also provide for specific performance in the case of "repair, reworking and replacement" of non-conforming performance.[123]

Article 27 of the ECL provides that a contract may be modified or avoided *only when*, among other conditions, it has become *impossible* to fulfill the economic contract, or when one party breaks the contract and it becomes *unnecessary* to fulfill the obligations under it.[124] This provision even has the effect that a party's contractual obligations will not be relieved or modified unless, *inter alia*, he is unable to fulfill them or it becomes unnecessary for him to tender or complete performance. The ECL does not specify who decides whether it is no longer possible and/or necessary to continue the performance. The present author considers that, in the absence of contrary indication, based on all relevant facts known and information supplied, it should be for the innocent party to determine whether it is still possible and/or necessary to fully perform the contract. Thus, the duty of continuing performance of the contract may not be changed or terminated merely because of its breach, unless, in the innocent party's judgment, the breach makes performance of the contract unnecessary or impossible. The mandatory payment of penalty in case of a breach under the ECL and the implementing Industrial and Agricultural Sales Contracts Regulations

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120. ECL, *supra* note 4, art. 35 (emphasis added); *see also* Regulations on Contracts for the Purchase and Sale of Industrial and Mineral Products, *issued* Jan. 23, 1984 by the State Council, Guo Fa (84) No. 15, art. 34 [hereinafter Indus. Sales Cont. Reg.] *reprinted in* JINGJÌ HÉTONG SHÍYÒNG SHÔUCÈ [Practical Handbook of Economic Contracts] 35-52 (CHENG YUAN ed. 1985), *translated in* COMMERCIAL, BUSINESS AND TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA (BOOKLET 13) 33-65 (1985).

121. Indus. Sales Cont. Reg., *supra* note 120; Regulations on Contracts for the Purchase and Sale of Agricultural and other Related Products, *issued* Jan. 23, 1984 by the State Council, *reprinted in* Practical Handbook of Economic Contracts, *supra* note 120, at 107-14.

122. Common Rules Civ. L., *supra* note 4, art. 111 (emphasis added). *Cf. A Translation of the Fourth Draft Civil Code (June 1982) of the People's Republic of China*, 10 REV. SOCIALIST L. 193, 216-17, art. 160 (William C. Jones trans., 1984) [hereinafter *Fourth Draft Civil Code*] (providing that actual performance may not be substituted by other remedies).

123. Common Rules Civ. L., *supra* note 4, art. 134(6).

124. ECL, *supra* note 4, art. 27(3) & (5).

typify the sanctions that are imposed to compel performance if it is still required.[125]

b. The FECL and the Opinion on FECL

Economic contracts (including sales contracts) between a Chinese party and a foreign party are generally governed by the Foreign Economic Contracts Law (FECL),[126] not the ECL. That law is interpreted and supplemented by the Supreme People's Court's Opinion on FECL (Opinion on FECL).[127] The FECL and the Opinion on FECL do not contain any express reference to specific performance as a particular remedial method. Article 18 of the FECL on remedies for breach of contract merely provides that the aggrieved party may demand compensatory damages or resort to "other reasonable remedial measures."[128] It thus appears that the FECL places less importance on specific performance as a remedy than on compensatory damages. It would be premature, however, to conclude that the remedy of specific performance is not available to parties to a contract governed by the FECL. On the contrary, the implicit right to specific performance is well recognized in the statute. As one commentator notes, although "nowhere in the FECL is performance mentioned as a particular remedial approach, specific performance is viewed as an implied remedial measure in the law."[129] Arguments may be made that, not only is the right to specific performance not barred by the FECL, it actually constitutes an inherent part of the remedial regime under that statute.

First of all, the reference to "other reasonable remedial measures" in the FECL could justifiably be construed to include, among others, the remedy of specific performance.[130] As one author remarks: "It is a reasonable inference that

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125. *Id.* art. 35; Indus. Sales Cont. Reg., *supra* note 120, arts. 35-38.

126. FECL, *supra* note 4.

127. *Zùigao Rénmín Fâyuàn Guanyú Shìyòng «Shèwài Jingjì Hétong Fâ» Ruògan Wèntí de Jiêdá* [The Supreme People's Court's Response to Several Questions Concerning the Application of the Foreign Economic Contracts Law] *issued* Oct. 19, 1987, 4 S.P.CT. BULL. 3 (1987) [hereinafter Opinion on FECL], *reprinted & translated in* CHINA L. FOR FOREIGN BUS. ¶ 5-555.

128. FECL, *supra* note 4, art. 18.

129. Ning Fu, *Remedies under Chinese Contract Law*, 2 INT'L LEGAL PERSP. 1 n.81 (1990) (citing Feng Datong, Professor of Law, Chinese International Economic & Foreign Trade University, Lecture on the Foreign Economic Contracts Law, (1985); Deborah E. Townsend, Note, *The Foreign Economic Contract Law of the People's Republic of China: A New Approach to Remedies* 24 STAN. J. INT'L L. 479, 494 (1988)).

130. Ning Fu, *supra* note 129. A similar expression is also contained in the Opinion on FECL, which states that the losses for which compensation is to be made by the breaching party to the aggrieved party shall be calculated in a certain way

the provision of Article 18, using the catch-all term 'other reasonable remedial measures,' *includes the performance remedy.*"[131] Furthermore, the right to demand specific performance and other remedies generally available under other relevant Chinese law are implicitly incorporated in the FECL remedial system, especially in view of the reference to "other reasonable remedial measures" in the FECL.[132] The rules and principles of The Common Rules of Civil Law are generally applicable to Sino-foreign transactions.[133] Some of the basic principles of the ECL may govern the FECL as well.[134] The FECL would not have the effect of depriving an innocent party to an FECL contract of his right to specific performance which is well established in Chinese law in general, unless (1) the FECL specifically exclude specific performance as a remedial option; or (2) by a choice of law clause or through the operation of rules of private international law, the substantive and procedural law of China was made inapplicable.[135] Since the FECL does not exclude specific performance from "other remedial measures," it is reasonable to conclude that the FECL has implicitly recognized the remedy of specific performance that is available under The Common Rules of Civil Law and the ECL.[136]

In addition, specific performance is expressly provided for in some local promulgations, such as the Dalian Foreign Economic Contracts Procedures (Dalian FEC Procedures), which apply to "foreign economic contracts" concluded or performed in a designated locality.[137] This is another indication that the traditional performance remedy does not vanish simply because the contract is between a Chinese party and a foreign party, and that special promulgations on foreign-related contracts share the same basic principles of The Common Rules of Civil Law and the ECL. The Dalian FEC Procedures provide, among other

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*unless* "other remedial measures have been taken" or provisions have otherwise been stipulated in the contract. *Id.*; Opinion on FECL, *supra* note 127, Item 6(1).

131. Ning Fu, *supra* note 129, at text accompanying n.82 (emphasis added).

132. FECL, *supra* note 4, art. 18.

133. Common Rules Civ. L., *supra* note 4, arts. 8 (general applicability of The Common Rules and other Chinese law to civil activities and to foreigners within China) and 145 (Chinese law would apply if it has the closest connection with a contract involving a foreign party which does not have a choice-of-law clause).

134. ECL, *supra* note 4, art. 55 (providing that regulations governing foreign economic contracts (*i.e.*, the FECL) must be formulated in accordance with the principles of the ECL as well as international practice).

135. Note that under the FECL itself, the parties to a foreign economic contract may choose the law to be applied in case of disputes; in the absence of such a choice, the law of the country which has the closest connection with the contract applies. FECL, *supra* note 4, art. 5, para. 1.

136. *See, e.g.*, ECL, *supra* note 4, art. 35; Common Rules Civ. L., *supra* note 4, arts. 111-16 & 134.

137. Dalian Economic and Technological Development Zone Procedures for the Administration of Foreign Economic Contracts, *issued* Oct. 15, 1984 by the City Government of Dalian, *translated in* CHINA L. FOR FOREIGN BUS. ¶ 83-006 [hereinafter Dalian FEC Proc.].

things, that "[the injured] party may *request* [require] the party that fails to perform his contract obligations *to continue performance.*"[138]

Moreover, a fundamental principle is indicated in Article 16 of the FECL that calls upon parties to a Sino-foreign contract to fully perform their contractual duty and to refrain from arbitrarily altering or terminating their respective contractual obligations.[139] This principle alone could constitute the basis of a court order compelling performance following the innocent party's application. Zhang and McLean observed that the principle of "honoring the contract and maintaining good faith" is one of the four "guiding principles" that constitute "the actual basis for the FECL."[140] This principle "requires that the contract be honored and that good faith be maintained in business activities," and that "once a contract is signed, it should be performed exactly and fully according to its terms, except for events of *force majeure.*"[141] The authors conclude that "[t]he practice in China . . . is that *actual performance is required and is to be preferred over damages,*"[142] and that, given the word "shall" in Article 16 of the FECL,[143] the drafters of the FECL "intended that full performance would be *mandatory.*"[144] Indeed, the emphasis on performance in the FECL alone could cause one to expect that a Chinese court would generally grant an application for an order compelling specific performance unless a limitation applies.

2. Concurrent Availability of Specific Performance and Other Remedies

Under Chinese law and practice, the availability of the performance remedy does not depend on whether another form of remedial measures has been taken. In other words, the grant of the remedy of requiring performance does not deprive the

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138. *Id.* art. 26 (emphasis added). Note that the original Chinese term, *yaoqiú*, means "*require*" or "*demand.*" The word "request" as used in the English translation is not accurate.

139. FECL, *supra* note 4, art. 16.

140. Yuqing Zhang & James S. McLean, *China's Foreign Economic Contracts Law: Its Significance and Analysis*, 8 NW. J. INT'L L. & BUS. 120, 126 (1987).

141. *Id.* at 128-29.

142. *Id.* at 136 (emphasis added). It should be noted, however, that the preference for actual performance is only a matter of general practice. The above statement of the author is not necessarily equally true in every and all foreign transaction, particularly when the non-performing party is far away and the delays in court proceedings and transportation are great. For practical reasons, a party to an FECL contract will not always prefer requiring performance to seeking damages. It also remains to be seen as to whether a Chinese court will *always* grant a request for specific performance in Sino-foreign sales transactions. International practice and other practical considerations might be taken into account in actual cases.

143. FECL, *supra* note 4, art. 16 (providing that "parties *shall* fulfill their obligations stipulated in the contract") (emphasis added).

144. Zhang & McLean, *supra* note 140, at 136 (emphasis added).

injured party of any other remedies available to it, and *vice versa*. In fact, although it is not uncommon for an aggrieved party who seeks and obtains an order compelling specific performance to be denied other inconsistent forms of relief, in many other circumstances, Chinese courts have granted both specific performance and damages or other relief simultaneously. An illuminating example is the *Sofa Frames Case*.[145] In that case, a timber mill (Seller) signed a contract with a furniture manufacturing company (Buyer) for the sale and supply of 500 sets of sofa frames at the price of RMB ¥15/set totalling ¥7,500.[146] According to the contract terms, Seller was to deliver the goods as soon as they were manufactured and Buyer was to pay for the delivered goods as soon as they were received. Delivery was to be completed by June 20. By May 15, Seller had delivered 200 sets of sofa frames and collected ¥3,000 in payment. At that time, Seller entered into a contract with a third party for the supply of 800 sets of sofa frames at the price of ¥16/set totalling ¥12,800 to be delivered by August 15. Seller's manufacturing capacity was such that it could not satisfy the orders of both Buyer and the third party at the same time. Seller therefore stopped delivery to Buyer and started manufacturing sofa frames for, and delivering them to, the third party. Seller failed to deliver the remaining 300 sets of sofa frames to Buyer, and affected Buyer's fulfillment of its obligations under separate contracts for the sale of sofas.[147] In an ensuing lawsuit, the court awarded ¥400 in "breach of contract penalty" and ¥600 in damages to Buyer, and in addition, ordered Seller to continue delivering the remaining 300 sets of sofa frames by July 20.[148]

Another example is *Liu v. Shuanghe Village*.[149] On April 6, 1984, Liu entered into a contract with Shuanghe Village for the purchase of a ginseng farm for the total price of RMB ¥25,000 to be paid in two installments. The first payment of ¥20,000 was due when Liu harvested the ginseng in the fall of that year. In mid-September 1984, Liu harvested the ginseng and contracted to have it sold to a third party. Before the ginseng was loaded on the third party's truck, the village intervened, claiming that since Liu had not yet paid the purchase price of the ginseng farm, the village had a lien on the ginseng. Thereupon the village seized the ginseng and sold it separately to a fourth party. In the suit that followed, Liu demanded that the contract be fully performed. The court found that the contract between Liu and the village was valid and that there was no provision in it regarding a lien on the ginseng produced to secure payment of the purchase

145. *Sofa Frames Case* (title added), *discussed in* YÎ AN SHUO FÂ - JINGJÌ HÉTONG FÂ [LAW THROUGH THE CASES - ECONOMIC CONTRACTS LAW] 26-28 (1986) [hereinafter *Sofa Frames*].

146. *Id.* Renmimbi Yuan (RMB ¥, or simply ¥) is the national currency of the People's Republic of China. The dollar value vis-á-vis the RMB ¥ has been on the rise. In 1984, ¥1.00 equalled about US$0.56. Today, it is roughly equivalent to US$0.12. *See, e.g.*, People's Daily, June 8, 1996, at 2, col. 1.

147. *Sofa Frames, supra* note 145, at 26-27.

148. *Id.* at 27.

149. XIE ANSHAN, «JINGJÌ HÉTONG FÂ» YÛ ANLÌ PAOXI [THE ECONOMIC CONTRACTS LAW AND CASES ANALYZED] 119 (1985).

price of the farm. Due to its breach of contract, the village was ordered to return the value of the sale of the ginseng amounting to ¥20,000 to Liu plus interest and to pay Liu for economic losses of ¥2,000, which was deductible from the purchase price of the farm. The court further ordered the parties to continue performance of the contract for the purchase of the ginseng farm.[150] The village was thus required both to pay the damages and to continue its obligations under the contract. The obligation of specific performance on the part of the defendant was to complete the delivery of full ownership of the ginseng farm to the plaintiff and to refrain from interference with the plaintiff's exercise of ownership.

These cases reflect the Chinese principle that specific performance can by no means be replaced by the payment of "breach of contract penalty" or damages, and *vice versa*. Article 35 of the ECL, while lacking adequate wording, implies, from the point of view of the aggrieved party, that the mandatory payment of penalty (and damages if larger than penalty) to him for breach, and the optional performance remedy that he may pursue do not conflict with each other. Rather, they can coexist. The exercise of the right to specific performance by the aggrieved party neither automatically precludes, nor is automatically estopped by, the mandatory payment of "breach of contract penalty" or damages. Whenever the aggrieved party demands specific performance, even if he has obtained other relief, the demand must be satisfied unless circumstances clearly indicate that performance has become impossible or unnecessary. Article 134 of The Common Rules of Civil Law, which states that "methods of bearing civil liability may be applied exclusively or *concurrently*,"[151] reaffirms this proposition. It is interesting to note that draft Article 160 of the Fourth Draft Civil Code states that, subject to two exceptions, "the party who has breached the contract may not use the method of accepting economic responsibility to substitute for actual performance of the contract."[152] Although the above language has never been adopted into positive law, it in fact reflects the principles of the ECL and The Common Rules of Civil Law as well as Chinese judicial practice.

The ECL and The Common Rules fail to contemplate under what conditions and to what extent concurrent application of different remedial measures may exist. In this regard, the FECL provides a better approach: none of the available remedies are mandatory; the aggrieved party may elect to either demand damages or resort to other remedies (such as specific performance); if his losses still cannot be offset completely by remedies other than damages, he is still entitled "to claim

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150 *Id.* at 120.

151. Common Rules Civ. L., *supra* note 4, art. 134 (emphasis added).

152. *Fourth Draft Civil Code, supra* note 122, at 216-17, art. 160. Draft Article 160 continues to state: "The following cases are exceptions to this rule: (1) The performance of the contract has in fact become impossible; (2) The performance of the contract no longer has any factual significance." *Id.*

for damages," and *vice versa*—an inference that can arguably be made.[153] Of course, exercising the right to specific performance must be done on the premise of proportionate deduction or elimination of damages and/or liquidated damages.

3. Contractual Provisions on Specific Performance

Penalty clauses in Chinese FTC (foreign trading companies) form contracts, and negotiated contracts serve objectively as a means to compel the breaching party to tender or complete performance. The penalty clauses in certain contracts even clearly provide that the seller's obligation to deliver continues after the penalty payment.[154] The Sino-[former] Soviet Union General Conditions also expressly states that the payment of penalty for late delivery by the sellers "shall not relieve the seller's obligation to deliver the delayed goods."[155] Furthermore, the "Claims" clauses in some form contracts, especially purchase contracts, deal with measures for the delivery of substitute goods or parts or for repair if the seller has delivered non-conforming goods. As Mitchell and Stein observe, if the goods "covered by a guarantee [prove] defective, the basic remedy under FTC form contracts is *repair* or *replacement* by the seller or reduction in the price of the goods (although the latter remedy is sometimes deleted from negotiated contracts)."[156] The "Claims" clause of one typical purchase contract provides:

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153. FECL, *supra* note 4, art. 18. The U.N. Convention provides an even sounder solution to this problem: concurrent resort to performance remedy and other remedial measures is permissible and does not waive the right to compel specific performance unless any of the other remedies (such as avoidance of contract) is inconsistent with performance. CISG, *supra* note 7, arts. 46(1) & 62.

154. *See, e.g.*, Memorandum of Agreement (Selling a Production Plant to China), CHINA TRADE AGREEMENTS 93, 106 cl. 9.2(b) (Chiu ed., 1987) (stating that "[t]he payment of the penalty as per the present [Clause] shall not release the Sellers from their obligations of continuous delivery").

155. General Conditions for the Delivery of Goods From the People's Republic of China to the Union of Soviet Socialist Republics and From the Union of Soviet Socialist Republics to the People's Republic of China, Apr. 10, 1957, China-U.S.S.R. 6 P.R.C. T.S. 77-92 (1957) [hereinafter General Conditions], *translated in* Geric Lebedoff, *The People's Republic of China's Purchase Contracts with the Soviet Union and with Nonsocialist Countries*, 28 AM. J. COMP. L. 645, 659-66 (1980); *see also supra* art. 17 (providing in the last paragraph that if the buyer's failure to pay the full or partial price of the goods is unfounded, the buyer shall be required to pay a penalty up to eight percent "of the amount of money withheld," and, in addition, tender "payment of the [full] amount of money withheld").

156. Stephanie J. Mitchell & David D. Stein, *United States-China Commercial Contracts*, 20 INT'L LAW. 897, 907 (1986) (emphasis added).

> 17(1) In case that the Sellers are liable for the discrepancies and a claim is made by the Buyers within the time-limit of inspection and guarantee period as stipulated in [Clauses] 15 and 16 hereof, the Sellers shall . . .
>
> c. Replace new parts which conform to the specifications, quality, and performance as stipulated in this Contract, and bear all the expenses and direct losses sustained by the Buyers. The Sellers shall, at the same time, guarantee the quality of replaced parts for a further period according to [Clause] 15 hereof.[157]

Another form "Contract" provides that in case of nonconforming delivery, "the Buyers shall . . . have the right to [a] claim for replacement with new goods, or for compensation" within "90 days after the arrival of the goods at destination," and the Sellers "shall be responsible for the immediate elimination of the defect(s), complete or partial replacement of the commodity or shall devaluate [the] commodity according to the state of defect(s)."[158] A particular negotiated contract for the sale of equipment, production facilities and raw materials similarly provides that "[i]f it has been found out that the Sellers are responsible for the defect the Sellers at their own expense shall repair or replace the defective parts of Equipment and Materials within the period agreed upon by both parties."[159]

These clauses, however, do not contain such limitations as the "fundamental breach" test in the case of replacement and the "reasonableness" test in the case of repair.[160] Many contracts do not even contain a provision or clause regarding the rights to specific relief in the case of non-performance, delayed performance, or even non-conforming performance. Where the Convention governs, Articles 46 and 62 of the Convention certainly have the effect of filling the gaps left in many standard and negotiated contracts used by or entered into with Chinese FTCs. Unless the parties clearly indicate in the contract that they wish to derogate from or vary the effect of Articles 46 and 62, or other related provisions of the Convention, the Convention rules also control and limit any contractual provisions regarding specific relief which are less specific than, or are contrary to, the Convention provisions.

Specific relief in China's foreign trade practice may not actually be limited to requiring replacement or repair for defective goods. It is observed that in the practice of China's international commodity trade, if the seller fails to deliver the goods, "the buyer, in order to protect his interests, is inherently entitled to request the seller to perform his obligations to deliver the goods in accordance with the provisions of the contract"; and if the goods delivered do not conform to the contract, the buyer may immediately notify the seller of the discrepancy after their discovery, and take such "remedial measures" as "request[ing] . . . delivery of

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157. CHINA TRADE AGREEMENTS, *supra* note 154, at 194-99, cl. 17(1)(a) & (c).
158. *Id.* at 203-04, cl. 15 (Claims).
159. Memorandum of Agreement, *supra* note 154, at 108, cl. 9.6(c).
160. *See supra* text accompanying notes 61-63.

substitute goods" and "request[ing] . . . repair of the goods delivered."[161] Similarly, it is said, if the buyer breaches the contract, the seller may also require the buyer to pay the price of the goods, take delivery, or perform other obligations provided in the contract.[162]

4. Historical and Social Factors Favoring Specific Performance

a. The Influence of the Civil Law Tradition

There are apparent explanations for the emphasis on specific performance under Chinese law and practice. First, the present Chinese legal system stems from a variety of legal sources and traditions including most noticeably the civil law system. Civil law recognizes the right to specific performance as the primary remedial measure and considers the right to monetary damages a secondary remedy.[163] The Chinese legal system came under the influence of the civil law tradition about a hundred years ago when the Qing Dynasty intended to adopt a civil code at the end of the 19th century.[164] That influence has not disappeared on its own and has never been completely eliminated with the passage of time or changes in government. The drafting of the Qing civil code was finished in 1911 with the assistance of a Japanese intellectual and was patterned after the German, Swiss, and Japanese civil codes.[165] However, the Qing Dynasty was overthrown just before it had the opportunity to enact the code.[166] In spite of this, subsequent legislation of the People's Republic of China between 1911 and 1949 followed the same civil law tradition.[167] The Government of the People's Republic of China abolished all laws and promulgations of the Qing Dynasty and those of the nationalist Republic of China.[168] Yet still, its legal system, especially in form, resembles that of civil law countries more than other systems. Indeed, deeply embedded in Chinese law is the civil law principle that, above all

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161. WU BAIFU & ZHOU BINGCHENG, GUÓJÌ MÀOYÌ SHÍWÙ [INTERNATIONAL TRADE BUSINESS] 284, 288 (1990).

162. *Id.* at 289.

163. *See supra* part III.2. In particular, *see, e.g.*, C. CIV. art. 1184 (Fr.) (providing that a breaching party may be compelled to fulfill his contractual obligations); BGB, art. 241 (providing that a creditor is entitled to demand performance by the debtor); C. CIV. art. 1124 (Spain) (providing that an aggrieved party has the right to specific performance).

164. *See* ZHONGGUÓ DÀ BÂIKEQUÁNSHU - FÂLÜ JUÀN [GRAND ENCYCLOPEDIA OF CHINA - THE VOLUME OF LAW] 766 (1984) [hereinafter ENCYCLOPEDIA - LAW].

165. *Id.*

166. *Id.*

167. *Id.*

168. *See* ALERT N.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA, 24 (1992).

other considerations, specific performance of the parties' contractual obligations should be stressed and compelled.

b. The Influence of Chinese Legal History

The principle of specific performance in Chinese contract law "does not directly derive from a consistent pattern in the Marxist-Leninist-Maoist doctrine. To a great extent, it reflects thousands of years of Chinese history."[169] The ancient feudal Chinese legal systems "overwhelmingly defined obligations rather than rights of individuals."[170] In the imperial days, disputes arising out of a "contract" were local in nature, and local mediators (rather than the "court") were the primary resolvers of such disputes.[171] There were no legal guidelines that local mediators could follow "to adjudicate the attribution of fault and assessment of damages."[172] Rather, they mediated a compromise between the disputing parties in accordance with moral norms or customs.[173] Whenever performance was found to still be possible, the mediators would require (and perhaps persuade) the defaulting party to fulfill his obligations under the contract. No damages could be claimed where the defaulting party fulfilled its contractual obligations following the mediation.[174] If performance became obviously impossible, the remedies then were not designed to place the victim in as good a position as if the contract had been fully performed but instead to place him in the same position as if no contract had been entered into (restitution).[175] In that event the victim of the breach of the contract could claim damages only in respect to that portion which he himself had actually performed, not to his expected benefits under the contract had it been fully performed by the breaching party.[176] "In both situations," it is noted, "the aggrieved party did not obtain full remedies. The compromise was always reached at the expense of some economic interests of the aggrieved party."[177] Therefore, "[t]he best approach for the aggrieved party to gain relief from this misfortune was to seek specific performance, rather than to claim compensatory damages after a breach occurred."[178] Such traditions hardly perish completely in an ancient and relatively less dynamic society.

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169. Ning Fu, *supra* note 129, at text accompanying n.18.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. Ning Fu, *supra* note 129, at text accompanying n.18.
175. *Id.*
176. *Id.*
177. *Id.* at text accompanying n.27.
178. *Id.*

c. The Importance of Actual Realization of Contractual Goals

In either a planned economy, a transition economy, or any economy with elements of central planning, the injured party does not *always, if at all,* have ready access to a market for substitute goods.[179] Using the words of a former Director General of the Hungarian Ministry of Foreign Trade:

> The uniform law applicable to the contracts concluded by the CMEA countries' enterprises with one another is called the General Delivery Conditions of CMEA (which is really not a general condition but a law). Both in this law and in the general business attitude of CMEA enterprises the decisive thing is specific performance—the actual realization of the deal which cannot be substituted by paying damages. For this reason, enforcement is decisive .... The legal and contractual systems of damages and penalties or liquidated damages promotes but does not replace this end.[180]

While the Council for Mutual Economic Assistance (CMEA) is no longer in existence, the basis for emphasis on actual performance may still exist in countries with a market that is not fully developed. In both theory and practice, centrally-planned economy (CPE) or non-market economy (NME) countries, and even countries with a transition economy (TE), attach greater importance to specific performance *vis-à-vis* damages. From the point of view of a NME or TE country, the purpose of a contract is to satisfy real and genuine needs. Naturally, the buyer's real and genuine interest is in the delivery and supply of specified goods that are often not readily available from alternative sources, and not in monetary damages or otherwise. Parties must adhere to real and actual performance for which no cash, damages, or other substitute will do.[181] Since a substantial portion of China's production is still subject to State planning, "the freedom of contract is in effect limited," and, consequently, "most products contracted for possess the characteristic of being 'unique,' in the sense that they are irreplaceable."[182]

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179. *Cf.* E. Allan Farnsworth, *Developing International Trade Law*, 9 CAL. W. RES. INT'L L.J. 461 (1979) [hereinafter Farnsworth, *International Trade Law*]; T. HOYA, EAST-WEST TRADE 196-220 (1984).

180. Iván Szász, *Legal Framework of the Economic and Foreign Trade System of Hungary and Other CMEA Countries*, 10 INT'L BUS. LAW. 99, 102 (1982).

181. *See* IVÁN SZÁSZ, THE CMEA UNIFORM LAW FOR INTERNATIONAL SALES 167 (2d ed. 1984). *Cf.* U.C.C. § 2-716(1) and cmt. 2 (specific performance may be decreed where the subject matter of the contract is unique or if, *e.g.* the buyer is unable to cover).

182. Ning Fu, *supra* note 129, at text accompanying n.41. 1996 marked the beginning of the 9th Five-Year Plan of China. One of the major goals of the 9th Five-Year Plan is to gradually transform the current economic system into a "socialist market economy." *See* People's Daily, Mar. 12, 1996, at 1; Mar. 15, 1996, at 1.

d. Contract Performance as a Means to Fulfill State Plans

The issue discussed here is related to the importance of realization of the contractual goals discussed above but adds a different perspective. The emphasis of Chinese contract law on specific performance is reflective of an overriding Chinese view that a contract should be performed in order to fulfill State plans.[183] In a study of Chinese contract law and court practice, Cheng and Rosett observed:

> When a plaintiff insists that the court order the breaching defendant to perform the contract in addition to paying damages for the breach, the court may feel inhibited from seeking a middle ground. Three crucial circumstances are whether the defendant in fact has the ability to perform (otherwise, ordering specific performance will be a vain act), whether the performance is available from another source, and whether performance is crucial to the ability of the complaining party to fulfill the state plan. If performance by the defendant provides the only way that the plaintiff can meet the demands of the plan, the judges told us they feel obliged to ensure that the contract serve the plan.[184]

Faithful performance of economic contracts in China may serve as a means to fulfill State plans. There are two types of State plans commonly known in China: "mandatory State plans" and "guidance-type State plans." State-owned enterprises have an absolute obligation to fulfill the targets of mandatory plans set by the State, although they enjoy more flexibility under State guided plans. Chinese State-owned enterprises enjoy more and more authority to determine their own management and production. Additionally, mandatory State plans have increasingly been replaced with guidance-type State plans and even non plans since economic reforms started nearly two decades ago. These enterprises have been able to deal directly and freely with one another beyond the targets of both types of State plans. Paragraph 3 of Article 5 of the Industrial Sales Contracts Regulations provides that parties may freely enter into "[c]ontracts for the purchase and sale of products which may be freely purchased and sold."[185] This does not mean, however, that sales contracts are meant only for non planned products or goods. Aside from State planned distribution, State purchases and State planned purchases, government-owned enterprises may also achieve the goal

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183. *See* Eldon H. Reiley & Run-Fu Hu, *Doing Business in China After Tiananmen Square: The Impact of Chinese Contract Law and the U.N. Convention on Sale of Goods on Sino-American Business Transactions*, 24 U.S.F. L. REV. 25, 67 (1989).

184. Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989*, 5 J. CHINESE L. 143, at text accompanying nn.124-25 (1991).

185. Indus. Sales Cont. Reg., *supra* note 120, art. 5, para. 3.

of fulfilling their State-planned targets by concluding purchase and sales contracts among themselves.[186] For example, the State plan targets transmitted to Factory A may be either in the form of production and supply of 50,000 tons of chemicals to Factory B, or simply in the form of turning over RMB ¥100,000 of profits out of the sale of such products to the State by the end of the planned year. In either case, Factory A, with or without assistance or coordination from the planning authorities, may meet the targets by establishing an economic relationship with Factory B (or in the latter case with any other enterprise) in the form of a domestic "purchase, sale or supply contract."[187] The following hypothetical example further illustrates how specific performance operates in the intertwined relationship between State plans and individual contracting:

*HYPOTHETICAL EXAMPLE 2*: Under the foreign trade plan, Gaopíng FTB was to arrange for the production and supply (for export) of 50,000 cases (500,000 bottles) of vinegar to the nation's "foreign trade system," valued at approximately US$250,000. The State itself does not handle the business. It was up to Gaopíng FTB to select its exporting agent to realize the targets. So, Gaopíng FTB chose FoodImpex to resell its fine vinegar abroad. At the same time, under the foreign trade plan FoodImpex was to export 100,000 cases of bottled vinegar valued at approximately US$500,000. There were ten sources of supply with Gaopíng FTB being its biggest one. In January, Gaopíng FTB and FoodImpex, as in *Hypothetical Example 1*, entered into a contract for the supply in two installments of 50,000 cases of bottled fine vinegar (10 bottles per case), at a price equal to US$5.00/case, Free On Rail Gaopíng Railway Station, in order to fulfill their respective targets under the State's foreign trade plan for the current year. Delivery was due on May 1. For FoodImpex, the purpose of its contract with Gaopíng FTB was to partly realize its export targets set by the State. For Gaopíng FTB, its purpose was also to meet the requirements of the State foreign trade plan. On May 1, however, Gaopíng FTB notified FoodImpex of its intention to repudiate the contract in order to ship the vinegar to a third party intermediary in Shenzhen, which would resell the goods to a Hong Kong buyer for a higher return, at US$6.50/case. FoodImpex extended the delivery date to July 1, and repeatedly sought performance from Gaopíng FTB. These efforts were all in vain. Gaopíng FTB made it clear that neither within the additional period nor thereafter would it deliver the vinegar to FoodImpex under the contract term. On June 1, FoodImpex sued Gaopíng FTB, demanding (1) continuous specific performance and (2) payment of "penalty for breach of contract" and/or damages.

*Hypothetical Example 2* presents two interesting points: (1) the conclusion and performance of a contract between two enterprises can be a practical means of fulfilling their respective production or business targets as set forth in State plans; and (2) a contract of this nature provides much less leeway for either party to depart from it, because the primary consideration thereunder is not the

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186. Cheng & Rossett, *supra* note 183; *see also* ECL, *supra* note 4, art. 1; Indus. Sales Cont. Reg., *supra* note 120, art. 1.

187. Indus. Sales Cont. Reg., *supra* note 120.

realization of profit but the accomplishment of what the State plan expects each to achieve. When a contract becomes part of the process of effecting State plans, a mere award of penalty or damages for its breach is not sufficient to compensate for what the aggrieved party was expected to accomplish. It is in the best interests of the State, as well as those parties (particularly the aggrieved party) whose State planned economic targets are in part or in whole incorporated in a purchase or sale contract, to see that the contract be fully performed if at all possible. A court in the above scenario is therefore more likely than not to uphold FoodImpex's request for specific performance in addition to a monetary "penalty" or damages, because the continuing performance of the contract is essential to FoodImpex's fulfillment of its export targets under the annual State plan.

One of the purposes of the Economic Contracts Law and of the Industrial Sales Contracts Regulations is to "guarantee the implementation of State plans."[188] According to Article 11 of the ECL and Article 5 of the Industrial Sales Contracts Regulations, where products and items included in the mandatory State plans are involved, the conclusion of economic contracts must be carried out in accordance with the quotas set by the State. If the parties are unable to reach an agreement on the purchase and sale of mandatory planned products, the matter shall be dealt with by the planning authorities superior to both parties.[189] Where products and items included in the guidance-type State plans are involved, economic contracts are to be signed in accordance with the actual conditions of the

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188. ECL, *supra* note 4, art. 1; Indus. Sales Cont. Reg., *supra* note 120, art. 1.

189. ECL, *supra* note 4, art. 11; Indus. Sales Cont. Reg., *supra* note 120, art. 5, paras. 1 & 2. The first two paragraphs of Article 5 of the Industrial Sales Contracts Regulations read as follows:

> Contracts for the purchase and sale of products falling under State ordered plans (including products under planned distribution, under State purchases and sales, under planned purchases, etc.) shall be executed in conformity with the planning targets approved and transmitted downward by the State and by the higher departments in charge authorized by the State, and in conformity with the designs and colors, types of goods, specifications and quality specified by the Demanding Party; if it is not possible to execute contracts in conformity with the planning targets and disputes arise, they will be handled by the higher departments in charge of transmitting the planning targets down to the disputing parties.
>
> Contracts for the purchase and sale of products under State guided plans shall be entered into by the Supplying Party and Demanding Party after consultation, and shall be made with reference to and in accordance with the targets transmitted downward by the State and by the departments in charge authorized by the State, incorporating the actual circumstances of the entities concerned.

*Id.*

parties concerned after considering the quotas set by the State.[190] Where the breach of a "purchase and sales contract executed in accordance with State ordered plans" was due to the breaching party's "private sale" of the planned products to a third party, the consequence of such breach includes not only a demand for specific performance or other remedies by the aggrieved party, but also the confiscation by the State of that portion of the profits of the private sale that exceeds the original contract price.[191] Despite the continuing reforms for greater market orientation in its economy, China remains, perhaps indefinitely, a socialist country with a certain degree of central planning that may not be completely replaced with a pure market within a predictable period of time. As long as there are State plans for State-owned enterprises to fulfill, and as long as planned targets drive purchase, sale, or supply contracts, there will be a need to emphasize specific performance to realize the real and genuine goals of these contracts which, in a sense, are part of the entire endeavor to fulfill these plans.

In view of the Chinese statutory provisions, contractual practices, and various historical and social factors favoring the performance remedy, one can conclude that specific performance, subject to certain limitations to be discussed below, is not only routinely available in China, but also often serves as a preferable remedial measure for breach of contract.

### 5. Limitations on Specific Performance

It may be said that no absolute right to specific performance exists under the law of any country - there is always one limitation or another.[192] China is no

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190. ECL, *supra* note 4, art 11; Indus. Sales Cont. Reg., *supra* note 120, art. 5, paras. 1 & 2.

191. Article 35, para. 2, of the Industrial Sales Contracts Regulation provides:

> With respect to purchase and sales contracts executed in accordance with State ordered plans, if the Supplying Party does not deliver the goods in accordance with the provisions of the contract because it privately sells the products, in addition to being dealt with in accordance with the provisions on breach of contract and the provisions relating thereto, it shall have the income from such private sale received in excess of the original contract price confiscated by the department for the administration of industry and commerce, and paid to the central fisc.

Indus. Sales Cont. Reg., *supra* note 120, art. 35(2).

192. *See, e.g.*, Robert von Mehren, *Contracts in General, in* 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 82, 104 (1982).

exception. A review of the limitations under Chinese law will help illustrate how the limitations on the performance remedy under Chinese law differ from those under the Convention, and determine whether Chinese domestic rules limiting the performance remedy may affect a Chinese court's decision on an application to enforce the right to specific performance under the Convention.

a. Inability/Impossibility and Disappearance of Necessity

The right to specific performance under Chinese law and practice is always subject to the doctrines of impossibility and change of necessity because of breach.[193] The principle that specific performance shall be granted unless it becomes impossible (or unnecessary following the breach) for such performance is recognized under Chinese legal theories,[194] and is also implied in positive Chinese law and regulations.[195] "Inability to perform," it is said, "refers to the case where the obligor cannot perform or cannot perform completely."[196] If a legally recognized cause "makes the obligation permanently incapable of being performed, the obligor is relieved from his obligation to perform," provided that he immediately notifies the obligee that the obligation cannot be performed.[197] Article 27 of the ECL provides that, except in the case of "actual incapability" or "change of necessity following breach," the contractual obligations may not be amended or terminated. This reflects the principle that post-breach contractual obligations continue *only if* the obligor is still able to perform and *only* if performance is necessary and required.[198] Under Article 108 of The Common Rules of Civil Law, a court will force a debtor to repay his debt if he is able to pay but has refused to do so.[199] It follows that when a debtor is absolutely unable to pay, a creditor's demand for specific relief would be futile. The Fourth Draft Civil Code made it even clearer that "actual performance" may not be requested and compelled when "performance of the contract has in fact become impossible" or "no longer has any factual significance."[200]

Further, Article 35(1) of the Industrial Sales Contracts Regulations states:

> (1) If the Supplying Party is *unable* to deliver the goods, it shall pay the Demanding Party a *penalty* for breach of contract. The penalty for

193. *See infra* text accompanying notes 198-202.

194. *See infra* text accompanying note 196.

195. *See infra te*xt accompanying notes 198-202.

196. MÍNFÂ YUÁNLÍ [CIVIL LAW PRINCIPLES] (2d ed. 1985) *translated and reprinted as* BASIC PRINCIPLES OF CIVIL LAW IN CHINA 160 (William C. Jones transl. & ed., 1989) [hereinafter CIVIL LAW PRINCIPLES].

197. *Id.*

198. ECL, *supra* note 4, art. 27(3); *see also* Dalian FEC Proc., *supra* note 137, art. 35(3) (inability) & (5) (loss of necessity after breach).

199. Common Rules Civ. L., *supra* note 4, art. 108.

200. *Fourth Draft Civil Code, supra* note 122, at 216-217, art. 160.

> breach of contract with respect to commonly used products shall be from one percent to five percent of the total price of that portion of the goods which could not be delivered; the penalty for breach of contract with respect to special purpose products shall be from ten percent to thirty percent of the total price of that portion of the goods which could not be delivered . . . .[201]

The above passage does not contain any reference to specific performance where the seller is not able to deliver. Had it been the intention of its drafters to make specific performance available even in cases of inability or impossibility, they could have phrased the paragraph to clearly indicate this.

Article 37 of the Industrial Regulations deals with another type of inability or impossibility to perform caused by the fault of a higher authority. In this case the higher authority assumes liability while the breaching party is only required to "first" pay penalty and damages but not to continue performance:

> If the contract *cannot be performed or cannot be fully performed* due to the fault of the higher leading authorities or authorities in charge of business, the higher leading authorities or the authorities in charge of business shall be liable for the breach of contract. However, the party in breach of the contract shall first pay the *penalty* for breach of contract and *compensation* to the other party in accordance with the relevant provisions of these Regulations, and then the higher leading authorities or authorities in charge of business who shall be liable, shall be responsible for handling such matter.[202]

Suppose the contract between FoodImpex and Asian-Food in *Hypothetical Example 1*[203] was purely a domestic transaction and thus out of the ambit of the Convention. The court then, under Chinese law, would not, and would in fact be bound *not to*, order specific performance against FoodImpex. Such relief would not be available to Asian-Food under the circumstances, because FoodImpex's partial failure was due to its inability or impossibility to complete performance. The court might well rely on Articles 35(1) and 37 of the Industrial Sales Contracts Regulations as well as other relevant statutory provisions to refuse Asian-Food's request for specific performance. FoodImpex's partial breach of the principal contract was due to Gaoping FTB's breach of the underlying supply contract, and the latter's breach in part was again due to the fault of their common superior, the DOFTEC. Under relevant provisions of China's domestic law, particularly under Article 37 of the Industrial Sales Contract Regulations, Asian-Food could only make a demand for "breach of contract penalty" and/or damages, not for specific performance.

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201. Indus. Sales Cont. Reg., *supra* note 120, art. 35(1) (emphasis added).
202. *Id.* art. 37 (emphasis added).
203. *See supra* text accompanying notes 49-54.

b. Limitation Based on the Usability of Non-Conforming Goods

The remedy of "return," "exchange," and "repair," of nonconforming goods is available under The Common Rules of Civil Law,[204] but no provision is contained in the statute regarding the conditions under which the buyer may or may not resort to that remedy. Under the Industrial Sales Contracts Regulations, however, the buyer's entitlement to require the seller to cure defects in the delivered goods by repair or replacement is subject to certain conditions. Article 35 of the Industrial Sales Contracts Regulations provides:

> (2) If the types, models, specifications, colors and designs and quality of the products delivered by the Supplying Party do not conform to contract stipulations, and the Demanding Party *agrees* to make use of the products, the price shall be negotiated on the basis of quality; if the Demanding Party *cannot use* the products, the Supplying Party shall be responsible on the basis of the actual condition of the products for the repair, exchange, or return of the goods and shall bear the actual expenses incurred for such repair, exchange or return of the goods. If the Supplying Party *cannot* repair or exchange the goods, the matter shall be treated as an inability to deliver the goods . . . .[205]

According to Article 35(2) of the Industrial Regulations, if the buyer "agrees to make use" of the nonconforming goods, and has negotiated a price reduction "on the basis of quality," it loses the right to demand the seller to deliver substitute goods or to repair the nonconformity.

Unlike the Convention, however, the test under the Industrial Regulations is not "fundamental breach" or "reasonableness," but whether the buyer can, or agrees to, make use of the nonconforming goods, and in the end whether the seller is actually able to effectuate the requested repair or replacement.[206] Whether a buyer can make use of nonconforming goods is a rather subjective decision to make by the buyer itself. Specific performance (repair or exchange) under the Industrial Regulations is more likely to be available to a buyer—the "Demanding Party." The buyer may insist that it cannot, and does not wish to, use the defective goods even though the defect is not so serious as to constitute a "fundamental breach of contract," a concept which does not exist in the ECL or the Industrial Regulations.

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204. Common Rules Civ. L., *supra* note 4, art. 134(4) & (6).

205. Indus. Sales Cont. Reg., *supra* note 120, art. 35(2) (emphasis added); 35(3) (same principle in case of nonconforming packaging); CIVIL LAW PRINCIPLES, *supra* note 196, at 160.

206. Indus. Sales Cont. Reg., *supra* note 120, art. 35(2).

Also, the Industrial Regulations do not require that the demand to repair the lack of conformity be reasonable. Only when the seller is unable to "repair" or "exchange" can it avoid these two types of specific performance. If the seller is still able to provide substitute goods or repair the defective goods, he will upon request . be bound to do so irrespective of any fundamental breach or reasonableness. On the contrary, under the Convention, the buyer's right to "exchange" (demanding delivery of substitute goods while returning the unwanted goods, presumably at the expense of the seller) may be exercised only when the lack of conformity amounts to a fundamental breach of contract.[207] Also, his right to have the seller repair the nonconforming goods may be exercised only when such repair does not cause the seller unreasonably high cost, heavy workload or excessive inconvenience.[208]

Under Articles 14 and 15 of the Industrial Sales Contracts Regulations, the buyer's right to the exchange or repair of nonconforming goods is subject to the condition that failure to submit a written objection to the lack of conformity may result in an assumption that the goods delivered conform with the contract.[209] Moreover, Article 14 of the Industrial Sales Contracts Regulations provides that the buyer "shall keep *safe* custody of the [non-conforming] products,"[210] implying that failure to "keep safe custody" of the non-conforming goods and to return or present them to the seller basically in the same condition as they were received, may in fact affect the buyer's performance remedy to require exchange or repair.

c. Remedies Inconsistent with Specific Performance

In neither the FECL system nor the ECL system is it clearly stated that where a party has canceled a contract or has resorted to another remedy that is not consistent with specific performance, he may no longer require that the other party fulfill its contractual obligations. On the other hand, it may be presumed that the right to specific performance, even if a primary remedy to the aggrieved party under Chinese law, may not be exercised where the contract has been "canceled," "rescinded" or "terminated" and where the breaching party has fully compensated the aggrieved party for its actual losses, including loss of profit. The reasons are obvious. It cannot be imagined, for example, that an aggrieved buyer continue demanding the defaulting seller to deliver the goods after it has canceled the contract due to the seller's breach, or for an aggrieved seller to insist on full payment of the contract price by the defaulting buyer after the seller has resold the goods and fully recovered the price. Article 34 of the FECL states that

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207. CISG, *supra* note 7, art. 46(2).
208. *See id.* art. 46(3).
209. Indus. Sales Cont. Reg., *supra* note 120, arts. 14(2), 15 & 15(5).
210. *Id.* art. 14(2) (emphasis added).

the cancellation of the contract does not affect any claim for damages,[211] but it does not mention its effects on any other remedial measures. This might imply that the cancellation (avoidance) of a contract would affect a party's right to specific performance. Article 35(2) of the Industrial Sales Contracts Regulations also has the effect that where the buyer has negotiated a price-reduction for non-conforming goods, he or she cannot demand that the seller deliver substitute goods or cure the non-conformity at the same time.[212]

d. Limitations for Early, Delayed, and Partial Delivery

In the case of early delivery, Article 27(1) of the Industrial Sales Contracts Regulations is similar to Article 52(1) of the Convention. The buyer (the Demanding Party) may either accept the early delivery of the goods and make payment "in accordance with the delivery time stipulated in the contract," or "refuse to pick up the goods."[213] After choosing to accept the goods in advance, the buyer may no longer reject them and request redelivery.[214]

As to late delivery, Article 27(2) of the Regulations resembles Article 48(2) of the Convention.[215] The seller (the Supplying Party) is required to consult with the buyer before it delivers the goods.[216] If the buyer "still wants them," the goods may be dispatched.[217] If the buyer "no longer wants the goods," it must so inform the seller within fifteen days from the date the buyer receives the seller's notice.[218] The effect of this Article is that, upon choosing to inform the seller that the goods are no longer needed, the buyer abandons its basis for requiring performance.

Article 10 of the Regulations provides that in the event the seller makes deliveries of goods that "fall short of the quantity stipulated in the contract," the buyer may "refuse to pay for the short-fall in the goods delivered."[219] If the buyer opts not to pay for the undelivered portion of the goods, he or she may

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211. FECL, *supra* note 4, art. 34.

212. Indus. Sales Cont. Reg., *supra* note 120, art. 35(2).

213. *Id.* art. 27(1).

214. *Id.*

215. Under CISG art. 48, the seller may inquire as to whether the buyer will accept performance. The buyer's failure to respond to such inquiry within a reasonable time may be deemed as acceptance of late performance. It follows that, should the buyer respond negatively to such inquiry within a reasonable time, it (1) will not be obligated to accept the unwanted late delivery, and (2) may no longer request specific performance by the seller. CISG, *supra* note 7, art. 48.

216. Indus. Sales Cont. Reg., *supra* note 120, art. 27(2).

217. *Id.*

218. *Id.*

219. *Id.* art. 10(2). *Cf.* CISG, *supra* note 7, art. 51(1) (providing no express authorization for price deduction or refusal of payment respecting the missing part of the goods).

presumably lose the right to demand make-up performance unless arrangements have otherwise been made for the make-up delivery and for appropriate payment.

## IV. CONCLUSIONS

This extensive discussion on the general availability of, and the limitations on, the remedy of specific performance under a domestic legal system such as that of China serves dual purposes. First, when a contract for the international sale of goods is governed by domestic law but not by the Convention, domestic rules applicable to *international transactions* on the remedy of requiring performance would be the only relevant rules, and, in general, there would not be the need for having recourse either under the Convention or under other domestic statutes and regulations governing *domestic transactions.*

Secondly, and more importantly, when a contract for the international sale of goods is in fact governed by the CISG, and the dispute is before a domestic court, because of the effect of Article 28 of the Convention, both the Convention rules on specific performance and those of domestic law might enter into play. Here, the domestic law rules that may affect the decision of the court are not limited to those applicable to *international transactions.* Rather, they also include statutes and regulations governing *domestic transactions.* Nothing in the language of Article 28 seems to suggest that "similar contracts of sale not governed by [the] Convention" cannot refer to similar sales contracts between *domestic* parties.

Undoubtedly, the general provisions in the Convention on the right to require performance, and those limiting the remedy of requiring performance, are the starting and controlling rules if a domestic court has to consider a party's application for specific performance under a CISG contract. The reason is that, *in addition to* the requirement that the court would grant such relief under domestic rules for a similar non-CISG sales contract, the court may, and/or is under an obligation to, grant such application *only* if the applicant "is entitled to require performance of any obligation" by the other party "in accordance with the provisions" of the Convention.[220] When the right to specific performance is first of all limited by, Article 46(2), for example, or any other provision of the Convention, domestic rules and limitations would then become completely irrelevant. The court is not authorized to enter a judgment for a remedy that, under the circumstances, is not available to the applicant party under the Convention itself.

The domestic rules and restrictions on the remedy of specific performance under the law of the country (or place) where the court is located, especially when not consistent with the Convention, would then become relevant when a party to a CISG contract does have the right to require performance under the Convention. If this right is established, one may at least conclude that the court is not

220. CISG, *supra* note 7, art. 28.

precluded from ordering specific performance. Then, according to Article 28 of the Convention, whether there is a legal duty on the part of the court to enforce that private right accorded by Article 46 or 62. will depend upon the relevant domestic law of the court. When an application to enforce specific performance under the CISG is made to a domestic court, the court's own domestic rules and limitations operate to assist the court in determining whether it is bound to grant the application for an order of specific performance of a CISG contract in accordance with Article 28 of the Convention.

Article 28 is necessary because, without it, specific performance would have the tendency of becoming an almost absolute right under Articles 46 and 62 of the Convention.[221] The limitative provision in Article 28 at least enables a court to choose not to grant the remedy of requiring performance where the limitations or exceptions under its domestic law apply. With the effect of Article 28 of the Convention, a Chinese court, for example, is not bound to grant specific performance in the event of impossibility to perform (such as inability to pay the price).[222] In other words, when a party to a Sino-foreign sales contract is entitled to require specific performance under the Convention, a Chinese court would be bound to order such specific performance *only if* it would be required to do so under Chinese rules in respect of a similar sales contract between Chinese parties. Where under China's domestic law a Chinese court *would not*, or *would not be required to*, order specific performance respecting similar non-CISG sales contracts (such as one between Chinese parties), the court might then choose, at its full discretion, whether to enter a judgment for specific performance on a CISG contract if the applicant party "is entitled to require performance" under the provisions of the Convention.[223]

The limiting provision in Article 28 of the Convention is likely to call for the selection of forum.[224] The words "unless the court would [render a judgment for specific performance] under *its own law*" (emphasis added) have left the following question open: If the law applicable under the rules of private

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221. *See U.N. Secretariat's Commentary*, *supra* note 26, at 77. art. 26, para. 4; O.R., *supra* note 7, at 27; DOC. HIST., *supra* note 7, at 417.

222. *See, e.g.*, Common Rules Civ. L., *supra* note 4, art. 108 (suggesting that a debtor may be compelled to repay his debt *only* when he is capable to pay but refuses to do so).

Similarly, Article 28 would also enable a German court to choose not to grant specific performance in cases of noncompliance with a *Nachfrist* ultimatum, or a French court to choose to deny, as it conventionally does, the performance remedy in respect of contracts requiring personal performance by the breaching party, or an American court to elect not to order performance where damages have provided adequate protection.

223. *See* HONNOLD (1st ed.), *supra* note 7, at 225; HONNOLD (2d ed.), *supra* note 7, at 273.

224. On the question of forum shopping, *see, e.g.*, Olga Gonzales, *Remedies under the U.N. Convention on Contracts for the International Sale of Goods*, 2 INT'L TAX & BUS. LAW. 79, 98 (1984).

international law is different from the domestic law of the forum, should the applicable "foreign" law govern or the substantive law of the forum itself? The "legislative history" of the relevant provisions of the 1964 Sales Convention, upon which Article 28 of the U.N. Sales Convention was modeled, suggests that the phrase "under [the court's] own law" refers to the domestic law of the court, *i.e.*, the domestic substantive rules on specific performance of the *forum* State. It does not encompass the whole law of the court, whose applicable rules of private international law might lead to the rules on specific performance of another State.[225] According to Professor Honnold, Article 28 of the Convention, providing that "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law," refers to the governing domestic rules of the forum.[226]

In any case, the issue of forum-shopping under Article 28 may be inevitable, although the practical need for choosing a court merely for the purpose of enforcing or avoiding specific performance might not be as great as one might think. The fact that under some legal systems specific performance is a routinely available remedy while under others it is treated as merely an occasional exception reminds trading parties to take advantage of the language of Article 28 of the Convention whenever necessary and feasible. For example, a Chinese importer of U.S. goods wishing to retain the right to specific performance must keep in mind that American courts and tribunals deem such relief as an exceptional remedy only. It may want to consider initiating an action or claim in a forum that treats the remedy of requiring performance as a primary and routinely available remedy as of right (such as a Chinese court or arbitral tribunal, if available). By the same token, an American merchant selling goods to a Chinese buyer must also recognize the routine availability of the performance remedy under Chinese law. If it wishes to avoid an order or decree compelling delivery, it may want to insist on a choice of forum clause so that the buyer may bring a lawsuit or arbitral claim only in a forum that views relieving the parties from contractual obligations, and awarding damages as a consequence, more favorably than compelling specific performance (such as an American court or arbitration panel).

Freedom of contract is not completely limited by the Convention. Parties may elect to choose their own applicable law not incorporating the rules of the Convention, or to "derogate from or vary the effect of any of its provisions."[227] The mere selection of forum does not absolutely promise a result that harmonizes with a party's choice for or against specific performance. To guarantee one's stronger or even "absolute" right to specific performance under Articles 46 and 62

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225. *See* HONNOLD (2d ed.), *supra* note 7, at 273 n.9, (citing 2 DIPLOMATIC CONFERENCE ON UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS, THE HAGUE, (1964), RECORDS AND DOCUMENTS OF THE CONFERENCE 11, 18, 179 (1966)).

226. *See* HONNOLD (1st ed.), *supra* note 7, at 224; HONNOLD (2d ed.), *supra* note 7, at 272-73; *see also* Kastely, *supra* note 43, at 637-38.

227. CISG, *supra* note 7, art. 6.

of the Convention and discourage unfavorable forum shopping, a party to a contract governed by the Convention may well insist on the insertion in the contract of a clause that specifically declares, in accordance with Article 6 of the Convention, that "the parties shall not be bound by Article 28" thereof. Similarly, to avoid specific performance, besides including a choice of forum clause in their contract disfavoring a possible decree for performance, the parties may specifically exclude the application of the Convention's provisions such as Articles 46 and 62 on specific performance. When a sales contract is not governed by the Convention, a choice of law clause would also be able to serve the purpose, *inter alia*, of either preserving or limiting the power of a non-breaching party to require specific performance as a remedy for breach of contract.