

## SPECIFIC PERFORMANCE – AND THE INTERNATIONAL UNIFICATION OF SALES LAW

MIKLÓS KIRÁLY

**Abstract:** Over the past decades, several approaches have been tried in the process of the unification of contract law to regulate the entitlement to performance in kind, but there is still no generally accepted solution. The Vienna Sales Convention, like its predecessors, resolves the question by a quasi-conflict of laws rule, essentially making the award of specific performance dependent upon the law of the forum, thereby undermining the results of unification. Other sources, such as the UNIDROIT Principles, provide autonomous rules that specify in detail the conditions under which it may be claimed. The Draft Common European Sales Law, continues to attach primary importance to the provision of performance in kind, obviously also bearing in mind the interests of consumers.

**Keywords:** unification of contract law; international sales; specific performance; CISG; Common European Sales Law; UNIDROIT Principles

**DOI:** 10.14712/23366478.2023.19

### INTRODUCTION

In normal economic circumstances – namely where there is free trade and sufficient supply of products – the significance of specific performance (performance in kind) is relatively modest, because, in international trade relations, the buyer rarely tries to force a reluctant, defaulting seller to fulfil his original obligations, but rather resorts to the often simpler and more sensible repurchasing of goods in the market<sup>1</sup> and claiming damages. However, it has been the fight against the COVID-19 pandemic that has shown that, in some cases, the performance in kind regarding certain contracts, whether for the purchase of limited supplies of protective equipment, medicines or vaccines, can be literally a matter of life and death, even in the 21st century<sup>2</sup> and paying damages

<sup>1</sup> BRIDGE, M. *The International Sales of Goods*. 4th ed. Oxford: Oxford University Press, 2017, pp. 704–705; RABEL, E. *Das Recht des Warenkaufs Eine Rechtsvergleichende Darstellung. Band 1*. Berlin: Walter de Gruyter, 1936, pp. 375–377; SCHWENZER, I. (ed.). *SCHLECHTRIEM & SCHWENZER: Commentary on the UN Convention on the International Sale of Goods (CISG)*. 4th ed. Oxford: Oxford University Press, 2016, pp. 483–484.

<sup>2</sup> See Advance Purchase Agreement (“APA”) for the Production, Purchase and Supply of a COVID-19 Vaccine in the European Union. In: *European Commission* [online]. 2020 [cit. 2022-04-08]. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_302](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_302).

for non-performance is hardly an adequate remedy. The risk of similar situation has emerged more recently, for example in case of the supply of semiconductor chips or certain raw materials, especially gas and oil. The difficulties of supply chains and disrupted deliveries have periodically reminded us of the importance of performance in kind and its legal regulation.

The legal systems of different states regulate performance in kind in diverse ways, and even the instruments aimed at unifying international sales law may contain different rules. This paper reviews these different regulatory models, analysing the following sources of uniform law: the 1935 and 1939 UNIDROIT Drafts,<sup>3</sup> the 1964 Hague Convention (ULIS),<sup>4</sup> the Vienna Sales Convention (CISG),<sup>5</sup> the UNIDROIT Principles (UPICC)<sup>6</sup> and the Draft Common European Sales Law (CESL).<sup>7</sup> It refers to the provisions of Principles of European Contract Law (PECL)<sup>8</sup> and DCFR<sup>9</sup> only as a supplement, since these latter instruments, for all their excellence, are not formal initiatives or results of the work of an international or regional organisation or institution. By analysing the different regulatory patterns of the past decades, this comparative-historical approach provides a better understanding of the evolution of the law as it stands today. Furthermore, it may contribute to the successful development of future solutions.

At the root of the regulatory challenge lies a difference in approach between continental and Anglo-Saxon law, as to whether and to what extent performance in kind can be claimed and decided by the courts.<sup>10</sup> While in the *civil law* world, it is gener-

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<sup>3</sup> International Institute for the Unification of Private Law – League of Nations. *Draft of an International Law of the Sales of Goods*. Rome, La Libreria Dello Stato, 1935. (1935 UNIDROIT Draft); also “Projet D’Une Loi Uniforme sur la Vente Internationale Des Objets Mobiliers Corporels” and “Draft Uniform Law on International Sales of Goods (Corporeal Movables)”. In: *L’Unification du Droit = Unification of Law: a general survey of work for the unification of private law (Drafts and Conventions)*. UNIDROIT, 1948 (1939 UNIDROIT Draft), pp. 103–159.

<sup>4</sup> Convention relating to a Uniform Law on the International Sale of Goods (ULIS).

<sup>5</sup> United Nations Convention on Contracts for the International Sale of Goods, signed at Vienna on 11 April 1980.

<sup>6</sup> Latest edition: *UNIDROIT Principles of International Commercial Contracts*. Rome: UNIDROIT, 2016 (hereafter: UPICC). On the impact on domestic laws: GARRO, A. – RODRÍGUEZ, J. A. M. (eds.). *Use of the UNIDROIT Principles to interpret and supplement domestic contract law*. Cham: Springer International Publishing, 2021. Furthermore PAUKNEROVÁ, M. The UNIDROIT Principles and Czech Law. In: UNIDROIT (ed.) *Eppur si muove: the Age of Uniform Law: essays in honour of Michael Joachim Bonell to celebrate his 70th birthday. Vol. 2*. Rome: UNIDROIT, 2016, pp. 1583–1592.

<sup>7</sup> CESL. Common European Sales Law: Proposal for a Regulation of the European Parliament and of the Council on Common European Sales Law, COM(2011)0635 final – 2011/0284 (COD).

<sup>8</sup> LANDO, O. – BEALE, H. (eds.). *Principles of European Contract Law. Parts I and II*. Hague: Kluwer Law International, 2000; LANDO, O. – CLIVE, E. – PRÜM, A. – ZIMMERMAN, R. (eds.). *Principles of European Contract Law. Part III*. Hague: Kluwer Law International, 2003.

<sup>9</sup> VON BAR, CH. – CLIVE, E. – SCHULTE-NÖLKE, H. (eds.). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. München: Sellier. European Law Publishers, 2009. The complete results of the Study Group on European Civil Code and the Research Group on EC Private Law were published by VON BAR, CH. – CLIVE, E. – SCHULTE-NÖLKE, H. (eds.). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Volumes I–VI*. Full edition. München: Sellier. European Law Publishers, 2009.

<sup>10</sup> BRIDGE, C. D., pp. 704–705; GARRO, A. M. Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods. *The International Lawyer*. 1989, Vol. 23, pp. 443–483, especially p. 458.

ally accepted,<sup>11</sup> and indeed the right of the buyer to enforce performance is a corollary of the principle of *pacta sunt servanda*,<sup>12</sup> the basic effect of the obligation,<sup>13</sup> in England, performance in kind, as it is called by English law “*specific performance*”, is an extraordinary equitable remedy, the granting of which is left to the discretion of the courts.<sup>14</sup> Traditionally, it is awarded where damages are not an appropriate remedy because, for example, the subject of the sale is a particularly rare or valuable thing or piece of land.<sup>15</sup> In addition, even English judicial practice is not well-established; it fluctuates between a narrower or broader use of this option,<sup>16</sup> although there are examples of its use. Under §52(1) of the *Sale of Goods Act 1979*, the court may, on the application of the plaintiff, order specific performance in respect of goods specified by the parties in or after the contract if it considers it appropriate.<sup>17</sup> According to § 2–716 of the *Uniform Commercial Code* (UCC), adopted separately by the US member states,<sup>18</sup> performance in kind may be required if the subject matter of the contract is a specific good or if

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<sup>11</sup> See, for example, German BGB § 241, Austrian ABGB § 918–919, Italian *Codice Civile* Article 1453 (1), also Articles 2930–2933, Dutch Civil Code 3:296 (1), French *Code civil* – old provisions on contracts – Article 1184 (2), and interpretation of old Articles 1142–1143. Among the new provisions of the French *Civil Code* governing contracts, Articles 1217 and 1222 should be mentioned. See VON BAR – CLIVE – SCHULTE-NÖLKE, *c. d.*, Notes to Article III-3:302, pp. 855–856; SARTORI, F. in: ANTONIOLLI, L. – VENEZIANO, A. (eds.). *Principles of European Contract Law and Italian Law*. Hague: Kluwer Law International, 2005, pp. 395–400; New Hungarian Civil Code. § 6:138 [Right to claim performance] and § 6:159 [Subsidiary warranty rights].

<sup>12</sup> VOGENAUER, S. *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. 2nd ed. Oxford: Oxford University Press, 2015, p. 888.

<sup>13</sup> SCHWENZER, *c. d.*, p. 482.

<sup>14</sup> The differences between the legal systems in this respect are also clearly illustrated by RABEL, *Das Recht des Warenkaufs Eine Rechtsvergleichende Darstellung*, pp. 269–271, going back to the New York court reform of 1846 and the English court reform of 1873/75. Also, SZLADITS, CH. The Concept of Specific Performance in Civil Law. *The American Journal of Comparative Law*. 1955, Vol. 4, No. 1–4, pp. 208–234; HAY, P. *US-Amerikanischer Recht*. 7. überarbeitete und erweiterte Aufl. München: C. H. Beck, 2020, p. 2. The current understanding, practice and exceptions to *specific performance* are analysed in great detail in the notes to the DCFR, especially pp. 855–859.

<sup>15</sup> GARNER, B. A. *A Dictionary of Modern Legal Usage*. 2nd ed. Oxford: Oxford University Press, 1995, p. 821.

<sup>16</sup> MCKENDRICK, E. *Contract Law*. 10th ed. Basingstoke: Palgrave Macmillan, 2013, pp. 372–375. Also, *Société des Industries Métallurgiques v. The Bronx Engineering Co Ltd* [1975] 1 Lloyd’s Rep. 465; and *Sky Petroleum Ltd v. VIP Petroleum Ltd* [1974], 1 WLR 576, cited in BEALE, H. – FAUVARQUE-COSSON, B. – RUTGERS, J. – TALLON, D. – VOGENAUER, S. *Cases, Materials and Text on Contract Law*. 2nd ed. Oxford: Oxford University Press, 2010, p. 853.

<sup>17</sup> Sale of Goods Act 52(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.” However, the provision applies only in a complementary manner to Scotland, which is closer to the continental tradition, showing the legal diversity that is also present within the United Kingdom: 52(4): “The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific performance in Scotland.” Analysed by ZHOU, Q. – DIMATTEO, L. A. *Three Sales Laws and the Common Law of Contracts*. Oxford: Oxford University Press, 2016, pp. 347–378, especially p. 349.

<sup>18</sup> The UCC was drafted by the National Conference of Commissioners of State Uniform Laws and the ALI and adopted by 50 states, DC and US Territories but not all states have implemented the entirety of the UCC.

special circumstances justify it;<sup>19</sup> the importance of this is growing,<sup>20</sup> but the literature suggests that this is also an exceptional solution.<sup>21</sup>

## THE 1935 AND 1939 UNIDROIT DRAFTS

Already in the report on the UNIDROIT 1935 Draft, it was made clear that the Institute was looking for a two-way solution, with a view to bridging the gap between Anglo-Saxon and continental legal systems. On the one hand, Articles 23 to 25 and 51<sup>22</sup> allowed the demand for specific performance if the forum in question considered this possible and recognised it in its own law and, on the other hand, it tightened up this law with a number of exceptions, such as the different solutions of commercial usages,<sup>23</sup> probably in order to come closer to the Anglo-Saxon solution.<sup>24</sup>

Also worthy of mention is Article 71 of the 1935 UNIDROIT Draft, which, as a cognate of Article 24, is also entitled “specific performance”, but deals with another aspect of when the seller may claim payment of the purchase price as “specific performance” from his point of view. The rule, rooted in international trade, is that “*the seller is only entitled to claim payment of the price if the sale is of goods which are such that there is no usage of the trade to effect a resale*”.<sup>25</sup> The rule is also an example of the acceptance of the prominent role of trade usages in the 1935 UNIDROIT Draft. As confirmed by the commentary to Article 71, where commercial usage requires resale, the seller is not entitled to the full purchase price but only to compensation for his loss resulting from the difference between the resale and the purchase price. The 1939 UNIDROIT

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<sup>19</sup> UCC 2-716. §: “Buyer’s Right to Specific Performance or Replevin. (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.” It should be noted that Louisiana is the only US state that has not adopted Article 2 of the UCC, although it has added some provisions to its civil code, which reflects the Spanish – French influence. ZHOU – DIMATTEO, *c. d.*, p. 348.

<sup>20</sup> GARNER, *c. d.*, p. 821; OMLOR, S. in: MANKOWSKI, P. (ed.). *Commercial Law: Article by Article Commentary*. Baden-Baden, München, Oxford: Nomos, C. H. Beck, Hart Publishing, 2019, p. 151.

<sup>21</sup> VOGENAUER, *c. d.*, p. 888, footnote 14.

<sup>22</sup> 1935 UNIDROIT Draft Article 23: “*In the event of total or partial failure to deliver or of delay in delivery the buyer may, subject to the provisions of Articles 24-25 require specific performance of the contract, provided that specific performance is possible and is recognised by the national law of the Court in which the action is brought. The buyer may, subject to the provisions of Articles 26 to 32, avoid the contract by a simple statement to that effect. He may also sue for damages as provided by Articles 33 to 40. In no event is the seller entitled to obtain a period of grace from the Court.*”; Article 24: “*Notwithstanding that the national law of the Court recognizes his right to require delivery of the goods, the buyer shall not be entitled to require such delivery where it is in accordance with the usage of the trade to repurchase the goods or where he can repurchase them without appreciable inconvenience or expense.*”; Article 25: “*If in circumstances other than those contemplated by Article 27, the buyer elects to demand specific performance of the contract, he must notify the seller to this effect without undue delay; otherwise, he will only be entitled to avoid the contract, as provided by the present law, without prejudice to his claim to damages.*”

<sup>23</sup> 1935 UNIDROIT Draft, Article 24: “*Notwithstanding that the national law of the Court recognises his right to require delivery of the goods, the buyer shall not be entitled to require such delivery where it is in accordance with the usage of the trade to repurchase the goods or where he can repurchase them without appreciable inconvenience or delay.*”

<sup>24</sup> 1935 UNIDROIT Draft, p. 39; RABEL, E. A Draft of an International Law of Sales. *The University of Chicago Law Review*. 1938, Vol. 5, No. 4, pp. 543–565, especially p. 560.

<sup>25</sup> 1935 UNIDROIT Draft, Article 71.

Draft also dealt with the question of the admissibility of specific performance and its conditions, again returning to the possibility of performance in kind.<sup>26</sup> First of all, in the case of non-compliance with the duty of delivery, the buyer could choose to claim specific performance under the first paragraph of Article 25, under the conditions set out in Articles 26–27, provided that specific performance was possible and recognised by the law of the court seized.<sup>27</sup> As we shall see, this solution, which has its roots in the 1935 UNIDROIT Draft, will continue to have an impact on the unification of the law, even decades later. Other sanctions included the right to rescind and to claim damages.

As to the detailed rules of specific performance in the 1939 UNIDROIT Draft, Article 26, irrespective of the permissive view of the law of the forum, did not give the buyer the right to specific performance in kind where it was in accordance with trade usage *to repurchase the goods* or where this could be done without considerable inconvenience or expense.<sup>28</sup> A further restriction appears in Article 27, according to which, if the buyer has chosen specific performance in connection with a contract for which the time of delivery is an essential element, he must notify the seller without delay<sup>29</sup> after the seller has established the delay in delivery, otherwise he will only be entitled to rescission under the draft uniform law.<sup>30</sup>

In the event of defective performance, the buyer had a choice of remedies, in particular avoiding the contract, claiming damages or price reduction, under the 1939 UNIDROIT Draft.<sup>31</sup> However, Article 48 of this Draft also opened up further possibilities for the buyer, such as *a*) to require the seller to deliver other goods, if the sale was for goods not previously unascertained and specific performance could be required, *as well as b*) to require the buyer to repair the seller's goods within a reasonable time, if the sale was for goods which the seller had to produce according to the buyer's specifications, provided that the defects could be repaired.<sup>32</sup> However, the quoted provision did not further specify the conditions for claiming specific performance.

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<sup>26</sup> The 1939 UNIDROIT Draft essentially developed the provisions of Articles 23–25 and 51 of the 1935 UNIDROIT Draft, without any conceptual change.

<sup>27</sup> 1939 UNIDROIT Draft, Article 25: “*Where the goods have not been regularly delivered, the buyer may, subject to the provisions of Articles 26 and 27 demand specific performance of the contract, provided, that specific performance is possible and is recognised by the municipal law of the Court in which the action is brought.*”

<sup>28</sup> 1939 UNIDROIT Draft, Article 26: “*Notwithstanding that the municipal law of the Court in which the action is brought recognizes his right to demand specific performance, the buyer shall not be entitled to demand such performance where it is in accordance with the usage of the trade to repurchase the goods or where such repurchase can be made without appreciable inconvenience or expense.*”

<sup>29</sup> 1939 UNIDROIT Draft, Article 27. In the original English text cited, it appears to have been mistakenly referred to a second time as *buyer*. See below.

<sup>30</sup> 1939 UNIDROIT Draft, Article 27: “*Where the buyer elects to demand specific performance of the contract for which the time of delivery is an essential condition, he must notify the buyer (sic) to that effect, without undue delay in delivery, otherwise he shall only be entitled to avoid the contract as provided by this law.*”

<sup>31</sup> 1939 UNIDROIT Draft, Section II. The seller's undertaking against defects in the Goods, C) Sanctions in case of defects, Article 47.

<sup>32</sup> 1939 UNIDROIT Draft, Article 48: “*The buyer who has duly notified the existence of defects may also elect:*

*a) to demand from the seller the delivery of other goods if the sale refers to unascertained goods and specific performance may be required;*

## THE 1964 HAGUE CONVENTION (ULIS)

A few decades later, under the relevant provisions of Article VII and Article 16 of the ULIS, as an exceptional remedy<sup>33</sup> the forum has made whether the court shall award specific performance or whether it is prepared to enforce such a performance subject to its own law. This was mitigated only to the extent that Article VII (2) stressed that this rule was without prejudice to obligations arising from Conventions concluded or to be concluded by Contracting States for the recognition and enforcement of judgments, arbitral awards and other similar enforceable instruments.<sup>34</sup> Article 16 of the ULIS, referring back to Article VII, confirmed the conditionality of awarding specific performance.<sup>35</sup>

On the whole, the rules were even stricter than those of the 1935 and 1939 UNIDROIT drafts, since they did not simply require that specific performance *was possible and is recognised by the municipal law*, as their predecessors did, but that the forum would actually do so in similar cases. As such, the ULIS court would only have to grant or enforce performance in kind if it *would do so* under its own law for similar contracts. At the same time, the reference to the fact that trade usage, where applicable, may also be an obstacle to the award of specific performance has disappeared from the ULIS.

## VIENNA SALES CONVENTION (CISG)

In essence, this regulatory solution, which is a compromise between the legal systems of common law and civil law,<sup>36</sup> is adopted in the Vienna Sales Convention, some of the provisions of which contain rules explicitly referring to state laws that lead away from the uniform law approach.

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b) *to demand that the defects be made good by the seller within a reasonable time if the seller refers to goods which the seller had to manufacture or produce in accordance with the special orders of the buyer, provided that the defects may be repaired.*"

<sup>33</sup> EÖRSI, G. The Hague Conventions of 1964 and the International Sale of Goods. *Acta Juridica*. 1969, Vol. 11, No. 3–4, pp. 321–354, p. 340; DCFR notes p. 856.

<sup>34</sup> ULIS VII. Article: "1. *Where under the provisions of the Uniform Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law.*

2. *The provisions of paragraph 1 of this Article shall not affect the obligations of a Contracting State resulting from any Convention, concluded or to be concluded, concerning the recognition and enforcement of judgments, awards and other formal instruments which have like force.*"

<sup>35</sup> ULIS 16. Article: "Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in accordance with the provisions of Article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods."

<sup>36</sup> OMLOR, S. in: MANKOWSKI, c. d., p. 151.

Thus, Article 28 CISG,<sup>37</sup> which deals with specific performance, states that: “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 judgement 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.”

It is clear that this is a serious concession made at the expense of unification. The assessment of specific performance depends on the law of the forum,<sup>38</sup> but the court has in fact been given an *opt-out* from following the CISG system of accepting the claim and assessment of specific performance.<sup>39</sup>

A detailed examination of Article 28 reveals that it contains several conceptual stages. First of all, the question of performance in kind must be considered in the context of the Vienna Sales Convention, in particular Article 46 (1), which provides that “[t]he buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement” and Article 62, which states that “[t]he 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”. The inadequacy of damages as a remedy is therefore not a condition for specific performance.<sup>40</sup> If the claim cannot give rise to performance in kind on the basis of the provisions cited above, the application of Article 28 CISG is clearly out of question. If it does, the court seized of the case has a challenging task: it must, in fact, model a similar situation, but one not covered by the CISG, such as a domestic sale, and consider the need for specific performance. If, under its own law, it would support such a claim, it would have to do the same in a case arising out of the application of the Vienna Sales Convention. Even so, that is the exception to the proposition in the article, because, before that, the main rule is that it is not obliged to adjudicate specific performance – and here is the fundamental *concession* to the common law concept<sup>41</sup> if it were to reject such a claim under its own law.

It is also worth recalling the English text of Article 28 of the CISG again, to unveil its exact message. In the earlier draft text of the Convention, the wording of the exception was “*unless the court could do so*”,<sup>42</sup> but the auxiliary “*could*” has been changed to “*would*” by the Vienna Conference, which drafted the final text of the CISG, reverting to the wording of Article VII of ULIS quoted above, namely the Anglo-US proposal. It is therefore not enough for the court to have the possibility to decide in favour of specific performance; more is needed, in fact certainty, as by referring to the decision in a similar case.<sup>43</sup> However, certainty is not easy to come by, if we look at English case

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<sup>37</sup> FERRARI, F. What Sources of Law for Contracts for the International Sale of Goods? Why one has to look beyond the CISG? *International Review of Law and Economics*. 2005, Vol. 25, No. 3, p. 338.

<sup>38</sup> BOOYSEN, H. The International Sale of Goods. *S. Afr. Y.B. Int'l L.* 17th (1991–1992), pp. 71–89, p. 84.

<sup>39</sup> OMLOR, S. in: MANKOWSKI, *c. d.*, p. 151.

<sup>40</sup> GARRO, *c. d.*, p. 458.

<sup>41</sup> BRIDGE, *c. d.*, p. 706.

<sup>42</sup> This wording of the possibility reflected the approach of the 1935 and 1939 UNIDROIT Drafts.

<sup>43</sup> SCHWENZER, *c. d.*, p. 492.

law, for example. While some judgments seem to point in the direction of embracing and extending *specific performance*,<sup>44</sup> others seem to cast doubt on it.

It is particularly interesting that Article 28 CISG can be considered a rule of private international law in its essence,<sup>45</sup> since it contains a reference to the law of the forum. Although it does not directly order the application of the *lex fori*, it makes the application of the relevant rules of the CISG, the decision of the court, dependent on its position. Hence, the conflict which theoretically exists between an international convention and state law, and which the states which are party to the convention will, of course, resolve in favour of the convention, is here reversed: the *lex fori* is given primacy, a kind of control, waiving the advantages of effective unification of law by this compromise solution.<sup>46</sup> This direct reference to the court's own law is, however, understood in such a way that the private international law of the forum is no longer taken into account, so the problem of *renvoi* should not arise.<sup>47</sup> Thus, if a Hungarian buyer sues a US seller before a Swiss forum, if the Swiss forum establishes jurisdiction, Swiss substantive law will govern the claim for performance in kind, subject to other conditions, on the basis of Article 28 of the CISG. This solution, the role assigned to the *lex fori*, also increases the importance of the choice of forum.

Despite the interesting theoretical problem, the available case law on Article 28 is modest according to the UNCITRAL *Digest*. In any case, the judgments seem to follow the Vienna Sales Convention solution, making the assessment of specific performance dependent on the position of national law,<sup>48</sup> at most adding in a Russian arbitration award that a claim for specific performance must be brought within a reasonable time after the breach of contract is perceived.

## THE UNIDROIT PRINCIPLES

After more than half a century, the UNIDROIT Principles broke with the above-described approach of ULIS, CISG and their predecessors, providing a fully-fledged, autonomous substantive law solution, in that they themselves define when in-kind performance, in other words, a non-monetary obligation, cannot be claimed. This solution, representing a kind of paradigm-shift, if widely applied, could lead to

<sup>44</sup> *Beswick v. Beswick* (1968) and *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* (1998). See MCKENDRICK, *c. d.*, pp. 372–373; CARTWRIGHT, J. *Contract Law: an Introduction to the English Law of Contract for the Civil Lawyer*. 3rd ed. Oxford: Hart Publishing, 2016, pp. 277–278.

<sup>45</sup> SCHWENZER, *c. d.*, p. 492.

<sup>46</sup> GARRO, *c. d.*, p. 460.

<sup>47</sup> SCHWENZER, *c. d.*, p. 487; OMLOR, S. in: MANKOWSKI, *c. d.*, pp. 152–153.

<sup>48</sup> UNCITRAL. *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*. UNCITRAL Secretariat, Vienna International Centre, 2016, p. 122; *Zurich Arbitration*, Switzerland, 31 May 1996; CLOUT case No. 417 [*U.S. District Court, Northern District of Illinois*, United States, 7 December 1999]; *Obergericht des Kantons Bern*, Switzerland, 1 December 2004, CISG-online 1192; *Arbitration Court of the International Chamber of Commerce*, France, 2004 (Arbitral award No. 12173); *Yearbook of Commercial Arbitration*. 2009, 111; *International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation*, Russian Federation, 30 January 2007 (Arbitral award No. 147/2005), Unilex: CLOUT case No. 636 (*Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires*, Argentina, 21 July 2002).



greater foreseeability and harmony in decision-making at international level, since granting specific performance would not be dependent upon the law of the court seized.

According to Article 7.2.2 UPICC, “[w]here a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless (a) performance is impossible in law or in fact; (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive; (c) the party entitled to performance may reasonably obtain performance from another source; (d) performance is of an exclusively personal character; or (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance”.<sup>49</sup>

With the above rules, the UNIDROIT Principles have chosen a kind of middle way solution, on the one hand accepting performance in kind, giving a right to claim it, in line with continental legal systems, but on the other hand tempering the main rule with a number of exceptions, which still come close to the restrictive approach of *common law* systems.<sup>50</sup> However, there are also differences. The UNIDROIT Principles use a different terminology, instead of the Anglo-Saxon right of “specific performance”, which refers to the admission of a specific claim, simply using the term “*right to performance*”, which is closer to continental legal systems and does not emphasise the extraordinary nature of this remedy.<sup>51</sup>

However, the decisive difference from its predecessors, such as the Vienna Sales Convention, is that Article 7.2.2, by listing the exceptions to the requirement of performance, itself provides an autonomous rule, closing the loophole of reference to the law of the court seized.<sup>52</sup> The same approach is also followed in Article 9:102 of the PECL and Article III.–3:302 of the DCFR, with some differences regarding the scope of the exceptions. It should be noted that the right to performance may also imply, in certain cases, compliance with a negative obligation, such as the obligation to keep trade secrets or confidential information.<sup>53</sup>

A detailed analysis of the exceptions to the performance in kind would go beyond the scope of this comparative paper, but it can be said that they offer considerable room for interpretation, as we encounter open-ended phrases such as “unreasonably burdensome or costly”.<sup>54</sup> Moreover, the exception that specific performance cannot be claimed if “*the party entitled to claim performance can reasonably obtain it from another source*”<sup>55</sup> obviously excludes all commercially available ready-made goods from the general rule.<sup>56</sup>

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<sup>49</sup> Article 7.2.2 of the UNIDROIT Principles 2016, on the performance of non-monetary obligation.

<sup>50</sup> BRÖDERMANN, E. J. in: MANKOWSKI, *c. d.*, p. 647; VOGENAUER, *c. d.*, p. 888.

<sup>51</sup> Others prefer to see this change as neutral terminology. VOGENAUER, *c. d.*, p. 889.

<sup>52</sup> *Ibid.*, p. 186.

<sup>53</sup> *Ibid.*, p. 890.

<sup>54</sup> Cf. SARTORI, F. in: ANTONIOLLI – VENEZIANO, *c. d.*, p. 400, in connection with similar provisions of the PECL, stressing that “*reasonableness*” is an uncertain and completely unknown concept in Italian law.

<sup>55</sup> UPICC Article 7.2.2 (c).

<sup>56</sup> BRÖDERMANN, E. J. in: MANKOWSKI, *c. d.*, p. 649.

The main rule, which is fine-tuned with several exceptions, does not run counter to the tendency, as indicated in the legal literature, that the enforcement of performance in kind is in retreat, even in continental legal systems (Denmark, France or Germany).<sup>57</sup> As regards the burden of proof, these are exceptions, so that it is the non-performing party who has to prove that he is exempt from the obligation to perform.<sup>58</sup>

In addition to the quoted Article 7.2.2 of the UNIDROIT Principles, there are further significant provisions, such as Article 7.2.3, which extends the right to performance to the right of rectification and replacement, or Article 7.2.4, which reinforces the obligation to perform by the possibility of a fine imposed by a court.<sup>59</sup>

## DRAFT COMMON EUROPEAN SALES LAW (CESL)

The CESL not only breaks with the previous regulatory approach referring to the law of the forum, but also shows a strong regulatory preference for performance in kind, by placing it first among the remedies and (as will be seen below) limiting the buyer's right to it only with very few exceptions in the case of a contract for pecuniary interest.<sup>60</sup> Thus, under Article 106 of the CESL, the buyer may require performance in the event of a breach of contract by the seller, which includes specific performance, repair or replacement of the goods or digital content. Article 155 CESL also allows the customer to claim performance in the event of a breach of contract by the service provider. An exception under Article 107 CESL is where the digital content has not been supplied for consideration, in which case the buyer can only claim damages for loss or damage to his property, including hardware, software and data, caused by the defect of the supplied digital content, except for any gain, of which the buyer has been deprived by the damage. A further safeguard is the reinforcement of the mandatory nature of the rules in Article 108: in a contract between a trader and a consumer, the parties may not exclude the application of this chapter to the detriment of the consumer, derogate from it or alter its effects before the consumer has brought the lack of conformity to the trader's attention.

The above-quoted provisions of the CESL are refined in Article 110 with regard to the claim for performance of the seller's obligations, setting certain general limits in paragraph (3). Performance may not be required if: *a*) performance would be impossible or become unlawful; or *b*) the burden or expense of performance would be disproportionate to the benefit to the buyer. In Article 132 of the ELI Statement considering the

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<sup>57</sup> LANDO, H. – ROSE, C. On the enforcement of specific performance in Civil Law Countries. *International Review of Law and Economics*. 2004, Vol. 24, No. 4, pp. 473–487, cited in HALEY, J. O. *Comparative Contract Law*. Cheltenham: Edward Elgar Publishing, 2017, pp. 924–938, especially p. 925, pp. 929–931. However, there are counter currents too: JUKIER, R. The Emergence of Specific Performance as a Major Remedy. *Quebec Law, Revue du Barreau*. 1987, Vol. 47, No. 1, pp. 48–72.

<sup>58</sup> VOGENAUER, *c. d.*, p. 891.

<sup>59</sup> *Ibid.*, pp. 888–889.

<sup>60</sup> This approach is critically analysed from the point of view of German law by ALBERS, G. Die Erzwingung der Erfüllung nach dem CESL im Vergleich mit dem deutschen Recht. *ZEuP*. 2012, No. 4, pp. 687–704.

CESL proposal,<sup>61</sup> it is suggested that a further point *c*) be added, according to which performance would not be required even if it were of such a personal nature that it would be unreasonable to enforce it. This addition would also transpose the clarifying provision in PECL<sup>62</sup> and DCFR<sup>63</sup> into the CESL rules.

## CONCLUSION

To sum up, it can be said that different regulatory models coexist or compete in the field of specific performance. This is well illustrated, for example, by the difference between the Vienna Sales Convention and the UNIDROIT Principles. It is time that will determine which solution will prevail in the future process of unification.

Recalling the challenges outlined in the introduction, it is reasonable to argue that, in an era of epidemics, wars and disrupted supply chains, the importance of specific performance is greater than ever. In this situation, the solution offered by the UNIDROIT Principles, providing autonomous rules that specify in detail the conditions under which performance can be claimed, is more advantageous than that of the Vienna Sales Convention. As the UNIDROIT Principles create a watertight set of rules, in that they do not refer to the law of the forum; they ensure a foreseeable outcome. By allowing only a limited number of exceptions, they tend to tip the balance in favour of performance in kind, although they are flexible enough to take truly exceptional circumstances into account.

Prof. Dr. Miklós Király  
Eötvös Loránd University, Faculty of Law  
kiraly.miklos@ajk.elte.hu  
ORCID: 0000-0002-7407-1587

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<sup>61</sup> Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law, COM(2011)635 final. Vienna: European Law Institute, 2012, amended by two supplements published in 2014 and 2015. Online available at: <https://europeanlawinstitute.eu/projects-publications/completed-projects/proposed-cesl/>.

<sup>62</sup> Article 9:102 of the PECL.

<sup>63</sup> Article III 03:302 of the DCFR.