The Chinese Journal of Comparative Law (2013) Vol. 1 No. 2 pp. 195–220
doi:10.1093/cjcl/cxt018

Specific Performance in International Arbitration

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Abstract

This article considers the definition of specific performance and examines the differences that are said to exist between the common law and civilian legal systems in relation to the availability of specific performance. As far as the availability of specific performance in international arbitrations is concerned, it is argued that arbitral tribunals generally have the jurisdiction to make a specific performance order and that there is no basis for the conclusion that arbitral tribunals should exercise their jurisdiction on a more restricted basis than would a national court. It is also argued that, as a general matter, a specific performance order made by an arbitral tribunal should be no more likely to be challenged successfully, or its enforcement successfully resisted, than would be the case where the same order was made by a court. It is, however, acknowledged that there may be practical difficulties in enforcing a specific performance order made by an arbitral tribunal, an illustration of which is provided by reference to a recent award made in a China International Economic and Trade Arbitration Commission (CIETAC) arbitration.

Keywords: *international arbitration; specific performance*

At first sight, the issue of the availability of specific performance in international arbitral proceedings seems a relatively narrow one. It is not one that is widely discussed in the legal literature. Nor does it appear frequently in the case law concerning international arbitration that comes before national courts. Equally, it does not appear to be a matter of great importance in the reported summaries of arbitral awards. The firm impression that is gained from both the legal literature and the case law is that damages are the primary

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remedy sought in international commercial arbitrations and that specific performance is an issue that is of less significance.

First impressions can, however, be misleading. This is so for a number of reasons. The first reason for attaching more significance to the role of specific performance in international arbitration relates to the difference that exists between civil law systems (where specific performance is generally regarded as the primary remedy) and common law systems (where specific performance is traditionally regarded as a secondary remedy and is only available when damages would not be an adequate remedy). This difference of perspective may assume a more important dimension in international arbitration than in national courts given that arbitrators and counsel are often drawn from different legal jurisdictions and so may hold divergent views about the availability of specific performance. In proceedings before a national court, by contrast, the judges and counsel are more likely to have been trained in the same legal system and so will generally hold an identical view on the availability of specific performance, with the consequence that the differences between common law and civil law systems are less apparent.

The second reason for examining the issue is that it provides us with an opportunity to reflect upon these traditional differences between common law and civilian systems and to inquire whether these differences continue to play an important role in the modern law. In so far as one can draw lessons from documents such as the UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL), it would appear that there is now greater agreement as to the circumstances in which specific performance should be available as a remedy and, to this extent, there would seem to be a greater convergence between common law and civilian systems.[1] However, convergence is not to be equated with uniformity. Differences remain, albeit the precise form that these differences assume does not seem to be agreed. For some, the difference remains one of principle (that is to say, whether or not specific performance is to be regarded as the primary remedy for a breach of contract). While, for others, it is one of degree (that is to say, there is substantial agreement as to the type of circumstance in which specific performance should be granted or refused, but this agreement is not absolute, with the result that it continues to be possible to identify differences between legal systems in regard to the precise circumstances in which specific performance should be granted or refused). A further difference that can be identified is one that relates to the definition of specific performance—in particular, whether remedies such as repair, replacement, and the action for the price are understood to fall within the definition of specific performance.

The third reason for examining the issue is that it gives us the opportunity to consider whether there is something about specific performance that

[1] International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational 2010) [PICC]; Ole Lando and Hugh Beale (eds), *Principles of European Contract Law*, parts 1 and 2 (Kluwer Law International 2000).

makes it unsuitable as a remedy for international arbitration. The impression that is often given is that the remedy of choice in international arbitration is damages and that arbitral rules are drafted on this assumption and consequently make little room for the availability of specific performance. While it is undoubtedly true that specific performance is sought in the minority of cases (and the same is true in the case of ordinary litigation before domestic courts), it does not follow that it is inherently unsuitable for international arbitration. That said, the fact that the parties to the arbitration are drawn from different jurisdictions and that the contract may require this performance to take place in a jurisdiction other than the one in which the arbitration is held, may present enforcement problems that lead ultimately to the parties seeking a remedy in damages. In this sense, it can be argued that these problems are no different from those that would arise in litigation before domestic courts where the parties are from different jurisdictions and the place of performance is not within the jurisdiction of the national court. This may be true, but it can be argued that it is practical difficulties of this type that give the impression that specific performance is of marginal importance in international arbitration.

In the course of this article, we shall seek to examine these issues in four stages. First, we shall examine the definition of specific performance, in particular, the question whether it includes the remedies of repair, replacement, cure, and the action for the price. Second, we shall turn to the differences between common law and civil law in relation to the availability of specific performance and consider whether, in the light of recent developments, it can be said that there is a gradual convergence between these different legal traditions as to the availability of specific performance. In the third section, we consider the extent to which specific performance is available in international arbitrations, and then, in the final section, we shall use as an illustrative study a case in which a party sought and obtained a specific performance award in a CIETAC arbitration, only to encounter overwhelming difficulties when seeking to enforce the order of the tribunal in the courts of Hong Kong. The lesson to be drawn from the case is not so much one relating to the differences in substantive law but, rather, one that concerns the practical obstacles likely to confront a party that seeks (and even obtains) a specific performance order in an international arbitration.

The meaning of 'specific performance'

The term 'specific performance' may be understood differently in different legal systems. As a matter of English law, it is used to describe 'the remedy available in equity to compel a person actually to perform a contractual obligation.'[2] This definition requires qualification in two respects. The first

[2] *Chitty on Contracts* (31st edn, Sweet and Maxwell 2012) para 27-004.

qualification relates to the word 'actually.' The performance that a defendant is required to supply by virtue of the specific performance order may not be identical to that set out in the contract between the parties. In particular, it is likely that the time of performance will differ from the time found in the contract. The reason for this difference is principally pragmatic, namely that a claimant will not generally bring a claim unless and until the defendant has actually failed to discharge its contractual obligations or has indicated in clear terms that it will not do so.[3] In such circumstances, it will not be possible for a claimant to bring proceedings and obtain the order prior to the time of performance, and, in such a case, performance must inevitably take place at a time later than that set out in the contract. The fact that there is typically a difference between the performance that is ordered and the performance that is provided for in the contract is a matter of some significance in theoretical terms in that the fact that the performance ordered to take place is not identical to that set out in the contract may be taken to suggest that specific performance, like damages, is a substitutionary and not a specific remedy. In other words, the aim of specific performance is to put the claimant as close as possible to the situation in which it would have been in had the contract been performed according to its terms. In this sense, specific performance can be said to have the same aim as the remedy of damages.

The second relates to the scope of the words 'to perform a contractual obligation.' Not every action to compel a defendant to perform a contractual obligation falls under the rubric of 'specific performance' as a matter of English law. In particular, the remedies of repair and replacement would appear not to fall within the definition. However, repair and replacement occupy a rather uncertain status in English law.[4] Although they are remedies that consumers frequently resort to in practice, their place in the structure of English private law is less obvious (as will be seen by consulting the index of leading textbooks on English contract law, which typically do not contain a reference to either repair or replacement). Given the lack of discussion of the issue, it is not possible to take a definitive view on whether or not repair and replacement fall within the scope of specific performance as a matter of English law. If one adopts a functional approach to the question, so that specific performance is defined as encompassing 'any court order compelling the promisor *personally*

[3] Although this is the case in practice, in law it is not necessary for a claimant seeking a specific performance order to demonstrate that the defendant has already broken the terms of the contract between the parties. However, until the breach takes place or is threatened, a claimant will not generally wish to incur the expense of seeking a court order to obtain the performance to which it is entitled under the contract. Therefore, in practice, cases coming before the courts tend to be ones in which the breach has already taken place.

[4] These remedies have crept into the structure of English law largely as a result of the influence of Europe, in particular, Council Directive (EC) 1999/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171. They may be given further impetus by the proposed Common European Sales Law. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Doc COM(2011) 635 final [CESL].

to perform his contractual undertaking so that the promisee receives the *result* for which he bargained,' then repair and replacement may fall within its scope.[5]

Support for the view that they should be seen as sub-forms of the right to specific performance can be gleaned from Dutch and German law where they are so treated.[6] Alternatively, it is possible to conclude that repair and replacement fall outside the scope of specific performance on the ground that 'the action required of the promisor will not necessarily mirror the contractual obligation' which the defendant has broken.[7] It can also be argued that specific performance is a right that arises from the contract and that enforces the actual performance that the claimant is entitled to according to its terms, whereas repair and replacement are available only upon a breach of contract and are therefore properly viewed as secondary, rather than primary, remedies. It is not necessary for the purposes of this article to resolve the debate as to the scope of specific performance. It suffices for us to point to the uncertainty and to note that different legal systems may have a slightly different understanding of the scope of specific performance.

Similar problems may be said to arise in relation to the action to recover a debt. In such a case, it can be said that the debtor is being required specifically to perform its obligation under the contract to pay the debt that is due under the contract. However, as a matter of English law, a debt claim is a very different type of claim from one seeking specifically to enforce a contract. The latter claim, as we have seen, cannot be maintained as a matter of entitlement; it is only available within the discretion of the court. A claim in debt, by contrast, is made as a matter of entitlement, and the English courts have resisted any attempt to turn it into a discretionary remedy.[8] There is therefore a significant difference, as a matter of English law, between an obligation to pay a debt and an obligation to provide a service. While English law has no difficulty in enforcing the former, it does have its concerns about the latter, and, therefore, it is more reluctant to require the defendant specifically to provide the promised service.

For the purposes of the remainder of this article, we shall focus our attention on cases in which the obligation that the claimant seeks to enforce is one to be found in the contract itself (other than a claim for payment of a debt that is due) and not extend the discussion to cases in which the claimant seeks to rely on a remedy, such as repair or replacement that is not to be found in the primary terms of the contract.

5 S Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University Press 2012) 18 (emphasis in original). To similar effect, see V Mak, *Performance-Oriented Remedies in European Sale of Goods Law* (Hart 2009) 120.

6 Mak (n 5) 120.

7 Ibid.

8 See eg *White and Carter (Councils) Ltd v McGregor* [1962] AC 413.

Common law and civil law

When considering the circumstances in which a court will require a defendant specifically to perform the obligations that it has assumed under contract with the claimant, it is traditional to distinguish sharply between common law and civilian legal systems. Specific performance is the primary remedy for breach of contract in civilian legal systems, whereas it is a secondary remedy in common law systems where damages is the primary remedy. However, this characterization of common law and civilian systems has come under pressure as a result of the steps taken towards the harmonization of contract law at both a European and an international level. Before turning to these European and international instruments, we shall first consider the position as a matter of national law.

The traditional divide between common law and civil law

A summary of the circumstances that an English court will take into account when deciding whether or not to make a specific performance order in favour of the claimant was recently provided by Mr Justice Akenhead in *Transport for Greater Manchester v Thales Transport and Security Ltd* in the following terms:

> What can be culled from this review [by Lord Hoffmann of the leading cases] is broadly that (1) specific performance is a discretionary remedy which is flexible and adaptable to achieve equity, (2) it should not be ordered when damages are an adequate remedy, (3) the need for constant supervision by the Court needs to be taken into account, (4) there is or may in different cases be a distinction between specific performance requiring the carrying on of an activity and the achievement of a result, and (5) the ability of the Court to be precise in its order is extremely important.[9]

A number of features of this summary should be noted. The first is the emphasis on discretion and flexibility. Much of this emphasis is attributable to the origins of the remedy in the courts of equity. It is not, however, necessary for present purposes to enter into an analysis of the historic origins of the remedy of specific performance in English law. It is sufficient to note that the remedy is not available as a matter of right. It is only available in the discretion of the court, and it is for the judge, not the parties, to exercise this discretion on the facts of the particular case.[10] In this sense, an important distinction can be drawn between a claim for damages or a claim in debt, both of which can be made as a matter of right, and specific performance, where there is no such entitlement. The second is the hierarchy that is implicit in the formula that specific performance should not be ordered when damages would be an

[9] *Transport for Greater Manchester v Thales Transport and Security Ltd* [2012] EWHC 3717 (TCC), para 17 [*Transport for Greater Manchester*].

[10] The judge can take account of the wishes of the parties when exercising his or her discretion, but the view of the parties is not, and cannot be, decisive: *Quadrant Visual Communications Ltd v Hutchison Telephone UK Ltd* [1993] BCLC 442, 451.

adequate remedy. Damages is the primary remedy, with specific performance being a secondary remedy, which is only available when damages would not provide adequate redress for the claimant. While it is true that in some modern cases the courts appear to have placed more emphasis on whether specific performance would be an 'appropriate' remedy on the facts of the case,[11] it remains the case that the courts are reluctant to make a specific performance order where damages would be an adequate remedy for the claimant. In this sense, specific performance remains a secondary remedy in English contract law.

A third feature of the summary is the unwillingness of the courts to make a specific performance order where it would require 'constant supervision' and also the need for 'precision' in the making of the order. The effect of these two propositions is to make it extremely difficult to obtain a specific performance order in the context of a long-term contract that requires the parties, or one of them, to provide a continuous service. This scenario was classically illustrated by the decision of the House of Lords in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd,* where the court refused to grant a specific performance order requiring the defendant store owner to perform its obligation under a 35-year lease to keep the shop open for retail trade for the duration of the lease.[12] Approximately 16 years into the agreement, the defendant decided that it no longer wished to keep open what was proving to be a loss-making shop and so it decided to close the store and make a swift exit. There was no doubt that, in doing so, the defendant had breached the terms of the lease and that it had done so deliberately. The only question was the remedy to which the claimant was entitled.

The Court of Appeal held that the claimant was entitled to a specific performance order, but this conclusion was reversed by the House of Lords who held that the claimant was confined to a remedy in damages. The adequacy of the damages remedy to the claimant may be doubted. It was left with the uncertain task of quantifying its losses over the remaining period of the lease. Much easier would have been the remedy of specific performance, which would have given the claimant the performance for which it had contracted. However, the House of Lords was persuaded that to require the defendant to keep the store open for the remainder of the lease was potentially oppressive to it, in so far as it had the potential to leave it exposed to substantial losses, and could, given the supposed difficulty of drafting the specific performance order, generate wasteful litigation over whether or not the defendant had complied with the terms of the order. An important point to bear in mind in relation to the latter point is that a failure to comply with a specific performance order leaves a defendant potentially liable to criminal proceedings for contempt of court. Contempt of court is a serious matter that carries with it the threat of imprisonment. One reason for the reluctance of the English courts to make more regular use of the remedy of specific performance is that it has the

[11] See eg *Beswick v Beswick* [1968] AC 58.

[12] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

potential to turn a breach of contract into a matter that is regulated by the criminal law. A less powerful sanction might incline a court to make greater use of specific performance as a remedy.

Turning now to the civil law, the picture changes rapidly. Article 1184, *alinéa* 2 of the French Civil Code provides that the innocent party to a breach of contract has a choice between compelling performance from the promisor, where it remains possible, or requesting termination together with damages.[13] In China, the applicable provision is Article 107 of the Contract Law of the People's Republic of China, which provides that 'if a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, it shall bear the liabilities for breach of contract such as to continue to perform its obligations, to take remedial measures, or to compensate for losses.'[14] One can see in Article 107 the influence of section 241.1 of the German Civil Code, the Bürgerliches Gesetzbuch, which provides that, by virtue of the obligation, the promisee is entitled to demand performance from the promisor.[15]

A number of features of these provisions should be noted. The first is the language of entitlement, rather than discretion. The claimant has an entitlement to demand specific performance. The second is that the choice of remedy is given to the claimant, rather than to the defendant or the court. It is therefore for the claimant to decide which remedy it wishes to obtain, and, once it has decided in favour of specific performance, it is generally the duty of the court to provide it with that remedy. However, it should not be thought that the entitlement to claim specific performance is unlimited: it is not. A limitation that is expressly found in Article 1184, *alinéa* 2, of the French Civil Code is that performance must remain 'possible'. While there are other situations in which courts in France have declined to grant a claimant specific performance, these situations are narrowly defined and contrast with the more broadly drawn grounds on which an English court can decline to make a specific performance order. So, for example, the French courts have not accepted that difficulties in supervision can act as a ground on which specific performance can be refused, and, equally, cases can be found in which the courts have made a specific performance order where the obligation of the defendant is one to supply services over a considerable period of time.[16]

It should also be noted that non-compliance with a specific performance order does not generally trigger the operation of criminal sanctions. So, for example, the courts in France may require a defaulting promisor (that is to say, a promisor who has not complied with the order of the court) to pay a monetary penalty to the promisee. This procedure, known as astreinte, can be

[13] French Civil Code (1804).
[14] Contract Law of the People's Republic of China (1999).
[15] Bürgerliches Gesetzbuch (1900).
[16] Rowan (n 5) 43–4.

described as being punitive in effect, but it does not involve the formal application of the criminal law.[17] In this way, French law can provide a very real and effective incentive to a party to comply with the court order, but it stops short of threatening that party with imprisonment.

From this description, it would appear that there is a considerable gulf between the common law and the civil law. A different view was taken by Lord Hoffmann in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* when he stated that 'in practice … there is less difference' between common law and civilian systems than one might infer from general statements drawing attention to the *prima facie* entitlement to specific performance in civilian legal systems and the general common law principle that specific performance will not be ordered when damages would be an adequate remedy.[18] While it can be said with some justification that there are similarities between the cases in which courts in both common law and civilian jurisdictions will decline to make a specific performance order,[19] two recent studies (both based on doctoral theses) have demonstrated that Lord Hoffmann was not correct in his assertion that the practical differences between common law and civilian systems are not as great as might at first sight appear. This has been argued with particular force by Dr Solène Rowan in relation to the differences between English law and French law. After reviewing representative case law from both England and France, she concludes that the view 'that there are few differences between the English and French approaches to specific performance is fundamentally misguided,' given the 'vivid' differences that exist between the two systems.[20] A more cautious approach has been taken by Dr Vanessa Mak in her comparison of English law relating to what she entitles 'performance-oriented remedies' in English, Dutch, and German law. While she acknowledges that 'there is indeed an overlap between the considerations taken into account by courts in common law and civil law systems in deciding whether specific performance would be inappropriate in a particular case,' she notes that the starting points are very different.[21] In English law, the restrictions 'apply to a notion of specific performance that is already subject to severe limitations,'[22] whereas in civil law countries 'they seek to restrict an otherwise general entitlement to specific performance,'[23] and this difference 'may lead to different outcomes in cases that are otherwise very similar.'[24]

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17 Ibid 44.

18 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

19 On which, see further E McKendrick, 'Specific Implement and Specific Performance: A Comparison' (1986) Scots Law Times 249. Thus, courts in most jurisdictions are reluctant to order specific performance where performance of the contract would be impossible, unlawful, or expose the performing party to severe hardship.

20 Rowan (n 5) 52 and 68.

21 Mak (n 5) 108.

22 Ibid 95.

23 Ibid.

24 Ibid 109.

Given the thorough nature of the studies by Dr Rowan and Dr Mak, it would be premature to conclude that national legal systems are now converging with respect to the circumstances in which specific performance should be available. There are differences between common law and civilian systems (and, although to a lesser extent, between civilian systems and within common law systems), and they remain significant. The impetus for harmonization has not, however, come from the decisions of national courts. On the contrary, it has come from attempts to draw up instruments that have as their aim the harmonization of contract law.

The attempts at harmonization through transnational law

The first attempt at harmonization can be found in Article 28 of the Convention on the Law Applicable to Contracts for the International Sale of Goods (CISG).[25] Article 28 provides that a court[26] is not bound to enter a judgment for specific performance unless the court would[27] do so under its own law[28] in respect of similar contracts of sale not governed by the CISG. This provision is clearly a compromise between common law and civil law systems given that it does not attempt to bridge the gap between the common law and civil law,[29] and it would appear to have had little impact in practice.[30] Instead, it draws attention to this gap by leaving the problem to national law. The deference that was shown to the court that was asked to make the specific performance order evidences the gulf that was thought to exist in this respect between the different jurisdictions of the world, particularly between the common law and civil law. In the absence of agreement over the circumstances in which the remedy of specific performance should be ordered, the matter was left in the hands of the court asked to grant the remedy. The failure to reach agreement illustrates the difficulties involved in the harmonization process. That said, one can appreciate

[25] Convention on the Law Applicable to Contracts for the International Sale of Goods, 24 ILM 1575 (1985) [CISG].

[26] It is generally accepted that the provision also applies to an arbitral tribunal. P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (3rd edn, Oxford University Press 2010) 464. The provision is also directed to the court (or arbitral tribunal) rather than the parties so that it is not open to the parties to exclude the operation of Article 28.

[27] Note the use of 'would' rather than 'could'.

[28] Its own law means the domestic law of the forum State, excluding conflict of laws.

[29] Although, in other respects, it can be argued that the CISG is based on the premise that the defaulting party can be compelled to perform. CISG (n 25) arts 46(1); 62 and O Lando, 'Commentary on Article 28' in CM Bianca and MJ Bonell (ed), *Commentary on the International Sales Law* (Giuffrè 1987) 236.

[30] It has been cited in a handful of cases and has attracted relatively little attention from scholars. For an exception, see S Herman, 'Specific Performance: A Comparative Analysis' (2003) 7 Edinburgh L Rev 5 and 194.

the difficulties that led those responsible for the drafting of the CISG to leave the resolution of this issue until another day.[31]

Rather more progress was made subsequently in both Article 9:102 of the PECL and what is now Article 7.2.2 of the PICC. While there are differences of detail between the drafting of these two provisions, their essential structure is the same. Both provide for a general entitlement to specific performance, and, in this sense, they may both be said to follow the civilian legal tradition. However, they subsequently qualify this initial entitlement by setting out a range of circumstances in which the remedy is not to be available. By way of illustration, Article 7.2.2 of the PICC provides:

> Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless
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> (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.

It may be said that this provision represents a compromise or a 'middle ground'[32] between the common law and civilian legal systems, but it is a rather more elaborate one than is found in the CISG. This model is one that has been followed in both the Draft Common Frame of Reference[33] and in the proposed Common European Sales Law (CESL). Article 110 of the CESL provides that the buyer is entitled to require performance of the seller's obligations, that the performance that may be required includes the remedying free of charge of a performance that is not in conformity with the contract, but that performance cannot be required where (i) performance would be impossible or has become unlawful or (ii) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.

The element that is common to most of these documents is that they start from the proposition that there is a general entitlement to specific performance. Where they differ is in the extent to which they recognize exceptions to this initial entitlement. So, for example, the exceptions set out in Article 110 of the draft CESL appear to be more narrowly drawn than those found in Article 7.2.2 of the PICC. The extent to which any or all of these proposals will succeed in bridging the gap between common law and civil law remains

[31] See further Schlechtriem and Schwenzer (n 26) 459.

[32] S Vogenauer and J Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford University Press 2009) 784.

[33] Article 3:302, on which see further H MacQueen, B Dauner-Lieb and P Tettinger, 'Specific Performance and Right to Cure' in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 612.

to be seen. On the one hand, they are unlikely to be acceptable to common lawyers on the ground that acceptance of a general entitlement to specific performance is a 'giant stride away from the prevailing rules of English law.'[34] On the other hand, a liberal interpretation of the exceptions may be unacceptable to jurisdictions such as France on the ground that it would unacceptably dilute the current entitlement to specific performance.

At present, the gap between common law and civilian legal systems remains at the level of domestic law. However, in the event that contracting parties agree that their relationship is to be governed by the PICC[35] or legal effect is given to the draft CESL, the court or arbitral tribunal asked to adjudicate any dispute arising under that contract will be required to wrestle with the question of the extent to which these instruments have succeeded in harmonizing the common law and the civil law in this area. Thus, the interpretation placed upon these provisions is likely to be examined with interest by lawyers on both sides of the common law/civil law divide who can be expected to examine the decision with a view to ascertaining the extent to which it adopts an interpretation of the provision that is consistent with their own domestic legal tradition. We remain a long way from a unified solution to the availability of specific performance.

Specific performance in an arbitral context

Turning now to the role of specific performance in an arbitral context, it is suggested that it is helpful to distinguish three different issues. The first is whether the arbitral tribunal has jurisdiction to make a specific performance order. The second is whether, on the facts of the case, the tribunal will grant or make a specific performance order. The third is whether a court will uphold or enforce an award in which the tribunal has ordered that the defendant specifically perform its contractual obligations. We shall consider each issue in turn.

The jurisdiction to issue a specific performance order

Arbitration is a consensual process. Absent the parties' agreement to create an arbitral tribunal and refer certain disputes to it, the tribunal does not come into existence at all. It flows from this basic premise that the tribunal will

[34] Rowan (n 5) 65.

[35] To the extent that domestic law permits contracting parties to choose as the law governing their contract a set of principles that do not have legal effect. Such a choice is currently not permitted in Europe because Article 3 of Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L177 [Rome I Regulation] provides that a contract shall be governed by the law chosen by the parties and law for this purpose is the law of a nation state. In such a case, the PICC (n 1) can be incorporated into the contract as contractually incorporated terms but not as the governing law.

only have such power as the parties agree to grant to it, subject to any constraints imposed on that agreement by the law at the place, or seat, of arbitration.

The question whether an arbitral tribunal has jurisdiction to make a specific performance order thus depends on the terms of the arbitration agreement entered into between the parties to the dispute (often by way of an arbitration clause in a commercial agreement), including any arbitration rules incorporated by reference into that agreement (such as the International Chamber of Commerce's Rules of Arbitration[36] or CIETAC's Rules of Arbitration) and the applicable arbitration laws at the seat of arbitration.

If the parties expressly provide in their contract that the tribunal may only make a damages award, then unless this express limitation is overridden by the applicable arbitration law (and we are not aware of any arbitration law that would override such an express limitation), the tribunal will have no power to issue a specific performance order. It is, however, relatively uncommon for parties to provide expressly for, or limit, the remedies that a tribunal may grant. As a result, resort must usually be had to any arbitration rules incorporated into the arbitration agreement, and the applicable arbitration law at the seat of arbitration to determine whether or not the tribunal has jurisdiction to make a specific performance order.

Arbitration laws and the rules of arbitral institutions are also often silent as to the remedies available to the tribunal. An obvious example with respect to arbitration law is the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), which has been adopted by many States as the basis for their arbitration laws and makes general provision for the identification of the law or the rules of law that are applicable to the substance of the dispute between the parties,[37] although it does not attempt to prescribe the remedies that are to be available to the tribunal in the event of a breach of contract.[38] However, where they are not silent, arbitration laws and rules generally make clear that arbitrators do have the jurisdiction to grant a specific performance order, either expressly or by making clear that tribunals have the same powers to grant relief as the court.[39]

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[36] International Chamber of Commerce (ICC), Rules of Arbitration, ICC Doc 108 (2012).

[37] UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985) art 28 [UNCITRAL Model Law].

[38] The UNCITRAL Model Law (n 37) now makes greater provision for interim measures and preliminary orders (in Article 17) but that is a very different matter from the subject matter of this article.

[39] The Practical Law Company Arbitration multi-jurisdictional guide of 1 August 2012 (compiled from submissions by local lawyers in each of the 27 jurisdictions covered) notes expressly that specific performance (or a similar remedy) is available from tribunals in Austria, Canada (with respect to international arbitral tribunals seated in Canada, the position for domestic tribunals being less clear and varying from province to province), Egypt, France, Hong Kong, Hungary, India, Mexico, Russia, Spain, South Africa, South Korea, Turkey, and the United Kingdom. In the following jurisdictions, although not specifically mentioned, it appears that specific performance would be available: Australia ('there are no limits on arbitrator's powers to award appropriate remedies'), China ('injunctive or equitable relief'), Singapore ('the

This is true not only with respect to arbitration laws from, or arbitral institutions established in, civil law countries where specific performance is the primary remedy for breach of contract and where one would expect an arbitral tribunal to have the jurisdiction or power to grant the ordinary, or the typical, remedy for breach of contract. It is also (and perhaps more commonly) true in common law countries where specific performance is the exception rather than the rule.

A number of examples can be provided. The first is Rule 43 of the American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures, which provides that:

> The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.[40]

The inclusion of an express provision of this nature in the AAA Commercial Arbitration Rules reflects a power that has existed in the United States since at least 1829.[41] In England, section 48(1) of the Arbitration Act 1996 states that 'the parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.'[42] Here we see the emphasis on party autonomy that is one of the fundamental characteristics of international arbitration. In the absence of agreement by the parties, section 48 proceeds to set out the default powers of an arbitral tribunal.[43] In this context, it is important to have regard to section 48(5)(b), which states that the arbitral tribunal has 'the same powers as the court … to order specific performance of a contract (other than a contract relating to land).' Nor is this a new provision. It was previously to be found in section 15 of the Arbitration Act 1950, and it can be dated back to legislation enacted in 1889.[44]

A further example is drawn from section 20 of the recently enacted Irish Arbitration Act 2010, which provides:

> Without prejudice to the generality of the Model Law, an arbitral tribunal shall, unless otherwise agreed by the parties, have the power to make an award requiring specific performance of a contract (other than a contract for the sale of land).[45]

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tribunal can grant any remedy or relief that could have been ordered by the High Court in Singapore'), Sweden ('broad power to award appropriate remedies'). The information provided by the contributing lawyers in other jurisdictions does not make the position clear. Practical Law Company Arbitration http://arbitration.practicallaw.com/crossborderhandbook6-500-0011 accessed 1 May 2013.

40 American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures (2009).

41 *McNeil v Magee* 16 F Cas 326 (D Mass 1829 (No 8,915)), as described by Troy E Elder, 'The Case against Arbitral Awards of Specific Performance' (1997) 13 Arbitration International 1, 11.

42 Arbitration Act 1996, c 23.

43 Ibid s 48(2).

44 Arbitration Act 1950, c 27.

45 Arbitration Act 2010, no 1 (2010).

A similar provision was also included when the UNCITRAL Model Law was adopted for domestic arbitration in New South Wales, Australia, in 2010.[46] It is interesting to note that it was thought to be necessary in both jurisdictions to enact a provision of this nature, notwithstanding the fact that, as we have noted, there is no such express provision in the Model Law. The apparent need to do so may reflect the uncertainty that exists in common law jurisdictions over the question whether an arbitral tribunal has such a jurisdiction in the absence of a provision of this type.

It is, however, suggested that there is no formal need for such a provision. Given that specific performance is a recognized remedy in common law systems, an arbitral tribunal in a common law country will have jurisdiction to grant the remedy in the absence of an agreement to the contrary by the parties.[47]

Thus, the jurisdiction to make a specific performance order is unlikely to be a serious issue. Although awards in arbitration proceedings are often confidential, a number of cases can be found in the public domain in which an arbitral tribunal has ordered specific performance. These include tribunals in Quebec,[48] India,[49] Australia,[50] and China. This illustrative list, it should be noted, includes a number of key common law jurisdictions.

Exercise of the jurisdiction to make a specific performance order

It does not follow from the fact that the arbitral tribunal has jurisdiction to make a specific performance order that it will exercise its jurisdiction to do so. As we have noted, in many cases, damages will be the remedy of choice of the claimant

[46] Commercial Arbitration Act 2010 (NSW) s 33A.

[47] That it is open to the parties expressly to exclude the power to make an award requiring specific performance of the contract is recognized in section 20 of the Irish Arbitration Act 2010 (n 45).

[48] As reported in *Necartic Nickel Mines Inc v Canadian Royalties Inc*, Case no 500-09-021110-101 (29 February 2012), 2012 QCCA 385 (QCA). See also Henri C Alvarez, *Necartic Nickel Mines Inc v Canadian Royalties Inc*, ITA Board of Reporters (Kluwer Law International 2012).

[49] An arbitrator's award of specific performance was upheld by the Supreme Court of India in *Olympus Superstructure Pvt Ltd v Meena Vijay Khetan & Ors* (1999) 5 SCC 651, an approach approved by the Supreme Court of India in a judgment of 28 September 2012 in *Chloro Controls (l) P Ltd v Severn Trent Water Purification Inc and Ors*, Civil Appeal no 7134 (2012) (not itself a case on specific performance), where the Supreme Court of India stated: 'The Court [in *Olympus Superstructure*] also took the view that a dispute relating to specific performance of a contract in relation to immoveable property could be referred to arbitration … This finding of the Court clearly supports the view that where the law does not prohibit the exercise of a particular power, either the Arbitral Tribunal or the Court could exercise such power. The Court, while taking this view, has obviously rejected the contention that a contract for specific performance was not capable of settlement by arbitration under the Indian law in view of the statutory provisions. Such contention having been rejected, supports the view that we have taken' (at 75). See Dipen Sabharwal and Aditya Singh, *Chloro Controls (l) P Ltd. v. Severn Trent Water Purification Inc. and Ors*, ITA Board of Reporters (Kluwer Law International 2012).

[50] As reported in *Larkden Pty Limited v Lloyd Energy Systems Pty Limited AS*, Case no 2010/416290 (3 November 2011) (Supreme Court of NSW).

and, for this reason, the issue whether specific performance should be ordered by the arbitral tribunal will not arise on the facts. In cases where the issue does arise, the question of whether an arbitral tribunal will in fact choose to make a specific performance order may depend upon a number of issues.

The first issue to be considered by an arbitral tribunal is the law to which it should look when determining the appropriate remedy. The arbitral tribunal will have to address the question of whether the availability of specific performance is to be determined by the law applicable to the contract (the *lex contractus*) or by the law of the forum (the *lex fori*). The traditional common law position in England was that the availability of specific performance is a matter governed by the *lex fori* and not the *lex contractus*.[51] The common law rule has now, however, been displaced by Article 12(1)(c) of Council Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I Regulation), which provides that:

> The law applicable to a contract by virtue of this Regulation shall govern in particular.
> …
> (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law.[52]

Thus, in the EU at least, the law applicable to the contract should determine the availability of a decree of specific performance.[53]

Having determined the applicable law, the arbitral tribunal will next need to consider what guidance that law provides as to the availability of specific performance as a remedy. This takes us back to the point discussed in the earlier part of this article, namely the differences that exist between common law and civilian legal systems as to the availability of specific performance. As we have seen, specific performance is an available remedy in both common law and civilian legal systems, so the law applicable to the contract is unlikely to preclude the possibility of a specific performance order. However, given the wider availability of specific performance in civilian legal systems, an arbitral tribunal may be more willing to make a specific performance order where the contract is governed by the law of a civil law country. Conversely, where the contract is governed by the law of a common law country, the tribunal may be less likely to make a specific performance order.

Account must also be taken of the effect of the proviso in Article 12(1)(c) of the Rome I Regulation that the law applicable to the contract will determine the consequences of a breach 'within the limits of the powers conferred on the court by its procedural law.' It is not easy to discern the effect of this proviso, but it may be limited given that the differences between common law and civilian legal systems relate not to the powers of the court in relation to

[51] *Boys v Chaplin* [1971] AC 356, 394; *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1, 32.
[52] Rome I Regulation (n 35).
[53] Although note the hesitation in Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet and Maxwell 2012) para 32-155.

the availability of specific performance as a possible remedy but, rather, to the priority given to specific performance in the hierarchy of remedies and to the factors to be taken into account by the courts in deciding whether to exercise a recognized power to grant a specific performance order.

However, outside the arbitration context, it has been suggested that the proviso might entitle an English court to 'refuse… a decree of specific performance if the order would require constant supervision by the court, according to English principles.'[54] The suggestion would seem to be that, because the English courts are reluctant to order specific performance for this reason where the contract is governed by English law, they should likewise be reluctant to do so where a contract is governed by another applicable law, even where there would be no such reluctance under that law. But there is, as yet, no authority on the point nor on whether it would extend to an arbitral tribunal with its seat in England. Further, authority from the USA suggests that a different approach may be taken in common law jurisdictions outside of Europe. In *Grayson-Robinson Stores, Inc and Iris Construction Corp*, the New York Court of Appeals refused to set aside the award of an arbitral tribunal in which the arbitrators made a specific performance order in relation to a contract for the construction of a building to be rented for use as a retail department.[55] The New York Court of Appeals noted that there was no absolute rule against making a specific performance order where it would require supervision from the court, and the fact that the order might involve the court in the supervision of a 'complex and extended construction project'[56] was held to be 'no deterrent'[57] to the confirmation of the award by the court.

It thus seems unlikely that the proviso to Article 12(1)(c) will be interpreted by an arbitral tribunal as restricting its discretion to make a specific performance order under the applicable law of the contract on the ground of a procedural objection arising under the law of the seat, such as the need for constant supervision, even where that objection might ordinarily be given weight by the court. At most, the objection is likely to be one of a number of factors the arbitral tribunal will take into account.

A second factor that should be taken into account by an arbitral tribunal when deciding whether or not to make a specific performance order is the agreement of the parties. As well as being relevant to the question of the arbitral tribunal's jurisdiction to grant a specific performance order, the parties' agreement is also relevant to the question of whether the arbitral tribunal should exercise this jurisdiction.

The parties may in their contract stipulate for the remedy of specific performance, provide for its availability as one of a range of options, or exclude its availability entirely. While, as we have seen, the English courts have concluded that they are not bound to give effect to the agreement of the parties

[54] *Chitty on Contracts* (n 2) para 30-339.
[55] *Re Grayson-Robinson Stores, Inc and Iris Construction Corp* 168 NE 2d 377 (NY 1960).
[56] Ibid 379.
[57] Ibid.

in relation to the availability of specific performance,[58] matters may be otherwise in the context of an international arbitration. A national court has an inherent jurisdiction, and, therefore, the parties' stipulation in such a context can be seen as an illegitimate attempt to restrict the inherent powers of the court. The court, as an organ of the state, cannot be subordinated to the will of the parties. Different considerations apply in the case of an arbitral tribunal that would not exist in the absence of an agreement by the parties to refer their dispute to arbitration, and, in this sense, the arbitral tribunal can be said to be the organ of the parties. As a creature of the parties' own agreement, an arbitral tribunal is in a different position from a national court.

In considering the parties' agreement, an arbitral tribunal is also likely to be conscious of the risk that, if it grants an award outside the restrictions imposed upon it by that agreement, the award is likely to be susceptible to challenge at the seat for excess of jurisdiction and enforcement may be resisted in the courts where enforcement is sought under Article V1(c) of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[59] since it contains 'decisions on matters beyond the scope of the submission to arbitration.'[60] The tribunal is therefore likely to consider itself bound by any conditions or provisos in the arbitration agreement, including any negative stipulation excluding the availability of specific performance, and to seek to give effect to a positive stipulation where it is in a position to do so.

No difficulty is likely to arise for the arbitral tribunal where the parties' arbitration agreement is restrictive, limiting the remedies available to the arbitral tribunal to a subset of those otherwise available under both the applicable law of the contract and the law of the seat of arbitration. More difficult issues may arise where the parties agree that the tribunal may grant an order for specific performance in circumstances where the law applicable to the contract would not permit such an order or where the courts in the relevant jurisdiction would not make such an order. Although the arbitral tribunal is a creation of the parties' agreement, it is the law at the place of arbitration that gives effect to this agreement, and the parties will likewise rely on the courts to enforce any award rendered by the arbitral tribunal. Thus, the parties do not have unlimited freedom to agree the powers of the arbitral tribunal.

There is, however, some authority to support the proposition that an arbitral tribunal may be able to make a specific performance order even where the courts would not do so. In *Staklinski and Pyramid Electric Company,* the New York Court of Appeals, in upholding the decision of an arbitral panel to order the reinstatement of the president of a corporation, drew attention to the fact that the parties had incorporated into their contract the AAA

[58] *Transport for Greater Manchester* (n 9).

[59] Convention on Recognition and Enforcement of Foreign Arbitral Awards, 7 ILM 1046 (1968) [New York Convention].

[60] D Jones, 'The Remedial Armoury of an Arbitral Tribunal: The Extent to Which Tribunals Can Look beyond the Parties' Submissions' (2012) 78 Arbitration 109.

Commercial Arbitration Rules, which in 1942 stated that 'the arbitrator in his award may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.'[61] The court upheld the specific performance order of the arbitrators, notwithstanding the fact that the contract was one for personal services that would not, in all probability, have been specifically enforced had the claimant brought a claim under his contract before the State courts. Although the case concerned enforcement and not whether the tribunal was correct in making a specific performance order, the court's focus on the arbitration rules adopted by the parties would appear to suggest that, where the parties specifically agree, through the rules they incorporate into their arbitration agreement, to the availability of specific performance, the arbitral tribunal may have a wider discretion on whether or not to order specific performance than would a court in a similar situation.

In most cases, an examination of the applicable law and the parties' agreement will not give rise to a conclusion that the arbitral tribunal should not grant a specific performance order in circumstances where a court would do so. These considerations therefore provide no basis for a thesis that the availability of specific performance in international arbitration is more limited than would be the case in other fora.

Challenges to, and enforcement of, the decision of the arbitral tribunal

The fact that an arbitral tribunal issues a specific performance order does not mean that the order will be obeyed by the defendant or respected by the courts. What then happens in the event that the defendant seeks to challenge, or declines to comply with, the award?

The specific performance order may come before the courts in one of two ways—the defendant may apply to the court to set aside the order (usually this must be done in the court at the seat of arbitration) or the claimant may apply to enforce the award (in the context of a specific performance order, this would usually be in the courts of the place where performance is to be made). We consider both possibilities below.

In order to secure the finality of arbitral awards, there are only limited grounds under most arbitration laws on which the unsuccessful party may challenge the awards made by arbitral tribunals.[62] Few arbitration laws permit an appeal from an arbitral award on the merits of the case or even on a point of law.[63] In most cases, therefore the fact that an arbitral tribunal has

[61] *Re Staklinski and Pyramid Electric Company* 180 NYS 2d 20 (NY App Div 1958), *aff'd* 160 NE 2d 78 (NY 1959). To similar effect, see *In re Grayson-Robinson Stores, Inc and Iris Construction Corp* 168 NE 2d 377 (NY 1960).

[62] See eg UNCITRAL Model Law (n 37) arts 34–6.

[63] Section 69 of the English Arbitration Act 1996 (n 42) is an example of a provision permitting an appeal on a point of law. However, section 69 is not mandatory and parties can contract out of it, which they will be considered to have done if they agree to the arbitral rules of

made a specific performance order in circumstances where a domestic court applying the applicable law would not itself do so will not, of itself, entitle a court to set aside the award of the arbitral tribunal. A much more serious irregularity is required before a court is entitled to intervene in this way.[64] Of course, this does not mean that the arbitral tribunal was correct to make such an order in the first place, but the limited grounds for review do mean that a decision of an arbitral tribunal to grant a specific performance order, where challenged by the unsuccessful party, is unlikely to be overturned by the courts of the seat.

Even where a defendant does not take positive steps to challenge the arbitral award, it may still fail to comply voluntarily with it. In such circumstances, it will be up to the claimant to enforce its award. In most international arbitrations, enforcement will take place under the New York Convention.[65] There is nothing in the New York Convention that gives the court power to resist enforcement of the award simply on the ground that the award consists of a specific performance order. In other words, there is no distinction on the face of the Convention between an award that consists of an order that the defendant pay damages to the claimant and one in which the defendant is ordered specifically to perform its obligations under the contract.

However, it has been argued that there is nevertheless a distinction between a money award and an order that the defendant perform its obligations under the contract. This case has been made in most detail by Troy Elder, who argues that:

> a meaningful enforcement of an award of specific performance would effectively require conscripting one or more foreign courts to supervise the implementation of the arbitrator's decree. Such a process would, accordingly, imply a role for the enforcing court that the treaty establishing the current system [the New York Convention] did not contemplate, and a corresponding risk that national courts will engage in the sort of judicial review of arbitral decisions that so plagues the system of mutual recognition of foreign judgments.[66]

There would appear to be two points here. The first is that enforcement may require the involvement of more than one court, and it may even be difficult to identify the court that has jurisdiction over the performance of the order. This objection has some practical force in the case where performance is to take place in a number of different jurisdictions, but in many cases it will be clear that performance is to take place in one jurisdiction and, in this case, the objection will generally lack force.

The second objection is that the more intrusive or coercive nature of a specific performance order may lead courts to engage in a greater level of review

a number of leading institutions, such as the ICC and London Court of International Arbitration. An appeal under section 69 is in any event only available where the applicable law is English law.

64 For a definition of serious irregularity, see section 68(2) of the English Arbitration Act 1996 (n 42).

65 As of 12 July 2013, there were 149 State parties to the New York Convention (n 59).

66 Elder (n 41) 31

of the award and thereby bring into question the system for the enforcement of arbitral awards. In short, the argument that is advanced is that the New York Convention was drafted with the enforcement of money awards in mind and that it does not easily apply to specific performance orders.

The argument advanced by Elder would appear to be over-stated. It seems to rest on the common lawyer's perception that there is something exceptional about a specific performance order, a perception that would not be shared by a civilian lawyer. It is also the case that there is no necessary distinction in kind to be drawn between a damages award and a specific performance order. An award that requires the defendant to pay a substantial sum of money to the claimant can be as intrusive as an order requiring the defendant to perform the obligation that he voluntarily accepted when agreeing to enter into the contract. However, Elder does have a point about the more intrusive nature of a specific performance order, at least in those jurisdictions, such as England, in which a failure to comply with such an order may trigger criminal sanctions. To the extent that it does so, it may be argued that the court in the jurisdiction in which the enforcement of the award is sought has greater justification for engaging in a more careful review of the award and a more detailed consideration of the question of whether it should lend its aid to the enforcement of the award.

In any event, it is not clear why the issues raised by Elder should be unique to an arbitral award requiring specific performance, as distinct, for example, from a court judgment requiring specific performance in another jurisdiction. When it comes to the practicalities of enforcement of a specific performance order, there is no clear reason why an arbitral award rendered in London, requiring specific performance in Italy, enforceable under the New York Convention, should be any different to an English court judgment requiring the same specific performance in Italy, enforceable under the Brussels Regulation (Council (EC) Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), which is the European Union's enforcement mechanism for court judgments.[67] The fact that enforcement of a specific performance order would require the involvement of more than one court should not make an arbitral tribunal more reluctant to make an order than a court. There may be pragmatic arguments against seeking a specific performance order in cases of this type, but there is no objection in principle and, further, no ground to suggest that a claimant who does choose to seek specific performance in a case of this type should be deprived of the remedy of its choice.

The weakness in Elder's argument becomes more apparent when we turn to the case law. We find that national courts have confirmed arbitral awards that have required specific performance of a contract to take delivery of coal[68]

[67] Council (EC) Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

[68] *Island Creek Coal Sales Co v City of Gainesville* 729 F 2d 1046, 1049 (6th Cir 1984).

or of a contract to deliver coal,[69] of an agreement to assign patents,[70] of an order requiring a company to stop using its name and to transfer certain patents and other intellectual property rights,[71] and to transfer an interest in a mineral property.[72]

Elder's objection also relates to what may be termed the 'permanent' nature of a specific performance order, and so he draws a distinction between an interim order and a permanent order, with the former being more widely available than the latter. Thus, he argues that:

> An order by an arbitrator to continue work on a construction contract pending the outcome of arbitration, so as to avoid the possible prejudice that might be suffered by one or both parties, or in order to ensure a more effective execution of a money damages award at the conclusion of the proceeding, is qualitatively different from a final award ordering specific performance on the original contract. While any meaningful enforcement of a final award of specific relief would require vesting the arbitral panel with a coercive authority that it now lacks, or … would entail vitiating the limited review function now allocated to enforcing courts, since interim awards of continued performance are largely self-enforcing, they run no such risk. The reason is simple. Rational parties will realize that disobeying an interim order will result in a loss of favour with the arbitrator who made it, a handicap that neither party is likely to wish to assume.[73]

This reasoning is pragmatic rather than principled. It may be true that a defendant will be less likely to object to an interim order made by an arbitrator than a permanent order. However, the fact that a defendant is less likely to object to an interim order does not mean that the arbitrator has greater jurisdiction to issue an interim order or that he should do so more readily than in the case of a final order. It is also a view that could be said to be out of date given that, as we have noted, the view that arbitral tribunals have the power in a final award to make a specific performance order has gained wide acceptance, and there is therefore less space for the idea that specific performance is more readily available on an interim rather than on a final basis.

In summary, as a general matter, a specific performance order made by an arbitral tribunal should be no more likely to be successfully challenged or its enforcement successfully resisted than would be the case if the same order was made by a court. Indeed, given the limited grounds of review of arbitral awards, the widespread reach of the New York Convention, and the limited grounds to resist enforcement under the New York Convention, the case can be made that a specific performance order, as a general matter, is more likely to be effective when made by an arbitral tribunal, as compared to the same specific performance order made by a court. That said, there will of course remain situations where the circumstances and the jurisdictions involved

69 *Marion Manufacturing Co v Long* 588 F 2d 538 (6th Cir 1978).
70 *Larkden Pty Limited v. Lloyd Energy Systems Pty Limited AS*, Case no 2010/416920 [2011] NSWSC 1567 (Supreme Court of NSW).
71 *Engis Corp v Engis Ltd* 800 F Supp 627 (ND Ill 1992).
72 *Necartic Nickel Mines Inc v. Canadian Royalties Inc* 2012 QCCA 385.
73 Elder (n 41) 29.

mean that the opposite is true, and a specific performance order by a court would put a claimant in a stronger position when it comes to enforcement.

Xiamen Xinjingdi Group Ltd v Eton Properties Ltd

Given that arbitrators in most jurisdictions in the world have jurisdiction to make a specific performance order, that arbitral awards can be found in which arbitrators have made such an order, and, further, that there is a body of case law in which courts have confirmed such arbitral awards, it cannot be said that there is an objection in principle to an arbitral tribunal making a specific performance order. Nevertheless, there may be good practical reasons why a party may not wish to seek such an order from an arbitral tribunal. An illustration of the latter proposition can be provided by recounting the rather tangled history of the arbitration, and subsequent litigation, between Xiamen Xinjingdi Group and Eton Properties.

The case related to the development of an area of land in Xiamen. The land was owned by a company from the People's Republic of China (PRC), Legend Properties (Xiamen) Company Ltd, which was a wholly owned subsidiary of two Hong Kong companies in the Eton group (namely Eton Properties Ltd and Eton Properties (Holdings) Ltd, each of which owned one share in the company), which we shall refer to as Eton. Eton's shareholding in Legend Properties (Xiamen) Company Ltd was held through another Hong Kong subsidiary, Legend Properties (Hong Kong Ltd).

In July 2003, Eton entered into an agreement with another PRC company, Xiamen Xinjingdi Group Ltd (hereinafter Xiamen). The intention of the parties was that Xiamen would acquire possession and ultimately ownership of development land owned by Legend Properties (Xiamen). The means by which Xiamen would do so was by paying RMB 120 million to Eton in return for which Xiamen would be entitled to take possession of the land and build apartments on it under the supervision of Eton. In return for the payment of RMB 120 million, Xiamen also acquired the contractual right to buy from Eton the two shares in Legend Properties (Hong Kong) for HK $2. In this way, Xiamen would acquire ownership of the company that owned the land. The agreement provided for CIETAC arbitration.

The agreement did not, however, proceed according to plan. In particular, Eton refused to hand over the land to Xiamen, and, in November 2003, Eton purported to terminate the agreement with Xiamen and return its deposit on the basis that performance would be contrary to PRC law.

In August 2005, Xiamen commenced a CIETAC arbitration in Beijing against Eton in which it sought specific performance of the agreement. Eton defended the claim on the basis that the agreement was contrary to PRC law. It also argued that performance had become impossible because it (or another Eton group company) had started construction work and that construction work was ongoing at the time of the arbitration. At the same time, the Eton group

had undergone a restructuring that involved the issue of 9,998 new shares in Legend Properties (Hong Kong). The effect of this restructuring was to dilute and transfer Eton's shares in Legend Properties (Hong Kong) to their parent company. The existence of this restructure was not, however, disclosed to the arbitral tribunal.

In October 2006, the CIETAC tribunal issued an award in favour of Xiamen, requiring Eton to 'continue to perform the Agreement'. It rejected Eton's argument that it was no longer possible to perform the agreement, stating that 'even though any change in circumstances makes it difficult to perform the agreement during its performance, the parties shall exert reasonable efforts in good faith to perform the Agreement completely and fully.'[74]

Subsequently, in March 2007, Eton sought to set aside the award in an application to the Second Intermediate People's Court in Beijing, but it subsequently withdrew this application.[75] At approximately the same time, Xiamen brought proceedings before the Intermediate People's Court of Xiamen to enforce the award made in the arbitration. These proceedings were, however, dismissed on the ground that Eton and their directly held assets (the shares in Legend Properties (Hong Kong), which were to be transferred) were not in Xiamen.

Thus, Xiamen sought to enforce the award in Hong Kong, where Eton and their immediate assets (the shares) were located. Under the Hong Kong arbitration ordinance then in force (and the situation is broadly the same under the new ordinance), there was a two-stage process for the enforcement of the New York Convention and Mainland China arbitral awards—they are first registered, converting the award into a judgment of the Hong Kong court, and then the party could seek execution of that judgment. Xiamen succeeded in having the award registered at the first hurdle, but Eton appealed.

The basis of Eton's appeal was its claim that it had become impossible to perform the award. There were, it was said, two reasons for this. First, the development of the land had been completed and 99 per cent of the units had been sold to third parties and, second, in the corporate restructure of the Eton group the shares in Legend Properties (Hong Kong) had been transferred to their parent company. Eton argued that, due to this impossibility, enforcement of the award would be contrary to public policy (one of the grounds on which enforcement can be resisted under the New York Convention, which is also reflected in the Hong Kong Arbitration Ordinance when addressing enforcement of Mainland awards).[76]

The case was heard by the Hong Kong Court of Appeal, where Eton's arguments were rejected.[77] The Court of Appeal reached this conclusion for a

[74] Civil Appeal nos 106 and 197 of 2008 (High Court of the Hong Kong Special Administrative Region Court of Appeal) 11 (reasons handed down 11 June 2009 for judgment of 22 May 2009).

[75] Ibid 13.

[76] Hong Kong Arbitration Ordinance (Cap 609).

[77] *Applicant not indicated v Eton Properties Ltd and Eton Properties (Holdings) Ltd*, CACV 106/2008 and CACV 197/2008 (Hong Kong Court of Appeal, 22 May 2009) (reasons handed down 11 June 2009).

number of reasons. First, it considered that the conversion of the award into a judgment of the Court did not involve reviewing the merits of the award but, rather, was a 'mechanistic' process. Second, it concluded that it was difficult to see why impossibility of performance was a relevant factor at the first stage of the process, namely the registration of the award. Third, it was held that no authority had been cited in support of the proposition that impossibility was a sufficient reason to justify a refusal to enforce the award on the basis that enforcement would be contrary to public policy.

Eton had also raised the concern that enforcement of the award left them exposed to the risk of proceedings for contempt of court with all of its consequences, including imprisonment. The Court of Appeal considered the risk of imprisonment to be 'entirely fanciful', noting that the order did not specify a time for performance and that committal proceedings can only be commenced against a person who refuses to do an act within the time specified in the order. The Court of Appeal considered that a person who was genuinely unable to carry out the order could not be made liable for contempt.

Thus, Xiamen obtained the order that it sought registering the award, and the registration of the award of the arbitrators was confirmed by the Court of Appeal. However, Xiamen then encountered a further problem. Although enforcement of the award was held not to be contrary to public policy on the ground of impossibility, it proved to be impossible to enforce the award as a matter of fact. Confronted by this difficulty, Xiamen started fresh enforcement proceedings in the Hong Kong Court of First Instance,[78] not under the standard summary enforcement procedure but, rather, under the older and now little-used common law action on the award (a procedure pre-dating the New York Convention), under which it sought to persuade the Hong Kong Court of First Instance to substitute a claim for damages or equitable compensation in lieu of specific performance.[79]

The Hong Kong Court of First Instance, although it had a great deal of sympathy for the position Xiamen found itself in,[80] reluctantly concluded it could not do so.[81] The Court simply did not have *carte blanche* to re-characterize the award of the CIETAC arbitrators and to order Eton to pay damages instead of specific performance.[82] It could not usurp the function of the arbitral tribunal in this way and give to Xiamen a new remedy under the guise of 'enforcement' of the original award. Xiamen attempted to obtain some redress by joining a number of other parties to these proceedings, and it started a number of new claims alleging conspiracy and various economic torts, but these were all rejected.

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78 *Xiamen Xinjingdia v Eton Group & Ors* [2012] HKEC 859.

79 It appears that there had been some uncertainty on the basis on which Xiamen brought its new enforcement action. Ibid 126–35 (judgment of Deputy High Court Judge William Stone, QC, 14 June 2012) at 132 (with the nature of the action confirmed).

80 Ibid 139.

81 Ibid 136–70.

82 Ibid 137.

Thus, Xiamen's victory in the CIETAC arbitration proved to be a pyrrhic one as well as a salutary lesson for claimants contemplating seeking a specific performance order from an arbitral tribunal. They may be successful before the tribunal but, if it is not possible to enforce this order, it can be very difficult to then change tack and claim damages instead. In hindsight, it can be seen that Xiamen made two errors that, in combination, proved to be fatal. First, there was a delay of some 21 months between the refusal of Eton to perform its obligations under the contract and the commencement of the CIETAC arbitration. During this period, Eton continued with the construction work and also undertook the corporate restructuring that rendered performance of the original contract impossible. Had Xiamen moved more swiftly or made more effective use of interim measures, it might well have been able better to protect its position. Second, in obtaining an arbitral award that ordered Eton to perform the agreement but made no provision for the award of damages in lieu of specific performance, it obtained an award that it could not enforce when specific performance proved to be no longer possible.

However, neither of these errors, nor the outcome of the case, can be used to support the proposition that an arbitral tribunal cannot make a specific performance order, nor can it suggest that a court cannot enforce an arbitral award in which a specific performance order has been made. Rather, the case demonstrates that there are practical reasons that may militate against seeking a specific performance order before an arbitral tribunal and that these factors should be taken into account before any arbitration is commenced in order to avoid the situation in which Xiamen ultimately found itself, namely with an arbitral award that it could not meaningfully enforce.